10-1926(L)

10-1951(CON)

To be argued by:
RICHARD WARE LEVITT

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant/Cross-Appellee,

-against-

RODNEY MORRISON,

Defendant-Appellee/Cross-Appellant.

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

CONSOLIDATED BRIEF ON BEHALF OF DEFENDANT-APPELLEE/CROSS-APPELLANT RODNEY MORRISSON

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PRELIMINARY STATEMENT

This is a consolidated brief filed on behalf of Rodney Morrison in response to the Government's appeal and in support of Morrison's appeal. Morrison was convicted in the Eastern District of New York (before Hon. Denis R. Hurley and a jury) of the charges alleged in Counts Two and Eight of the Superseding Indictment, charging RICO conspiracy (18 U.S.C. § 1962(d)) and felon in possession (18 U.S.C. § 922(g)), respectively. He was acquitted of all other charges[1] and the district court dismissed Count Two pursuant to post-trial motion, said dismissal being the subject of the government's appeal.

On May 7, 2010, the court sentenced Morrison upon Count Eight to imprisonment for 120 months, three years of supervised release, a $75,000 fine and a $100 special assessment (Docs 912, 913).

[1] Morrison was acquitted of RICO (Count One), arson conspiracy (Count Three), arson (Count Four), conspiracy to use extortionate means to punish nonpayment of credit (Count Five), extortionate punishment for nonpayment of credit (Count Six), use of fire to commit a felony (Count Seven), illegal possession of a firearm by a convicted felon (Count Nine), conspiracy to use interstate facilities in the commission of murder for hire (Count Ten), and use of interstate facilities in the commission of murder for hire (Count Eleven).

STATEMENT OF SUBJECT MATTER AND APPPELLATE JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York, which had jurisdiction pursuant to 18 U.S.C. § 3231. Judgment was filed May 12, 2010 (Doc. 913), and a timely Notice of Appeal was filed on May 12, 2010 (Doc. 915). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issues Relating to Count Two-RICO Conspiracy

1. During the time period when Morrison was allegedly violating the Contraband Cigarette Tax Act ("CCTA") by selling cigarettes in quantities exceeding 60,000 without payment of taxes supposedly required by New York Tax Law § 471: (a) the regulations required to implement § 471 on Indian Reservations had been repealed; (b) New York State had agreed to forbear from prosecuting cigarette sales on reservations; (c) no prosecutions had *ever* been brought under the CCTA and § 471 (d) other reservation retailers – including the government's trial witnesses – believed such sales were lawful and; (e) as described by this Court in its *Golden Feather* decision (and relied on by the court below when granting Morrison's motion to dismiss Count Two as unconstitutionally vague), the question of taxing cigarette sales on reservation lands was one that "has been addressed by the

New York State courts, the New York Legislature, the Department of Taxation and Finance, and even New York's Governor, all with varying outcomes." *City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 127 (2d Cir. 2010) ("*Golden Feather*").

Given these facts, did the district court correctly rule that the CCTA was unconstitutionally vague as applied?

Standard of Review:

A ruling that a statute is unconstitutionally vague is reviewed *de novo*. *United States v. Duran*, 596 F.3d 1283, 1290 (11th Cir. 2010); *Arriaga v. Mukasey*, 521 F.3d 219, 222 (2d Cir. 2008).

2. The New York Court of Appeals, in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010) has now held that § 471 may not be used as a vehicle to prosecute simple possession and sale of untaxed cigarette sales on reservations.

Where, as here, Morrison was prosecuted on a theory that has now been found to not support a violation of § 471, should Count Two be dismissed?

Standard of Review:

Whether or not a theory of prosecution is valid under a particular statute is a question of law. *See United States v. Foley*, 73 F.3d 484, 488 (2d

Cir. 1996). An authoritative holding of state law by the state's highest court is binding on this Court. *Portalatin v. Graham*, 624 F.3d 69, 84 (2d Cir. 2010).

3. The district court granted Morrison's motion, under Fed.R.Crim.P. 29, to dismiss the CCTA Racketeering Acts as alleged in Count One (RICO) because the government's avowed, exclusive theory of prosecution was that Morrison had aided and abetted the *off*-reservation sale of untaxed cigarettes in violation of the CCTA, but had failed to prove that any such off-reservation sales had been made, much less that Morrison aided and abetted such off-reservation sales.

Did the court misapply both Rule 29 and collateral estoppel principles when it refused to dismiss the *identical* Racketeering Acts as incorporated into Count Two (RICO conspiracy), ruling that the government could simply change its theory of prosecution going forward to one that the evidence might support?

Standard of Review:

The denial of Rule 29 motions are reviewed *de novo. See, e.g.*, *United States v. Pizzonia*, 577 F.3d 455, 462 (2d Cir. 2009). Double jeopardy claims are reviewed *de novo*. *United States v. Basciano*, 599 F.3d 184, 196

(2d Cir. 2010). Collateral estoppel is a species of double jeopardy. *Yeager v. United States*, 129 S.Ct. 2360 (2009).

4. The district court refused to instruct the jury that the CCTA and the charge of conspiracy to violate the CCTA each contains a *mens rea* requirement, and it therefore permitted the return of a verdict of guilty without any finding that Morrison believed his conduct was wrongful.

Did the court err in ruling that the CCTA and conspiracy are each strict liability offenses?

Standard of Review:

Courts "review de novo whether the jury instructions accurately define the elements of a statutory offense." *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000); *see also Sutherland v. Reno*, 228 F.3d 171, 174 (2d Cir. 2000); *Turesco*, 566 F.3d at 83 (challenges to jury instructions reviewed *de novo*).

5. The district court instructed the jury that the CCTA would not be violated if the charged cigarette sales were to Native Americans, but then told the jury not to determine whether this was so. *See* Jury Instructions, Doc. 769 at 122 & n.11.

Did the court err in ruling that the Native American status of the cigarette purchasers was an affirmative defense to a CCTA violation rather

than an offense element, and that Morrison's failure to present evidence regarding the purchasers' ethnicity therefore precluded the issue from being presented to the jury?

Standard of review:

Courts "review de novo whether the jury instructions accurately define the elements of a statutory offense." *Hicks*, 217 F.3d at 1045; *see also Sutherland*, 228 F.3d at 174; *Turesco*, 566 F.3d at 83.

Issues Relating to Count Eight – Felon in Possession

6. Count Eight charged Morrison with violating 18 U.S.C. § 922(g) – the "felon in possession" statute – by "knowingly and intentionally possess[ing a firearm] in and affecting interstate commerce," but the court instructed the jury that this jurisdictional element could be satisfied by proof that the charged firearm "was shipped or transported in interstate or foreign commerce" at any time in the past.

Did the court's instruction constructively amend the indictment by permitting a verdict of guilty upon a theory other than that upon which the grand jury indicted Morrison?

Standard of review:

Constructive amendment issues are reviewed *de novo*. *United States v. Rigas*, 490 F.3d 208, 225-26 (2d Cir. 2007).

7. Was instructing the jury that the jurisdictional element of § 922(g) could be satisfied if the firearm had ever been transported in interstate commerce error, in that such transport alone is not sufficient to establish federal jurisdiction under the Commerce Clause?

Standard of review:

A claim that a statute is unconstitutional is reviewed *de novo*, subject to *stare decisis. United States v. Holston*, 343 F.3d 83, 85 (2d Cir. 2003).

Argument Relating to Sentencing

8. The district court imposed the maximum ten-year sentence permissible under Count Eight (felon in possession) after considering as permissible sentencing factors under 18 U.S.C. § 3661 conduct of which Morrison was acquitted.

Did the court's use of acquitted conduct violate Morrison's Fifth and Sixth Amendment rights?

Standard of review:

A claim that the court imposed a sentence in a manner that violates the Constitution is reviewed *de novo*, subject to *stare decisis. United States v. Sanchez*, 517 F.3d 651, 661 (2d Cir. 2008).

STATEMENT OF THE CASE

A. Introduction

Rodney Morrison was tried on a superseding indictment ("the Indictment") filed July 11, 2006 in the Eastern District of New York. Although the Indictment charged numerous offenses and the trial transcript spans more than 10,000 pages reflecting evidence introduced over some five months of trial, Morrison was convicted only of RICO conspiracy (Count Two) based on alleged violations of the CCTA, 18 U.S.C. § 2341 *et seq.*, and one of the two charged felon in possession counts (Count Eight), involving an unloaded and unused weapon licensed to an employee. We summarize in a footnote the charges of which Morrison was acquitted, but otherwise limit the facts recited here and in the argument section of this brief to those necessary to address the issues raised on appeal.[2]

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[2] The murder charge, which was the subject of Racketeering Act 3 and Counts Ten and Eleven, alleged that Morrison hired an acquaintance, Arturo Kerr, to kill Sherwin Henry, a former Peace Pipe employee whom Morrison believed had stolen Peace Pipe customer information to bolster an illegal untaxed cigarette business he started in Brooklyn, New York. When arrested, Kerr immediately accepted responsibility for hiring the persons who killed Henry and said Morrison had asked him only to steal Henry's cigarettes. After several debriefing sessions – but before the government had finally agreed to sign a cooperation agreement with him – Kerr changed his story, saying Morrison had wanted Henry killed.

The arson charges, alleged as Racketeering Act Two and in Counts Three through Seven, related to the February 2000 arson of a car belonging to Thomasina Mack by Peace Pipe employee Tony Phillips, supposedly in retaliation for Mack's failure to repay a loan Morrison made to her to purchase the car. In a tape-recorded conversation

Morrison managed a retail smoke shop, the "Peace Pipe" and its Internet component SmokersDen.com. The business, owned by his wife Charolette, a Native American member of the Unkechauge Indian Nation, was located on the Unkechauge's Poospatuck Indian Reservation in Mastic, New York.[3] The Unkechauges are a recognized sovereign Tribe under New York State Law. Indian Law Article 10 § 150-53. The CCTA, during the relevant time period, forbade the sale of cigarettes in quantities exceeding 60,000 that did not bear valid tax stamps as required by applicable state law. The state law that Morrison allegedly violated by selling unstamped cigarettes was New York Tax Law § 471(1), which provides, in relevant part:

> There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax….

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between Phillips and Morrison made after the arson and while Phillips was cooperating, Morrison berated Phillips for committing the arson against his explicit instructions not to do so, but Phillips testified that Morrison had told him not to perform the arson *himself*, but rather hire others to do it for him.

The robbery charge, which was alleged only as Racketeering Act One, concerned the March 10, 1999 nighttime robbery, by three masked persons, of Jesse Watkins, which occurred in Watkins' store, Monique's Smoke Shop. The government alleged the robbery was either motivated by a pricing dispute between Morrison and Watkins, or was in retaliation for the filing of a criminal complaint by a member of Watkins' family alleging Morrison had intimate contact with Watkins' stepdaughter. Each of the government's witnesses was substantially impeached and the jury rejected their testimony.

We discuss the gun possession charges in Points Six and Seven.

[3] Non-Native Americans may not lawfully own businesses on Indian reservations.

We discuss the history and development of this statute in Point One. For present purposes, however, we observe, as did the Fourth Department in *Cayuga Indian Nation v. Gould*, 66 A.D.3d 100 (4th Dept. 2009) ("*Cayuga I*"), *affd. as modified*, 14 N.Y.3d 614 (2010) ("*Cayuga II*"), that "[i]t is well settled that a state is without power to tax cigarettes to be consumed on reservations by tribal members but has the power to tax on-reservation sales to non-Indians and non-member Indians." Although New York State, therefore, unquestionably may tax on-reservation cigarette sales to non-Indians, it did not do so during the time period charged in the indictment, both for political reasons and also because regulations required by Supreme Court precedent to apply the tax to on-reservation sales were not in place. Regulations first promulgated in 1988 to apply § 471 to on-reservations sales were repealed in 1998 in the wake of litigation before the New York Court of Appeals and the Supreme Court (discussed in Point One), and in that same year then-Governor George Pataki declared the continuation of a policy of "forbearance" pursuant to which New York agreed not to sanction Indian retailers for on-reservation sales of untaxed cigarettes.[4] In this light, it is not surprising that every government witness who owned or worked for

[4] As we discuss in Point One, such prosecution could not have occurred, in any event, in the absence of the repealed regulations.

an on-reservation cigarette retailer testified that he or she believed their sales of untaxed cigarettes on the reservation to Indians and non-Indians alike were lawful. (*See, e.g.*, Tr. 1096 (testimony of Thomasina Mack); Tr. 2529-30 (Tony Philips); Tr. 765 (Jesse Watkins)).[5]

The repeal of § 471's regulations and the forbearance policy notwithstanding, the federal government saw fit to prosecute Morrison under the CCTA and § 471 for precisely such sales, in the first such prosecution. Thus, both the RICO count (Count One) and the RICO conspiracy count (Count Two) included some 76 Racketeering Acts[6] alleging that, between approximately October 1996 and his arrest in September 2004, Morrison, through the Peace Pipe "enterprise," sold unstamped cigarettes in violation of the CCTA based on asserted violations of New York State Tax Law § 471.

There is no dispute that Morrison managed Peace Pipe and that Peace Pipe employees made the sales reflected in RAs 5-80. Rather, the dispute regarding Count Two lies with whether the CCTA and Tax Law § 471 were

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[5] Numbers preceded by "Tr" refer to the pages of the trial transcript, "Doc" to the docket sheet entries, and "GA" to the government's appendix.

[6] These were charged as Racketeering Acts ("RAs") 4-80. RA 4, however, was dismissed on the government's motion during trial and therefore did not go to the jury. *See* Jury Instructions (Doc. 769-2) at 52. Throughout this brief, therefore, we refer to RAs 4-80 or 5-80, as appropriate.

lawfully invoked to punish Morrison for supposedly aiding and abetting these on-reservation sales.

B. Pretrial Motions

In his pretrial motions Morrison moved on multiple occasions to dismiss the CCTA-based Racketeering Acts alleged in Counts One and Two, arguing that § 471 could not be used to prosecute sales of unstamped cigarettes on a sovereign Indian nation reservation because § 471's implementing regulations had been repealed and New York State had agreed to forbear against enforcing § 471 on reservations. The defense, during this same pretrial period, continually sought to determine the government's theory of prosecution with respect to the CCTA Racketeering Acts.

In response to these motions and efforts to clarify the government's theory of prosecution, the government continually flip-flopped regarding whether it intended to prove that Morrison violated the CCTA through *on*-reservation sales of unstamped cigarettes or by aiding and abetting others to make *off*-reservation sales of unstamped cigarettes. *Compare* Docs. 336, p.5 *and* 337, p.14 (*off*-reservation theory) *with* Doc. 352 (*on*-reservation theory).[7]

[7] The government's repeated, opportunistic changes of theory are summarized in the district court's post-verdict decision at GA 182.

At the court proceedings of October 9, 2007, the defense attempted to clarify the government's position[8] and, after numerous requests, the government disavowed – temporarily, it turned out – reliance on *off*-reservation sales (Tr. 10/9/07 at 143-44). At this same proceeding, the court denied Morrison's motion to dismiss on the ground that § 471 did not apply to sales of unstamped cigarettes on the reservation, but added that as a consequence of its ruling, it would entertain a motion arguing that "it would be a violation of substantive due process to prosecute an individual in such a muddled state in terms of the law," Tr. 64. – the term "muddled" being a reference to the Executive's "forbearance policy" (*Id*.).

Morrison thereafter argued that if § 471 were otherwise applicable to his alleged conduct, its application was unconstitutionally vague in violation of due process (Doc. 367). The government, seeking to avoid Morrison's vagueness arguments and to support its motion in limine to preclude

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[8] Defense counsel represented that "we are still looking for certain information that will assist us in preparing for the trial, even if the government's preparing a new theory, that Morrison was assisting or aiding and abetting *these off-reservation sales.*" Tr. of 10/9/07 at 127 (emphasis added). Counsel repeated the request, noting that the defense had to know if the theory supporting the government's factual allegations at trial concerned the point at which the cigarettes "left the reservation" or "at the time that there was a resale." *Id.* at 128. When extended colloquy failed to resolve the question, defense counsel returned to the point, stating that "if there is any evidence of a resale that the government is relying on as part of their theory, we would like that information." *Id.* at 143. The government disavowed that theory of prosecution, and declared "that is not our theory... we're not relying upon our aiding and abetting theory on the basis of being able to identify exactly when this material was then resold to the general public." Tr 10/9/07 at 143-44.

Morrison from presenting a defense of entrapment by estoppel (Doc. 352), responded that it in fact would *not* proceed to trial on the theory that Morrison violated the CCTA merely by making on-reservation sales of untaxed cigarettes but, rather would argue that he aided and abetted off-reservation sales, by selling cigarettes on the reservation that he knew would be sold off the reservation in violation of the CCTA (Docs 372, 388). The defense took note of the government's *off*-reservation sales theory in its reply submission (Doc. 409). Relying on the government's representation that it was pursuing, exclusively, an off-reservation theory of prosecution, the district court granted the government's motion to preclude the defense from offering a defense of entrapment by estoppel (Doc. 431, p.3 (noting government's position that "[Morrison's] liability in this case will be determined on evidence that he knowingly and intentionally aided and abetted others in sales and distribution of untaxed cigarettes off the reservation")), and denied Morrison's motion to dismiss for lack of adequate notice as to what conduct was prohibited (Doc. 438). The latter order was explicitly based on the government's commitment to limit its theory of prosecution to a theory that Morrison aided and abetted off-reservation sales and the court's ruling that the government would be required to prove specific intent as an element of its aiding and abetting theory – a requirement

that mitigated vagueness concerns (Doc. 438 at 13-14 (citing, *inter alia*, *Screws v. United States*, 325 U.S. 91 (1945))). Ironically, as we discuss below and in the argument section of this brief, the court subsequently permitted the government, after it rested, to revert to its *on*-reservation sales theory and it retracted its ruling that the government needed to prove specific intent.

C. Trial Proceedings

Jury selection began October 29, 2007. Although the trial testimony was extensive, most is not relevant to this appeal given the acquittals upon all charges except those in Counts Two (RICO conspiracy) and Eight (felon in possession) and also considering the nature of the issues we raise herein. We therefore address the testimony in the argument section only to the extent relevant to the Points raised on appeal.

After the government rested, the defense moved to dismiss the CCTA Racketeering Acts under Count One (RICO). The court, after confirming with the government its previously stated assurance that it proceeded to trial *exclusively* on the theory that Morrison aided and abetted *off*-reservation sales in violation of the CCTA, granted the motion, finding there was no proof that the off-reservation sales were in quantities that violated the CCTA threshold of 60,000 cigarettes. The court held that absent a violation of the

CCTA by the principals, Morrison could not be convicted as an aider and abettor. The defense then moved to dismiss these same CCTA Racketeering Acts from Count Two (RICO conspiracy). The government immediately flip-flopped once again, now saying it had been misunderstood and that it actually was prosecuting Morrison for *on*-reservation sales of unstamped cigarettes. This was transparently mendacious, as the district court pointed out on numerous occasions. *See, e.g.*, GA 183 ("Simply put, defendant has the better side of the argument…"). But the court nonetheless deferred ruling on this prong of defendant's Rule 29 motion, and permitted the government to switch theories going forward under Count Two and proceed to the jury on an *on*-reservation sales theory. The defense then put on its case and renewed its motions after resting.

The defense filed several requests to charge, discussed in the argument sections where relevant to the issues raised on appeal. The jury asked several questions during the deliberations, one of which was "Does the defendant have to know the acts that are committed are illegal or criminal in nature [a]s the definition of conspiracy as charged on page 42 is a partnership for criminal purposes." The court's negative response is discussed in Point Four. The jury returned its verdict on May 5, 2008 (Doc.

766), convicting Morrison under Counts Two and Eight and acquitting him of all other charges.

D. Post-trial Motions

The defense filed post-trial motions under Fed.R.Crim.P. 29 and 33, arguing, among other things, that the same reasoning that required the dismissal of the CCTA Racketeering Acts from Count One also compelled the dismissal of these Acts from Count Two and that Count Two should also be dismissed as unconstitutionally vague as applied (Doc. 773). The district court denied these motions in a decision issued February 6, 2009 (Doc. 787, GA 159). Morrison renewed his motion to dismiss Count Two after New York's Fourth Department rendered its decision in *Cayuga I* which, *inter alia*, enjoined enforcement of § 471 against persons selling unstamped cigarettes on Indian reservations, upon finding that § 471 was never intended to apply to on-reservation cigarette sales without implementing regulations and in light of the Governor's announced policy of forbearance (Docs. 817, 827). The district court denied this motion in a bench decision issued August 11, 2009 and in a Memorandum and Order dated December 4, 2009 (Doc. 838, GA 218).

Morrison thereafter sought reconsideration in light of this Court's order in *Golden Feather*, 597 F.3d 115, certifying questions to the New

York State Court of Appeals regarding the application of § 471 to sales of unstamped cigarettes by reservation retailers (Doc. 894). In its certification order (discussed further in Point One), this Court said, among other things, that it could "divine" no "mechanism… by which to assess and collect" taxes "imposed on cigarette sales on reservations" (*id*. at 125), and that the question of taxing cigarette sales on reservation lands is one that "has been addressed by the New York State courts, the New York Legislature, the Department of Taxation and Finance, and even New York's Governor, all with varying outcomes." *Id.* at 127. The district court granted the motion to reconsider and dismissed Count Two in a Memorandum and Order dated April 16, 2010 (Doc. 897, GA 228), relying, *inter alia*, on this Court's finding in *Golden Feather* that "the applicability of § 471 to on-reservation sales [is] unsettled and ambiguous, *i.e*., not self-evident or predictable from a simple reading of the section" (GA 236).[9] The district court held that this Court's "detailed analysis" in *Golden Feather* was inconsistent with its previous conclusion that "a fair reading of § 471, unencumbered by the confusion arguably interjected into the analysis via the enactment of § 471-e, provided more than adequate notice that on-reservation sales of unstamped

[9] The New York Court of Appeals accepted certification of the questions posed by this Court in *Golden Feather* but this Court, upon joint motion of the *Golden Feather* litigants, withdrew the certification after the New York Court of Appeals rendered its decision in *Cayuga II*, discussed in Point One.

cigarettes to non-Native Americans is illegal" (GA 235).

The court thereafter sentenced Morrison as indicated above.

ARGUMENT SUMMARY

Arguments Relating to Count Two – RICO Conspiracy

Point One:

The district court properly dismissed Count Two as void for vagueness not only because this Court in *Golden Feather* (certifying questions to N.Y. Court of Appeals) "perceive[d] the applicability of § 471 to on-reservation sales as unsettled and ambiguous, *i.e.*, not self-evident nor predictable from a simple reading of the section" (GA 236), but also because this perception was well grounded in: a) the repeal of the regulations crafted to apply § 471 on reservations; b) the state's forbearance policy; c) the historic lack of enforcement of § 471 on reservations; d) and the views expressed by the state and federal courts, the Governor, the Legislature and even the government's trial witnesses. The Court may, however, avoid the constitutional vagueness inquiry because the theory of prosecution on which this case went to verdict, in fact, is not a crime under the charged statutes. *See* Point Two.

Point Two:

The government was permitted to proceed to verdict under Count Two (RICO conspiracy), over repeated defense objections, on the altered theory that Morrison violated New York Tax Law § 471 and the CCTA through *on*-reservation sales of untaxed cigarettes. The New York Court of Appeals has now held that the absence of implementing regulations or their equivalent "precludes reliance on Tax Law § 471 as the sole basis to sanction Nation retailers for alleged noncompliance with the New York Tax Law." *Cayuga II*, 14 N.Y.3d 614. Because *Cayuga* precludes conviction under the theory of prosecution upon which the case proceeded to verdict, Count Two must be dismissed.

Point Three:

The CCTA Racketeering Acts alleged in Count Two should have been dismissed for the additional reason that the identical Acts had been dismissed from Count One after the government rested pursuant to Morrison's motion under Fed.R.Crim.P. 29. The government, pretrial, had committed itself to an "off-reservation theory," *i.e.*, that Morrison aided or abetted the off-reservation resale of cigarettes purchased from Peace Pipe in violation of the CCTA. Yet it failed to prove that any of the cigarettes identified in the Racketeering Acts in fact *were* resold – or even were

intended to be resold – *off*-reservation in CCTA quantities, let alone that Morrison aided or abetted any such resales. The district court, however, thereafter declined to dismiss these same unproven Racketeering Acts from Count Two (RICO conspiracy) permitting the government to shift its theory of prosecution to one alleging that Morrison committed the charged CCTA Racketeering Acts by Peace Pipe's mere *on*-reservation sale of the cigarettes identified in those same Acts. This was error since Morrison was entitled under Rule 29 to have the sufficiency of the evidence judged against the theory upon which the government presented its direct case, and the dismissal of CCTA Racketeering Acts from Count One compelled a similar result with regard to Count Two under collateral estoppel principles.

Point Four:

The district court erred when it declined to instruct the jury that an element of the CCTA and of conspiracy is that Morrison acted with some understanding that his conduct was wrongful or unlawful. The court's ruling converted these crimes into strict liability offenses, contrary to substantial Supreme Court and Second Circuit precedent holding that *mens rea* is an element of all but a select few crimes, of which the CCTA and conspiracy are not examples. Morrison was therefore convicted of RICO conspiracy –

and exposed to a 20-year sentence – without any finding that he knew he was acting wrongfully, let alone unlawfully.

Point Five:

The district court further erred when it failed to instruct the jury that one of the elements of the CCTA offenses alleged in RAs 5-80 was that the charged sales were to non-Native Americans. Such an instruction was required because § 471 provides, "no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax." The district court correctly instructed the jury that a sale "to Native American(s) is not illegal" but then erroneously instructed, "However, you are not being called upon to determine whether the… sales… were to be made to Native Americans or non-Native Americans." (Jury Instructions, Doc. 769 at 122 n.11.) The court so instructed after ruling that the Native American status of Peace Pipe's customers was an affirmative defense as to which Morrison bore the initial burden of production. This was error, as an analysis of the relevant factors establishes that the customers' status is an essential element of a CCTA violation as to which the government bore the burden of proof. The court's ruling therefore removed from the jury's consideration an essential element of the offense in violation of Morrison's Sixth Amendment right to a jury trial.

Arguments Relating to Count Eight – Felon in Possession

Point Six:

Count Eight charged Morrison with violating 18 U.S.C. § 922(g) – the "felon in possession" statute – by "knowingly and intentionally possess[ing a firearm] in and affecting interstate commerce," but the court instructed the jury that this jurisdictional element could be satisfied by proof that the charged firearm "was shipped or transported in interstate or foreign commerce" at any time in the past. This instruction constructively amended the indictment, because it permitted the jury to convict Morrison upon a theory of prosecution that was not charged in the Indictment.

Point Seven:

Instructing the jury that the jurisdictional element of § 922(g) could be satisfied if the firearm had ever been transported in interstate commerce was error for the additional reason that such transport alone is not sufficient to establish federal jurisdiction under the Commerce Clause. We recognize the existence of contrary law, however, and raise this issue to preserve it for further review.

Argument Relating to Sentencing

Point Eight:

The district court could not (and did not) consider the conduct of which Morrison was acquitted as part of the Guideline analysis because it was not "relevant conduct" under U.S.S.G. § 1B1.3 with respect to the single count upon which Morrison was sentenced – 18 U.S.C. § 922(g). The court did, however, consider this same conduct under 18 U.S.C. §§ 3553(a) and 3661 and, for this reason, imposed the maximum ten-year sentence. Although § 3661 authorizes a court to consider any information in determining sentence, we assert that the use of acquitted conduct to determine Morrison's sentence violated his Fifth and Sixth Amendment rights. We acknowledge the existence of contrary law, however, and raise this issue to preserve it for further review.

Point One

THE DISTRICT COURT CORRECTLY DISMISSED COUNT TWO AS VOID FOR VAGUENESS AS APPLIED

The district court found that the CCTA conspiracy offense charged in Count Two of the Indictment was unconstitutionally vague as applied, where it alleged that Morrison failed to pay "applicable" state taxes supposedly required by New York Tax Law § 471. The court found that this Court's decision in *Golden Feather* required the conclusion that § 471's application to on-reservation cigarette sales would not have been apparent to a person in Morrison's shoes. This conclusion is fully supported by the following facts

and circumstances: Rodney Morrison was the first, and only, reservation cigarette seller[10] prosecuted under the CCTA and New York Tax Law § 471 for on-reservation sales of unstamped cigarettes. During the relevant time period the implementing regulations required to enforce § 471 on Indian reservations were repealed. Governor Pataki had instituted a policy of forbearance under which New York State made no effort to enforce § 471 on qualified reservations[11] for cigarette sales in any quantity. Subsequent decisions by the state's courts provided legal support for this executive branch policy. As a result, during the time period charged in this Indictment, reservation cigarette sellers could lawfully possess an unlimited quantity of unstamped cigarettes for the purpose of reselling them to the general public on qualified reservations (GA 142, Tr. 10893). The government, pre-trial, abandoned an *on-reservation* theory of prosecution in favor of an *off-reservation* theory in order to circumvent issues relating to

[10] Under current New York law a "[r]eservation cigarette seller" is "[a] seller of cigarettes which is an Indian nation or tribe, one or more members of such tribe, or an entity wholly owned by either or both, which sells cigarettes within the boundaries of a qualified reservation." Tax Law § 470(17). No evidence introduced at trial even suggested that this definition would not apply to Peace Pipe Smoke Shop. The theory of prosecution was not, in any way, based on an allegation that Morrison, whose wife, a member of the Unkechauge tribe, owned Peace Pipe, stood in a legal context different from other reservation cigarette sellers.

[11] The Poospatuck Reservation is designated by statute as a qualified reservation under New York Tax Law § 470(16)(c).

the applicability of the state's taxation scheme to Morrison's conduct that were raised in Morrison's initial vagueness motion.

The charging of these violations as predicate offenses for both the RICO and RICO conspiracy counts exposed Morrison to 40 years' imprisonment. At trial, the government witnesses who were engaged in conduct similar to that for which Morrison was prosecuted testified that *they* believed their conduct was lawful. *See, e.g.*, Tr. 1096 (testimony of Thomasina Mack); Tr. 2529-30 (testimony of Tony Philips); Tr. 765 (Jesse Watkins). Government witness Jennifer Hink, a veteran attorney employed by the New York State Department of Taxation and Finance, was herself confused about the application of Tax Law § 471 to on-reservation sales, acknowledging that the state had made no effort to collect taxes from reservation retailers since 1988 (Tr. 4495-96) and characterizing the distinction between § 471's supposed *de jure* application to on-reservations sales and its non-enforcement due to forbearance as "semantics" (Tr. 4438). New York's Fourth Department, in *Cayuga I*, held that § 471 in fact does *not* tax *any* on-reservation cigarette sales. This Court, in its decision and order certifying questions to the New York Court of Appeals in *Golden Feather*, perceived the applicability of § 471 to on-reservation sales as (in the district court's words when describing the *Golden Feather* decision)

"unsettled and ambiguous, *i.e.*, not self-evident or predictable from a simple reading of the statute" (GA 236). The New York State Court of Appeals in its *Cayuga II* decision concluded that the absence of implementing regulations to distinguish between exempt and non-exempt sales on reservations "precludes reliance on Tax Law § 471 as the sole basis to sanction Nation retailers for alleged noncompliance with the New York Tax Law." 14 N.Y.3d at 653.

Yet despite the lack of implementing regulations, the Governor's policy of forbearance, the stated belief of government and defense witnesses that such conduct was lawful or not sanctionable, the uncertainties expressed by an attorney in the New York State Tax Department, the views of the Fourth Department, the New York Court of Appeals, the district court and this Court, the government argues that § 471 in fact was clear enough to give Morrison fair notice that § 471 proscribed his conduct and exposed him to up to 40 years' imprisonment.

We respectfully disagree, for the reasons discussed below, although we note that this Court may choose to affirm the dismissal of Count Two on the non-constitutional ground addressed in Point Two, that the case went to verdict on a theory of prosecution that in fact is not a crime under the charged statutes.

A. Facts

1. The District Court's Denial of Morrison's Initial Motions to Dismiss on Due Process/Vagueness Grounds

The CCTA, the alleged violation of which was charged in Racketeering Acts 5-80, prohibited, during the relevant time period, the sale or distribution of in excess of 60,000 cigarettes:

> which bear no evidence of the payment of applicable State... cigarette taxes in the State where such cigarettes are found, if the State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes ...

18 U.S.C. § 2341(2). The state taxes that allegedly were "applicable" yet not paid in this case were those of New York Tax Law Article 20 § 471(1), which imposed, during the relevant time period, "a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax."

During the proceedings below, Morrison argued repeatedly, before, during and after trial, that § 471(1) was unconstitutionally vague as applied because he was not given fair notice that this section prohibited reservation cigarette sellers, *see* Tax Law § 470 subd. 17, from selling untaxed cigarettes. He argued that a confluence of circumstances (discussed in greater detail below) - including the repeal of the regulations that had been

passed to implement § 471 on reservations; the Governor's forbearance policy; the lack of historic application of § 471 to reservation sales notwithstanding that such sales were conducted, in bulk, openly by numerous reservation retailers; and the disparate case law interpreting § 471 and the need for implementing regulations – all conspired to deny him notice that he would be prosecuted (in fact be the *first person prosecuted*) for CCTA offenses based on asserted violations of § 471 through on-reservation sale of untaxed cigarettes.

The district court denied Morrison's pretrial motion to dismiss, *United States v. Morrison*, 521 F.Supp.2d 246 (E.D.N.Y. 2007) (*Morrison I*) (GA 146), as well as his post-trial motion to dismiss, *United States v. Morrison*, 596 F.Supp.2d 661 (E.D.N.Y. 2009) (*Morrison II*) (GA 159). It also denied his renewed motion filed after the Fourth Department's decision in *Cayuga*, 66 A.D.3d 100 (oral decision on August 11, 2009). As the district court would later state, it had denied those motions, notwithstanding the Governor's forbearance policy, the repeal of the implementing regulations and the many other cited facts and circumstances, because the broad and plain language of § 471 imposed a tax on all cigarettes possessed for sale except when the "state is without power to impose such tax." It rejected the decision of the Fourth Department in *Cayuga I* – that § 471, standing alone,

does not impose a tax on on-reservation cigarette sales – concluding that the New York Court of Appeals would likely agree with the contrary dissenting opinion in *Cayuga I*.

2. This Court's Decision in *Golden Feather*

Morrison again sought reconsideration after this Court's decision in *Golden Feather* adopted an analysis of applicable state law contrary to that on which the district court had relied in its earlier opinions (Doc. 894 (filed March 17, 2010)). *Golden Feather* involved numerous civil defendants (including Morrison) who had engaged in large volume on-reservation sales of unstamped cigarettes on the Poospatuck reservation. These defendants appealed from a preliminary injunction entered in the Eastern District (Amon, J.) in favor of New York City, prohibiting defendants from violating the CCTA and the Cigarette Marketing Standards Act, N.Y. Tax Law § 2341 *et seq*. ("CMSA") by selling untaxed cigarettes other than to tribal members for their personal use. *City of New York v. Golden Feather Smoke Shop, et al.*, 2009 WL 2612345 (E.D.N.Y. 2009).

This Court observed in *Golden Feather* that, "[f]or either the CMSA or CCTA to be violated there must be an underlying tax provision that requires the reservation vendors to purchase stamped cigarettes for resale," 597 F.3d at 122. All parties, as well as Judge Amon, agreed that the only

New York statutes that could have imposed such a requirement were New York Tax Law § 471 and 471-e. This Court's inquiry in *Golden Feather* therefore turned on whether the applicability of those state laws to on-reservations sales of cigarettes was so uncertain that it was appropriate to use the certification process to the New York State Court of Appeals to clarify the unresolved questions of state law that would, in turn, determine the applicability of the CCTA and the CMSA to such on-reservation sales. In addressing this inquiry, the *Golden Feather* Court first recognized that "New York State has a somewhat labored history as it concerns taxing sales of cigarettes on Native American reservation lands." *Id.* This history reflects the political deference traditionally shown by the State of New York to sovereign Indian Nations as well as legal imperatives required by state and federal law.

As this Court recounted in *Golden Feather*, § 471, passed in 1939, imposed a tax "on all cigarettes possessed in the state by any person for sale" except when the "state is without power to impose such tax," but § 471 was not enforced against Native American vendors until 1988 when the New York DTF adopted regulations that created a taxing mechanism for sales to non-Tribal members. *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 65 (1994) (*Milhelm Attea*). The

Supreme Court in *Milhelm Attea* reversed a holding by the New York Court of Appeals finding these regulations to be legally deficient and ruled, instead, that § 471 together with these regulations (referred to colloquially as the "*Attea* Regulations") were sufficient to lawfully tax on-reservation cigarette sales to non-tribal members. The Court so ruled upon finding that the regulations provided an adequate means – as required by law – to estimate and fulfill the "probable demand" for tax-free cigarettes by tribal members. *Id.* at 122-23. These regulations, however, were repealed in 1998, at which time the DTF adopted the policy of forbearance, and DTF thereafter suspended any efforts to collect a tax from any on-reservation cigarette sales.[12]

Continuing in its analysis, the *Golden Feather* court observed that, beginning in 2005 the New York Legislature attempted once again, through the enactment of § 471-e, to establish a tax-free coupon program necessary to tax on-reservation sales; but the DTF failed to print or issue required tax free coupons, nor was the probable demand of tribal members estimated, resulting in a declaration by the Appellate Division, Fourth Department that § 471-e was therefore not "in effect." *Id.* at 123 (citing *Day Wholesale, Inc.*

[12] The Appellate Division, Third Department, thereafter found a "rational basis" for the forbearance policy. *Matter of New York Assn. of Convenience Stores v. Urbach*, 275 A.D.2d 520, 522-23 (on remand from the Court of Appeals in *Association of Convenience Stores v. Urbach*, 92 N.Y. 2d 204 (1998)), *appeal dismissed*, 95 NY2d 931 (2000).

v. State, 51 A.D.3d 383 (4th Dept. 2008)). As this Court explained in *Golden Feather*: "Without the coupon system, the Appellate Division reasoned, there was no adequate method 'to serve the intent of the Legislature to collect taxes that are legitimately due while at the same time "leav[ing] ample room for legitimately tax-exempt sales."' *Id*. (*quoting Milhelm Attea*, 512 U.S. at 76).

The *Golden Feather* opinion recognized that the Fourth Department had focused on whether § 471, standing alone (*i.e.*, without § 471-e), was sufficient to tax on-reservation cigarette sales to non-tribal members, a necessary prerequisite to integrating on-reservation sales into the state's taxation scheme. *Cayuga I*. The majority decision in *Cayuga I* held that, in light of "the sovereignty considerations attendant upon imposing and collecting a state cigarette tax on reservation sales" under § 471, as well as the non-effect of § 471-e under *Day Wholesale*, "there is no statutory basis for the imposition of a cigarette tax on a qualified reservation." 66 A.D.3d at 110. In other words, this Court in *Golden Feather* recognized that the Fourth Department – which at the time was the senior state appellate court to have directly addressed the issue – had held that § 471, by itself, was insufficient to require reservation cigarette sellers to collect the tax. *Id.* at

124 (*quoting Cayuga I*, 66 A.D.3d at 109).[13]

Turning to whether the City had shown a likelihood of success on the merits, this Court in *Golden Feather* carefully summarized each of the parties' positions and concluded that each side's position was "supported by cogent arguments and prior judicial analysis." 597 F.3d at 125. It noted that "§ 471 imposes a tax on all cigarettes" unless the cigarettes are "sold under such circumstances that this state is without power to impose such tax" and that, absent the mechanism for assessing taxes on reservations that was to be provided by § 471-e, there appeared to be no "other mechanism… by which to assess and collect such taxes." *Id.* "Given this state of affairs," asked the court, "does the absence of any such mechanism applicable to taxes imposed on cigarette sales on reservations give rise to 'circumstances that [render New York] without power to impose such tax'?" *Id.* The court concluded that it could not answer this question of state law, and therefore deemed it appropriate to certify two questions of New York law to the New York Court of Appeals.

The Court's decision in *Golden Feather* to certify these questions was

[13] Judge Amon, when granting the preliminary injunction that was the subject of the *Golden Feather* appeal, had concluded that the New York Court of Appeals would likely reject the *Cayuga* majority decision and side with Judge Peradotto's dissent (a prognostication that turned out to be incorrect).

based on several factors that are relevant to the instant vagueness analysis.[14] First, the questions the *Golden Feather* court was asked to decide implicated what the Court deemed "unsettled" issues of state law: "The New York Court of Appeals has not spoken directly on the issue of the applicability of § 471 alone to reservation cigarette sales to non-Tribal members, nor has it addressed whether § 471 is actually in effect considering the DTF's explicit refusal to implement it with respect to reservation vendors." *Id. at 126.*

The second reason this Court found certification appropriate was the disparate interpretations of § 471's application to on-reservation sales given by virtually everyone and every institution that addressed the subject:

> The question of taxing cigarette sales on reservation lands is one that has been addressed by the New York State courts, the New York Legislature, the Department of Taxation and Finance, and even New York's Governor, ***all with varying outcomes***. We recognize that the New York Court of Appeals is in a far better position to interpret ***the variety of laws, regulations and state case law by which the issue will be determined***. Thus certification on this issue will address an important issue of state law ***that to this point remains unresolved.***

Id. at 127 (emphasis added).

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[14] Our local rules, as well as New York law, allow this Court to certify questions of state law to the New York Court of Appeals where no controlling precedent exists. *See* 2d Cir. R. 27.2 ("If state law permits, the court may certify a question of state law to that state's highest court."); 22 N.Y.C.R.R. § 500.27(a); *Golden Feather*, 577 F.3d at 125. Among the three factors this Court considers in granting certification is whether there is an "'absence of authoritative state court decisions.'"

The third reason this Court gave for certifying questions was that the questions to be certified were "purely legal" and likely to be dispositive. *Id.*

Based on the foregoing analysis this Court in *Golden Feather* certified the following two questions:

> (1) Does N.Y. Tax Law § 471-e, either by itself or in combination with the provisions of § 471, impose a tax on cigarettes sold on Native American reservations when some or all of those cigarettes may be sold to persons other than members of the reservation's nation or tribe?
>
> (2) If the answer to Question 1 is "no," does N.Y. Tax Law § 471 alone impose a tax on cigarettes sold on Native American reservations when some or all of those cigarettes may be sold to persons other than members of the reservation's nation or tribe?

Id. at 127-28.

3. Morrison's Renewed Motion To Reconsider And To Dismiss Count Two

In his motion for reconsideration of the district court's denial of his motion to dismiss Count Two, Morrison argued that this Court's decision in *Golden Feather* undermined the two principle reasons the district court had previously rejected Morrison's vagueness arguments, *i.e.*, that (1) the "plain language" of § 471 made it applicable to reservation vendors and this alleged applicability "cannot be diluted by executive acts, limitations emanating from Indian sovereignty or legislative history"; and (2) there was no significance in the lack of a collection mechanism (such as the *Attea*

regulations or those contemplated by § 471-e) because such a void in the taxation scheme "is obviated by the ability of a reservation vendor to formulate an *ad hoc* means of compliance" (Doc. 894 at 5).

The district court's "plain language" analysis was undermined by this Court's understanding that far more than the "plain language" of the statute must be considered. Issues of sovereignty, the repeal of the *Attea* regulations, the policy of forbearance, the failure to implement § 471-e and many other factors had to be evaluated to determine whether § 471, standing alone, was *intended* to apply to on-reservation sales.

Additionally, the district court's finding that the lack of regulations were of little moment because retailers could establish their own *ad hoc* mechanisms for instituting a compliant taxing system, was undermined by this Court's inquiry of whether "the absence of any such mechanism applicable to taxes imposed on cigarette sales on reservations give[s] rise to "circumstances that [render New York] without power to impose such tax" under controlling Supreme Court law. *Id.* at 125.

4. Judge Hurley's Grant Of The Motion To Reconsider And To Dismiss Count Two

Judge Hurley granted Morrison's motion to reconsider in light of *Golden Feather*. *Unites States v. Morrison*, 706 F.Supp.2d 304, 307-08 (E.D.N.Y. 2010) ("*Morrison III*"). He then dismissed Count Two as void

for vagueness as applied, finding a violation of Morrison's due process right to fair notice of whether his conduct was prohibited. *Id at* 313. After reviewing the procedural history of the case and the *Golden Feather* decision, the court concluded that its previous reasoning was inconsistent with *Golden Feather*, which recognized that the application of § 471 alone to on-reservation sales was "unsettled and ambiguous" and that the absence of regulations created "circumstances that [render New York] without power to impose such tax":

> [T]he detailed analysis provided by the Circuit in *Golden Feather* is at odds with my conclusion that a fair reading of § 471, unencumbered by the confusion arguably interjected into the analysis via the enactment of § 471-e, provided more than adequate notice that on-reservation sales of unstamped cigarettes to non-Native Americans is illegal. Tellingly the Circuit, in framing the second question for certification, asked whether "§ 471 alone impose[s] a tax on cigarettes sold on Native American reservations when some or all of those cigarettes may be sold to persons other than members of the reservation's nation or tribe?" 597 F.3d at 128. That question, when viewed in conjunction with the explanation that "[c]ertification... should be done sparingly, mindful that it is our job to predict how the New York Court of Appeals would decide the issues before us," *id.* at 126, compels the conclusion that the Circuit perceives the applicability of § 471 to on-reservation sales as unsettled and ambiguous, i.e. not self-evident nor predictable from a simple reading of the section. Also significant is the Circuit's query whether the absence of regulations setting forth a collection mechanism may be equated with "'circumstances that [render New York] without power to impose such tax,'" referencing the excepting language found in § 471. *Id.* at 125 (*quoting* N.Y. Tax Law § 471).

> Given that the Circuit has found a sufficient lack of clarity in the statutory scheme to call for certification in a civil context, my conclusion that the text of § 471 satisfies constitutional notice requirements in a criminal context may not stand. Accordingly, defendant's conviction under Count Two is vacated and the Count dismissed.

Morrison III, 706 F.Supp.2d at 312-13 (footnote omitted).

5. The New York Court Of Appeals' Decision In *Cayuga* And Its Aftermath

After this Court in *Golden Feather* certified the foregoing two questions the New York Court of Appeals decided *Cayuga II*. The Court of Appeals held that § 471 *in haec verba* purports to impose a tax on *all* cigarette sales – including those occurring on reservations – but that, absent necessary statutory provisions or implementing regulations to provide for both taxable and tax-exempt sales, § 471 alone could not lawfully be enforced on reservations:

> In sum, although Tax Law § 471 certainly "imposes" a cigarette sales tax, we conclude that the Cayuga Nation is entitled to a declaration that the absence of an appropriate legislative or regulatory scheme governing the calculation and collection of cigarette sales taxes that distinguishes between federally exempt retail sales to Indians occurring on a "qualified reservation" and non-exempt sales to other consumers precludes reliance on Tax Law § 471 as the sole basis to sanction Nation retailers for alleged noncompliance with the New York Tax Law.

14 N.Y.3d at 653. In so ruling, however, the Court opined that § 471 may nonetheless lawfully be applied to a "bulk sale of cigarettes to a party *that*

intends to resell them off the reservation"[15] even absent implementing regulations because "not a single pack of cigarettes involved in such a transfer would be tax exempt." *Id.* (emphasis added).[16]

In the aftermath of the *Cayuga II* decision, the New York State Legislature enacted amended versions of §§ 471 and 471-e in an attempt to create an enforceable statutory scheme by which on-reservation cigarette sales may be taxed. Enforcement of the amended laws, however, has been stayed and enjoined in the United States District Court for the Western and Northern Districts of New York, respectively. *See Seneca Nation of Indians v. Paterson*, 2010 WL 4027795 (W.D.N.Y. Oct. 14, 2010) (J. Arcara); *Oneida Nation of New York v. Paterson*, 2010 WL 4053080 (N.D.N.Y. Oct. 14, 2010) (J. Hurd). Judge Arcara entered a stay pending appeal after denying the Seneca Nation a preliminary injunction, but agreeing that plaintiffs raised "serious legal questions going to the merits of their claims. *Seneca Nation*, 2010 WL 4027795 at *3 ("The Nations have raised serious

[15] It should be noted, however, that not all bulk cigarette sales by reservation retailers are to persons who intend to resell them off-reservation, as some are to other on-reservation retailers (such as grocery stores or gas stations) that resell them to reservation members for their own consumption. Even under the *Cayuga* formulation these would be transactions to which § 471 does not apply.

[16] In the instant case, however, the court permitted the government to proceed to verdict (over defense objection) on the theory that the *on-reservation* cigarette sales *alone* violated § 471 and the CCTA – precisely the theory *Cayuga* held would *not* support a § 471 prosecution. *See* Point Two.

We also note that, in light of the Court of Appeals' decision in *Cayuga II*, the parties in the *Golden Feather* litigation jointly moved this Court to withdraw the certified questions, and this motion was granted.

legal questions going to the merits of their claims. Because some aspects of the new tax amendments are unprecedented, there is some possibility of success on appeal").

B. Discussion.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972). Although vagueness analysis applies both to civil and criminal statutes alike, criminal statutes are subject to more searching scrutiny "because the consequences of imprecision [in civil cases] are qualitatively less severe." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 498-99 (1982). As the district court observed in its decision granting Morrison's motion to dismiss, "This is simply because it would be unthinkable to convict a man for violating a law he could not understand." *Morrison III*, 706 F.Supp.2d at 310 (*quoting Barenblatt v. United States*, 360 U.S. 109, 137 (1959)). Scrutiny is further heightened where constitutional or other special protections are implicated, *see, e.g., Grayned*, 408 U.S. at 109, and here, Tax Law § 471 implicates the legally and politically sensitive

area of Indian sovereignty. *See e.g., Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 138 (1980) (referencing the "intricate problem of state taxation of matters involving Indian tribes and their members"); *Association of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 213 (1998) (Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and territory") (internal quotations omitted). Applying these principles, the Supreme Court has found numerous statutes to be unconstitutionally vague on their face or as applied. *See, e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1047 (1991) (statute limiting public statements by criminal defense lawyers); *Kolender*, 461 U.S. at 357 (California disorderly conduct statute); *Smith v. Goguen*, 415 U.S. 566 (1974) (flag abuse statute); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy ordinance); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (statutes and regulations used to prevent appointment and retention of subversive employees); *Winters v. New York*, 33 U.S. 507 (1948) (New York statue prohibiting publications that incite violent and depraved crimes).

The government's insistence that "The CCTA and New York Tax Law § 471 clearly applied to Morrison's conduct" and therefore are not vague as applied (Gov. Br. at 44) simply ignores the crushing weight of

contrary evidence. When this Court certified questions to the New York Court of Appeals regarding the scope of § 471, it recognized the uncertainties that surrounded the application of § 471 to reservations sales, and made the following observations:

- "Both the smoke shop vendors and the City offer us competing interpretations of §§ 471 and 471-e, each supported by cogent arguments and prior judicial analysis," *Golden Feather*, 597 F.3 at 125;
- "The New York Court of Appeals has not spoken directly on the issue of the applicability of § 471 alone to reservation cigarette sales to non-Tribal members," *id.* at 126;
- "although some appellants argue that New York case law on these issues is well-settled, we disagree," *id.* at 126; and
- the question of taxing cigarette sales on reservation lands is one that "has been addressed by the New York State courts, the New York Legislature, the Department of Taxation and Finance, and even New York's Governor, all with varying outcomes."

Golden Feather, 597 F.3d at 127.

The government argues that this Court "did not base its certification of these questions on a finding that the statutes at issue were so unclear as to

implicate the doctrine of unconstitutional vagueness" and that "to treat this Court's certification of questions to the New York Court of Appeals as a precedential decision concerning the interpretation of a statute would be inconsistent with the purpose of the certification process" (Gov. Br. at 26). We disagree, as did the district court below.

Although this Court's decision to certify questions in any given case does not *necessarily* reflect a determination that the relevant statute is unconstitutionally vague, it does suggest, at the least, "'(1) the absence of authoritative state court decisions; (2) the importance of the issue to the state; and (3) the capacity of certification to resolve the litigation.'" 597 F.3d at 126 (*quoting O'Mara v. Town of Wappinger*, 485 F.3d 693, 698 (2d Cir. 2007)). Additionally, since "Certification… should be done 'sparingly, mindful that it is our job to predict how the New York Court of Appeals would decide the issues before us,'" *id.* (*quoting Highland Capital Mgmt., LP v. Schneider*, 460 F.3d 308, 316 (2d Cir. 2006)) (internal quotation marks and brackets omitted),[17] the decision to certify is made when this Court is asked to consider one of those rare issues as to which it does not feel comfortable predicting how the New York Court of Appeals will rule.

[17] Contrast this Court's view that certification is to be used "sparingly" with the government's representation that certification merely reflects the federal courts' "institutional reluctance to rule on an unsettled issue of state law," Gov. Br. at 50. Of course the government's acknowledgment that the relevant state law issues were unsettled is telling in and of itself.

Thus, certification reflects recognition by this Court of uncertainty regarding the application of a statute. Where such uncertainty concerns the application of a *criminal* statute, it is easy to see how the Court's decision to certify manifests concern that persons might be – or might have been – prosecuted for failing to divine the meaning of a vague statute. *See Village of Hoffman Estates*, 455 U.S. at 498-99.[18]

In any event, the application of § 471 to Morrison's conduct *was* unconstitutional because Morrison was not provided fair notice that his conduct was prohibited. The government for the most part simply ignores the unanimity of confusion acknowledged in *Golden Feather* and reflected in the extraordinary and singular circumstances summarized in the opening paragraphs of this Point, and instead seeks refuge in Justice Holmes' *obiter* that "the law is full of instances where a man's fate depends on his estimating rightly" and that his wrong estimation may result even in his death (Gov. Br. at 43) (citing Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 69 (1960)

[18] In its decision finding § 471 unconstitutionally vague as applied, the district judge explained that its conclusion was not dependent on whether this Court's decision in *Golden Feather* "represents 'controlling authority,' as contended by defendant… or is not 'a "holding" or other judicial determination of the Court,' as contended by the government," because even if *Golden Feather* "is neither 'a holding' nor 'other judicial determination,' adherence to my earlier determinations as to notice would create a manifest injustice in that three Circuit judges, in a thoughtful and thorough opinion, found ambiguity." *Morrison III*, 706 F.Supp.2d at 313 n.6.

(quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)). The quoted statement surely does not reflect Justice Holmes' rejection of a rule that due process demands persons be given reasonable notice of what conduct is prohibited[19] even if constitutional vagueness analysis had yet to be well developed.[20]

Justice Holmes' statement notwithstanding, the government acknowledges that constitutional vagueness concerns ultimately "rest on lack of notice," but adds that these concerns "may be overcome in any specific case where reasonable persons would know that their conduct is at risk" (Gov. Br. at 43-44, *quoting Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)). The facts and circumstances cited above, however, overwhelmingly demonstrate that "reasonable persons" *would not have known* that the sales alleged in RAs 5-80 violated § 471.

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[19] Justice Frankfurter explained in his dissent in *Winters v. New York*, 333 U.S. 507, 535 (1948), that Justice Holmes in *Nash* was commenting on how a *jury* might later interpret a defendant's conduct: "Of course a man runs the risk of having a jury of his peers misjudge him. Mr. Justice Holmes has given the conclusive answer to the suggestion that the Due Process Clause protects against such a hazard: 'the law is full of instances where a man's fate depends on his estimating rightly, that is, *as the jury subsequently estimates it*, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.'" (emphasis added). Here, of course, the problem was not how the jury would interpret Morrison's motives, as they were never given an opportunity to consider his motives.

[20] *But see* Federalist Paper # 62 (Madison), deploring laws that are "so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?"

The government goes to great lengths to suggest that, at least, *Morrison himself* knew that his conduct was unlawful, and that § 471 - and therefore the CCTA – was not vague as applied to *him*. Specifically, the government cites, *inter alia*, the alleged use of opaque trash bags to package the cigarettes purchased by "large purchasers" and the use by such large purchasers of pseudonyms (Gov. Br. at 49). We could easily counter that Morrison operated his business openly and notoriously, and kept accurate records of all his sales – even those above the CCTA threshold – thus showing no intention to conceal and therefore no guilty knowledge. In fact, the government relied on these very records to document the sales that were the subject of RAs 5-80 (*See* testimony of Agent Wanderer, Tr. 4544 *et seq*.). We could point as well to the testimony of defense witness attorney Eric Facer that Morrison went to numerous meetings at which, among other things, the state's repeal of the *Attea* regulations on April 29, 1998 - "out of respect for the sovereignty for the Indian tribes, and because of a variety of problems surrounding the implementation of the regulations" (Tr. 11166) - and continuation of the forbearance policy were discussed (Tr. 11143-67, 11179, 11182). Additionally, Facer testified that he communicated to those attending the tribal meetings in which he participated, including to Morrison, that "the forbearance policy meant that the smoke shops on the Indian

reservations were allowed to sell unlimited amounts of untaxed cigarettes to non-Indians, or anyone who came on the reservation to purchase those cigarettes" (Tr. 11179, 11182).

Such a debate however, is beside the point, since an *objective* analysis is employed to determine whether a statute is vague as applied: "A statute or ordinance is unconstitutionally vague, as applied to a plaintiff, if the statute fails to define the crime 'with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "encourage[s] arbitrary and discriminatory enforcement.'" *Catron v. City of St. Petersburg*, 2009 WL 3837789 (M.D. Fla. Nov. 17, 2009) (*quoting Kolender*, 461 U.S. at 357). Of course, a defendant's knowledge may become relevant to vagueness analysis where the statute imposes a *scienter* requirement – *see Village of Hoffman Estates*, 455 U.S. at 499 ("[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice... that [the] conduct is proscribed") - but the district court ruled the CCTA does not contain a scienter requirement (see Point Four)[21], and that Morrison's knowledge and intent therefore were of no moment.

[21] The district court initially instructed the jury during opening statements, in the context of aiding and abetting liability, that the government would have to prove that Morrison had "specific intent to aid somebody, to help that individual to accomplish that illegal goal," Tr. 418, but it thereafter reversed itself and then declined to instruct the jury, in response to a specific jury question during deliberations (*see* Tr. 13005: "Does the defendant have to know the acts that are committed are illegal or criminal in nature

The government cites the New York Court of Appeals' recent decision in *Cayuga II* to support its argument that § 471 clearly applied to Morrison's sale of wholesale quantities of cigarettes on the reservation (Gov. Br. at 40-1, 53). Specifically, *Cayuga* held that, although § 471 may not be invoked to sanction on-reservation sales of untaxed cigarettes, it would nonetheless apply to on-reservation bulk sales intended for illegal off-reservation resale. As we discuss in Point Two, however, this limited carve-out from *Cayuga's* principal holding *was the theory the government ran away from after the district court dismissed the CCTA Racketeering Acts from Count One after the government rested.* The case then proceeded to verdict on the very theory *Cayuga* holds may *not* support a conviction under § 471, *i.e.*, the mere sale of untaxed cigarettes on-reservation.

In any event, neither Morrison nor anyone else could have anticipated the carve-out that the Court of Appeals created in *Cayuga*. This Court held as much in *Golden Feather* by certifying to the Court of Appeals the questions that the *Cayuga* court thereafter answered – questions that were substantially identical to the questions addressed here. If the answers to the certified questions were obvious or readily ascertainable from a review of

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[a]s the definition of conspiracy as charged on page 42 is a partnership for criminal purposes") that the government was required to prove that Morrison understood the general wrongfulness of his conduct (discussed in Point Three). It also declined to give a good faith instruction (Tr. 9461).

the then-existing law the demanding standards required for certification would not have been met. The *Cayuga* court's carve-out of bulk sales from the general inapplicability of § 471 to on-reservation sales had not been adopted in any of the cases leading up to the Court of Appeals' decision, including the Fourth Department's decisions in *Cayuga I* and *Day Wholesale, Inc.*, the latter of which established the key rationale applied when *Cayuga* came before the Fourth Department.

In fact, not only was the distinction based on bulk sales not anticipated by *any* of the prior New York case law addressing the scope of § 471, such a distinction played no part in the forbearance policy applied by the very executive branch department charged with enforcing the state's taxation scheme. The trial testimony confirmed that the state DTF had monthly reports of the *exact* volume of unstamped cigarettes sold to each reservation by each *state licensed* wholesaler, and each of those wholesalers had exact records of monthly sales to each qualified reservation cigarette seller, of which Peace Pipe was but one of many engaged in similar practices (Tr. 4458).

The government appears to find solace in this Court's summary order in *United States v. Kaid*, 241 Fed.Appx. 747 (2d Cir. 2007), which it describes as having rejected the argument that the forbearance policy had

"effectively de-taxed sales of cigarettes to non-Native Americans on reservation land, thereby negating the element of contraband necessary to a conviction for trafficking in contraband cigarettes under 18 U.S.C. §§ 2341-42" (Gov. Br. at 48, citing *Kaid*, 241 Fed. Appx. at 750 (internal quotation marks omitted)). *Kaid*, which arose under completely different facts and prior to many of the key state and federal cases on which the district court relied, does not at all establish that § 471 was not vague as applied to the instant prosecution. In *Kaid* this Court upheld the CCTA convictions of bootleggers, not of reservation cigarette sellers. The defendants in *Kaid* had bought tax-free cigarettes on a reservation to sell off the reservation in New York and Michigan. The court stated that, "While it appears that New York does not enforce its taxes on small quantities of cigarettes purchased on reservations for personal use by non-Native Americans, nothing in the record supports the conclusion that the state does not demand that taxes be paid when, as in this case, massive quantities of cigarettes were purchased on reservations by non-Native Americans for resale." *Id.* at *1. This is a correct statement of the state's applicable rule as to *off-reservation* possession. *See* Tax Law § 1814(d) ("the possession… at any one time of five thousand or more cigarettes in unstamped… packages shall be presumptive evidence that such cigarettes are possessed… for the purpose of

sale and are subject to the tax imposed by section four hundred seventy-one of this chapter"). However, the state law as to off-reservation conduct hardly gave persons in Morrison's shoes, *i.e.*, reservation cigarette sellers, notice that the conduct for which Morrison stands convicted – the mere on-reservation sale of unstamped cigarettes in CCTA quantities - was, in fact, prohibited under § 471 and the CCTA. Rather, it upholds the theory on which the government *initially* tried this case, *i.e.*, that Morrison aided or abetted Peace Pipe's customers to sell unstamped cigarettes *off* the reservation - but not the theory under which Morrison was *convicted* – aiding and abetting *on*-reservation sales of unstamped cigarettes.

Additionally, and of particular importance when considering what "notice" *Kaid* would have provided to persons in Morrison's shoes, the time period charged in the *Kaid* indictment was 1994-1998, and the charges *did not implicate the repeal of the Attea regulations in 1998.* And so the repeal of those regulations – which is of such significance to the instant analysis – was not part of this Court's analysis in *Kaid*.[22] As the *Cayuga* court explained: "In the absence of another collection mechanism tailored to on-reservation retail sales, the repeal of the regulations signified that the Tax

[22] The government's brief on appeal in *Kaid* reveals that the Indictment alleged conduct between 1994 and 1998, and there is no mention, let alone discussion, of the *Attea* regulations.

Department [had] committed itself to withholding active enforcement on a long-term basis… Although non-Indian consumers remained obligated to pay the taxes [*i.e.*, under Tax Law § 471 subd. 2], the 1998 repeal of the regulations resulted in the annulment of an authorized method for calculating and collecting that tax from Indian retailers." 14 N.Y.3d at 648 (internal quotations omitted). In this light, it is no wonder that this Court did not even mention *Kaid* in *Golden Feather*, where it found the state of the law to be muddled and unsettled and certified questions regarding § 471's reach to the New York Court of Appeals.

Kaid, therefore, does not state this Court's position regarding the clarity of § 471 to the charges against a reservation cigarette seller such as Morrison during the relevant time period – *Golden Feather* does. The district court correctly held that *Golden Feather* reflects this Court's considered judgment that the application of § 471 to Morrison for the conduct for which he stands convicted was based on a state taxation scheme that was, as to reservation cigarette sellers, "unsettled and ambiguous, *i.e.*, not self-evident or predictable from a simple reading of the statute" (GA 236).

For these reasons the district court correctly dismissed Count Two upon concluding that § 471 was vague as applied.

Point Two

MORRISON WAS WRONGLY PROSECUTED UNDER COUNT TWO UPON A THEORY THE COURT OF APPEALS IN *CAYUGA* AUTHORITATIVELY HELD MAY NOT SUPPORT A CONVICTION UNDER TAX LAW § 471

The New York Court of Appeals held in *Cayuga II* that the absence of implementing regulations or their equivalent "precludes reliance on Tax Law § 471 as the sole basis to sanction Nation retailers for alleged noncompliance with the New York Tax Law." 14 N.Y.3d at 653. The prosecution of Morrison under Count Two, therefore, was invalid because it did precisely what *Cayuga II* forbids - it prosecuted Morrison for on-reservation sales of untaxed cigarettes *solely* because the sales allegedly violated § 471.[23]

The prosecution is not saved by that portion of the *Cayuga II* decision stating that § 471 nonetheless *would* apply to a "bulk sale of cigarettes *to a party that intends to resell them off the reservation.*" *Cayuga II*, 14 N.Y.2d at 653 (emphasis added). Here, the court permitted the government (though wrongly we argue, *see* Point Three) to proceed to verdict on the theory that Morrison violated the CCTA merely by selling untaxed cigarettes *on* the

[23] *Cayuga II's* authoritative holding of state law is, of course, binding on this Court. *See Portalatin v. Graham*, 624 F.3d 69, 83 (2d Cir. 2010) ("Of course, we do not defer to [the state] court's interpretation of *federal* law, but we are bound by its construction of *New York* law in conducting our analysis.")(emphasis in the original).

reservation. The court permitted the government to do so over Morrison's repeated objections that it should not be permitted to alter the theory upon which it presented its direct case, namely, that Morrison violated § 471 and the CCTA by aiding and abetting unlawful *off*-reservation sales of untaxed cigarettes by those who purchased from Peace Pipe. *See* Point Three.

The government got what it wanted but it turns out that what it wanted was to prosecute Morrison for a crime that does not exist – the mere sale of untaxed cigarettes on a New York State reservation. For this reason Count Two must be dismissed.

Point Three

THE TRIAL COURT ERRED WHEN IT DENIED MORRISON'S MOTION, UNDER FED.R.CRIM.P. 29 AND COLLATERAL ESTOPPEL PRINCIPLES, TO DISMISS THE CCTA RACKETEERING ACTS FROM COUNT TWO (RICO CONSPIRACY) AFTER DISMISSING THE SAME ACTS FROM COUNT ONE (RICO) FOR INSUFFICENT EVIDENCE

The record is unequivocal – and the trial court found – that the government presented its direct case exclusively on the theory that Morrison violated the CCTA by aiding or abetting *off*-reservation sales of unstamped cigarettes (*See* District Court decision, February 6, 2009 at 25, GA 183 (concluding, "Simply put, defendant has the better side of th[is] argument")). The government had settled on this theory to avoid Morrison's due process/vagueness argument (Doc. 367). The government thus assured the

court and Morrison that it would rely *exclusively* on the theory that Morrison "knowingly and intentionally *aided and abetted others* in sales and distribution of untaxed cigarettes *off the reservation* in violation of both New York and federal law" (Doc. 372, GA 142, (emphasis added)). This self-imposed restriction on the government's theory of prosecution, said the government, vitiated Morrison's due process claim, since "[t]he sale and aiding and abetting in the distribution of such cigarettes *outside of an Indian reservation* is unaffected by the repeal of 22 NYCRR §§ 336 *et seq*. [the *Attea r*egulations] and forbearance policy" (Doc. 372, GA 142, (emphasis added)).

After the government rested, the court correctly granted Morrison's motion under Fed.R.Crim.P. 29(a) to dismiss the CCTA Racketeering Acts alleged in Count One (RICO) for insufficient evidence. The court ruled that the government failed to prove that "principals" had violated the CCTA by selling CCTA quantities of unstamped cigarettes off the reservation which they had purchased at Peace Pipe, much less that Morrison aided or abetted such principals. Tr. 9569, 9925-32; *see also Morrison II*, 596 F.Supp.2d 686, GA184. The court then deferred (Tr. 10779, 10791) – and later denied (596 F. Supp.2d at 683-94) - Morrison's motion to dismiss these same Racketeering Acts from Count Two (RICO conspiracy) (Doc. 652), and

permitted the government to proceed to verdict upon its previously abandoned theory that Morrison unlawfully sold unstamped cigarettes in CCTA quantities *on* the reservation – *the very theory the government had explicitly and repeatedly disavowed pretrial to gain strategic advantage.*

Regardless of whether a court, as a general rule, may permit the government to alter its explicitly stated theory of prosecution after the government rests, Morrison was entitled to a Rule 29(a) determination of whether the evidence presented by the government during its case-in-chief was sufficient *under the theory upon which the government had relied during its case-in-chief rather than the theory upon which the case was thereafter permitted to proceed*. Additionally, the court's dismissal of the CCTA Racketeering Acts from Count One for factual insufficiency collaterally estopped the government from proving the same Racketeering Acts under Count Two. Although the application of collateral estoppel within the same proceeding was previously in doubt, the issue was resolved after Morrison's trial in *Yeager v. United States*, 129 S.Ct. 2360, 2374 (2009). For these reasons, Racketeering Acts 5-80 should have been dismissed from Count Two as they had been from Count One.

A. The Court Was Required, Under Fed.R.Crim.P. 29(B) To Consider The Sufficiency Of The Government's Case As Presented During Its Case In Chief And Not As Presented Under The Altered Theory Upon Which The Court Permitted The Case To Proceed To Verdict

Federal Rule of Criminal Procedure 29(a) provides, in part, that "[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Rule 29(b) provides that if the court reserves decision on the motion and decides it thereafter, it "must decide the motion on the basis of the evidence at the time the ruling was reserved." *See, e.g.*, *United States v. Clotida*, 892 F.2d 1098 (D.P.R. 1989) (testimony of codefendant, outside Government's case-in-chief, was to be excluded in determining whether trial court erroneously denied motion for acquittal); *United States v. Davis*, 562 F.2d 681 (D.C. Cir. 1977) (in determining sufficiency of evidence to withstand motion for acquittal, court must consider only evidence as it was when government rested); *Powell v. United States*, 418 F.2d 470, 135 (D.C. Cir. 1969) (on motion of defendant for acquittal at close of government's evidence on case in chief, court measures evidence as it was when government rested its case in chief). When the court tested the government's evidence introduced to support the CCTA Racketeering Acts

as charged in Count One, it found the evidence deficient and dismissed those Acts. The court erred in making a contrary ruling with respect to those same Acts as charged in Count Two.

The evidence, as the district court found when analyzing RAs 4-80 as charged in Count One, was insufficient to prove that Morrison aided and abetted others to violate the CCTA through off-reservation sales of untaxed cigarettes, because there was no evidence that anyone in fact had sold those cigarettes off-reservation, or sold them in quantities that would violate the CCTA, much less that Morrison aided and abetted anyone to do so. In fact, the government presented no evidence of off-reservation sales of these cigarettes at all, and there can be no aiding and abetting liability without a crime committed by a principal. *United States v. Ruffin*, 613 F.2d 408, 412 (2d Cir. 1979).

Thus, the court's dismissal of Racketeering Acts 4-80 from Count One unquestionably was proper. The court nonetheless denied defendant's motion to dismiss these same Racketeering Acts from Count Two because it found that, in the absence of demonstrable prejudice to Morrison, there was no reason to deny the government's application to try the balance of the case on the government's previously disavowed *on*-reservation sales theory (GA 186). But this rationale simply bypassed entirely the threshold question of

whether the court should have granted the Rule 29 motion *as made when the government initially rested*. Up until that point, as the court repeatedly acknowledged, the case had been tried on an *off*-reservation sales theory *to the exclusion of an on-reservation sales theory*. Under Rule 29(b) Morrison was entitled to have his Rule 29(a) motion decided *as if it were decided at the time it was initially made*, even though it was not decided until after the verdict. Thus, the question was whether the evidence proved the CCTA Racketeering Acts under the theory upon which the case was *exclusively* tried to that point. The court answered this question when it dismissed these same racketeering acts from Count One.

For this reason the court's reliance in its post-trial decision on *United States v. Mapp*, 170 F.3d 328 (2d Cir. 1999) is misplaced (*See* GA 161). In *Mapp*, defendant Moore was convicted, *inter alia*, of murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1). The government alleged that Moore murdered the victim, Severides, during a bank robbery, in violation of New York Penal Law § 125.25(3), New York's felony murder statute.

The government's principal cooperator testified that Moore was the shooter. After deliberations had begun, the jury inquired whether Moore could be convicted under § 1959 if he did not at any time either carry or use

the gun involved in the murder. The court responded that the jury could convict Moore under the statute if it found that, during the course of a robbery in which Moore was a participant, Moore *or another participant* caused Severides's death. Before giving this instruction the court provided Moore an opportunity to offer additional argument and/or evidence to the jury. Moore declined.

In denying relief, this Court emphasized that Moore did not claim that the supplemental instruction deviated from the charges in the indictment or that the content of the supplemental instruction contained legal error, but that "Moore argues only that the instruction 'changed the government's theory of liability' on the section 1959 charge and that he might have asserted additional defenses at trial if he had known that such an instruction would be given." *Mapp*, 170 F.3d at 337. The court rejected this argument because "even now, Moore is silent as to what those defenses might have been." *Id.*

Mapp is inapposite because it does not address the issue presented here: whether the evidence introduced by the government on its direct case was legally insufficient to prove the off-reservation sales theory that the government repeatedly agreed was the *exclusive* theory upon which the case

proceeded to trial.[24] It is this theory against which the evidence of the CCTA Racketeering Acts as incorporated into Count Two must be tested for purposes of deciding the Rule 29 motion.[25] Here, although the district court, in its post-trial decision, said it was testing sufficiency against the evidence as it stood at the time the government rested (GA 186 *et seq.*) *it failed to test that evidence against the government's theory of the case as it then existed*, and instead tested it against the theory that the government had explicitly and repeatedly abandoned and disavowed and which was not made a part of the case until *after* the government rested. This was error and Morrison therefore was entitled to dismissal of RAs 5-80 as charged in Count Two no

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[24] To be sure, Moore raised sufficiency issues, but they addressed only whether the evidence sufficed for the jury to find that Moore participated in the robbery and murder with the requisite motive, and whether the named enterprise affected interstate commerce. *Mapp*, 170 F.3d at 336.

[25] Although a RICO conspiracy charge does not require proof of completed Racketeering Acts, the grand jury nonetheless explicitly incorporated the Racketeering Acts alleged in Count One into the Count Two conspiracy charge, alleging, "The pattern of racketeering activity through which the defendant RODNEY ARNOLDO MORRISON, together with others, agreed to conduct the affairs of the Enterprise consisted of the acts set forth in paragraphs 11 through 21 of Count One, as racketeering acts one through eighty." Superseding Indictment at ¶ 24. The grand jury's decision to limit the charged pattern of racketeering to the explicitly alleged Racketeering Acts – asserting that the pattern "consisted of" those acts rather than "included" those acts – was strategic. *See United States v. Pizzonia*, 577 F.3d 455, 464 (2d Cir. 2009) ("A Department of Justice manual specifically instructs prosecutors that '[t]he pattern of racketeering should be drafted to allege that it "consists of" rather than "includes" the acts of racketeering to avoid double jeopardy problems in the event a RICO defendant is charged with a subsequent RICO violation.' U.S. Dep't of Justice, Racketeer Influenced & Corrupt Organizations, A Manual for Federal Prosecutors 222 (4th rev. ed. 2000) (footnotes omitted).")).

less than he was with respect to Count One.

B. The Government Was Collaterally Estopped From Using The CCTA Racketeering Acts To Prove The Pattern Of Racketeering Activity Alleged In Count Two After The Court Dismissed, For Insufficient Evidence, Those Same Ras As Alleged In Count One

The government was also precluded by the collateral estoppel component of double jeopardy from using RAs 4-80 to prove Count Two. These principles prohibit the government from proving a crime using facts that have previously and necessarily been resolved against the government by an acquittal or its equivalent. Here, the court entered a partial judgment of acquittal under Rule 29 dismissing for insufficient evidence the CCTA Racketeering Acts as alleged in Count One. These same Racketeering Acts, therefore, should not then have been used as direct proof of Morrison's guilt of Count Two.

The Double Jeopardy Clause of the Fifth Amendment embodies two broad concepts. First is the "'deeply ingrained' principle that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" *Yeager*, 129 S.Ct. at 2365-66 (*quoting Green v. United States*, 355 U.S. 184, 187-88

(1957)) (citations omitted). This first principle, which applies where there exists identity between the first and subsequent charges under the "same elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932), is not implicated here, since RICO (Count One) and RICO conspiracy (Count Two) each require proof of an element the other does not.

The second principle of double jeopardy, which was dispositive in *Ashe v. Swenson*, 397 U.S. 436 (1970), provides that "'when an issue of ultimate fact has once been determined by a valid and final judgment' of acquittal, it 'cannot again be litigated' in a second trial for a separate offense." *Yeager*, 129 S.Ct. at 2367 (*quoting Ashe*, 397 U.S. at 443). This is the doctrine of "collateral estoppel" or "issue preclusion." *See id.* at n.4; *see also United States v. Merlino*, 310 F.3d 137 (3d Cir. 2002) (collateral estoppel may be applied to government attempts to revisit factual findings made by a jury with regard to Racketeering Acts). In *Ashe*, this principle was invoked to preclude a second trial where the defendant and others allegedly robbed six people at a poker game. He was tried and acquitted of robbing one victim and thereafter was tried for robbing a second victim. The Court held that the second trial violated double jeopardy because the jury had necessarily decided the "fact" that the defendant was not involved in the robbery. *See Yeager*, 129 S.Ct at 2368-69 (collateral estoppel would

be applicable to attempted retrial of insider trading counts after hung jury, if jury, in acquitting defendant of fraud counts, necessarily found that defendant had not possessed insider information); *United States v. Coughlin*, 610 F.3d 89, 93 (D.C. Cir. 2010) (retrial of two mail fraud counts prohibited by double jeopardy where defendant acquitted of three mail fraud counts that necessarily resolved in defendant's favor charge question whether he defrauded September 11th Victim Compensation Fund).

Here, the district court found as a matter of law that the government failed to prove the CCTA Racketeering Acts alleged in Count One, and entered judgment thereon. These same Racketeering Acts were explicitly incorporated into Count Two, as establishing, along with Racketeering Acts 1-3, the requisite "pattern of racketeering activity" contemplated by the charged RICO conspiracy:

> The pattern of racketeering activity through which the defendant RODNEY ARNOLDO MORRISON, together with others, agreed to conduct the affairs of the Enterprise consisted of the acts set forth in paragraphs 11 through 21 of Count One, as racketeering acts one through eighty, which are realleged and incorporated as if fully set forth in this paragraph.

Superseding Indictment (GA 104), Par. 24.

For obvious reasons, collateral estoppel is rarely implicated in judgments rendered in a single case, rather than in successive prosecutions, because double jeopardy may be invoked only where the government seeks

to prosecute a defendant for a crime after a final judgment has been rendered with regard to an identical crime, or where the first prosecution decided an issue in the defendant's favor upon which the government seeks to rely to prove an essential element of another charge. Additionally, the Court has held that double jeopardy is not implicated by a jury's return of inconsistent verdicts at the same proceeding, since the inconsistency may merely reflect a jury's compromise. *Powell*, 469 U.S. at 65. Where, however, a Court has dismissed, as insufficiently proved, Racketeering Acts used to establish an essential element of a charged offense, no reason exists to permit these same facts to be used to prove another crime, whether during the same trial or at a subsequent trial.

Indeed, the argument for estoppel is at its zenith where pleaded facts have been dismissed for insufficiency under Rule 29, rather than having been the subject of a jury's acquittal, as a Rule 29 dismissal is attainable only where the court has found the evidence insufficient *as a matter of law*, granting the government all reasonable inferences from the evidence.

In any event, *Yeager* dispels any suggestion that collateral estoppel cannot be applied internally during the same proceeding, since *Yeager* applied collateral estoppel to the retrial of a hung count, and such a retrial unquestionably is considered a mere continuation of the same proceeding.

Richardson v. United States, 468 U.S. 317, 325 (1984). As Justice Scalia pointedly observed in his *Yeager* dissent, "Today's holding… interprets the Double Jeopardy Clause, for the first time, to have effect internally within a single prosecution, even though the criminal proceedings against [the] accused have not run their full course." 129 S.Ct. at 2372-73 (Scalia, J., dissenting) (*quoting Justices of Boston Muncipal Court v. Lydon*, 466 U.S. 294, 308 (1984)) (internal quotations omitted). *Yeager* was decided after the instant trial, but its holding, of course, applies on this direct appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 321-22 (1987).

The district court rejected Morrison's collateral estoppel argument because, it said, the *non*-CCTA Racketeering Acts had not been dismissed and because RICO conspiracy is a crime separate and apart from substantive RICO:

> Again, what I did in dismissing the racketeering acts previously mentioned, was that there was no evidence in the record that would permit the jury to reasonably conclude that the purchases of large quantities of product from Peace Pipe and/or Smokers Den violated the CCTA. So, the question is whether that determination of that issue in effect creates a collateral estoppel effect as to the government proceeding under Count Two.
>
> And I don't think at this juncture that that is the case. Among other things, there are racketeering acts that have survived in Count One, number one. Number two, as we are all aware, the charge of conspiracy is a separate charge from the substantive crime, which is the goal of the conspiracy.

> And that's true for double jeopardy purposes, and it is true even if the same underlying incident is the predicate for both the substantive and the conspiracy based claim. So, I don't believe that collateral estoppel is in effect here.

(Tr. 10780-81). That "there [were] Racketeering Acts [*i.e.*, RAs 1-3] that have survived in Count One" does not at all preclude the application of collateral estoppel principles to the government's attempt to use other Racketeering Acts [i.e. RAs 5-80] as to which the court had rendered a final order of dismissal for insufficient proof. Indeed, RAs 1-3 were also alleged in Count One. The question was not, as the court suggested, whether the dismissal of the CCTA Racketeering Acts from Count One "in effect create[d] a collateral estoppel effect as to the government proceeding under Count Two,"[26] but rather whether the government could use the Racketeering Acts dismissed from Count One for insufficient evidence as part of its proof to establish the requisite pattern of racketeering activity pleaded in Count Two. *Ashe* instructs it may not.

Likewise, that substantive RICO and RICO conspiracy are separate crimes is of no legal moment for purposes of the instant analysis, since

[26] The court permitted Count One to proceed to the jury with only RAs 1-3 remaining, and could have done the same with respect to Count Two. Although the jury's finding that RAs 1-3 had not been proved moots the issue, we note that Morrison argued below that Count One should not have proceeded to the jury in reliance on RAs 1-3 alone, since the elimination of RAs 5-80 fundamentally altered the charged RICO enterprise by eliminating its CCTA core, and left only Racketeering Acts that were insufficient to establish the continuity and relatedness required to prove a "pattern of racketeering activity" under RICO (*see* Doc. 653).

collateral estoppel involves *fact* or *issue* preclusion, not *charge* preclusion, and identity of elements in the *Blockberger* sense is not required. Indeed, *Yeager* applied collateral estoppel to the retrial of insider trading counts that had elements different from those of the acquitted fraud charges.

The dispositive fact is, as the district court put it, "there was no evidence in the record that would permit the jury to reasonably conclude that the purchases of large quantities of product from Peace Pipe and/or Smokers Den violated the CCTA" (Tr. 1080). If this evidence was not sufficient to be considered with respect to Count One, it was not sufficient to be considered with respect to Count Two, and the Court should have so ruled.

Point Four

THE TRIAL COURT ERRONEOUSLY RULED THAT MORRISON COULD BE FOUND TO HAVE VIOLATED THE CCTA, OR TO HAVE CONSPIRED TO HAVE DONE SO, WITHOUT ANY KNOWLEDGE THAT HE WAS SELLING "CONTRABAND" CIGARETTES OR THAT HIS CONDUCT WAS WRONGFUL IN ANY WAY

The Racketeering Acts that formed the heart of Count Two consisted largely of alleged violations of the CCTA, which proscribes the "knowing" trafficking in "contraband cigarettes." This Count alone exposed Morrison to twenty years' imprisonment (as did Count One, which was dismissed after

the government rested).[27] The Court nonetheless ruled that a violation of § 2342(a) could be proved without a finding by the jury that Morrison knew the cigarettes sold by Peace Pipe possessed certain of the characteristics that made them "contraband," *i.e.*, that they were required to, but did not, bear New York State tax stamps evidencing the payment of applicable taxes. Additionally, the court ruled, in response to two jury inquiries during deliberations (discussed below), that a conspiracy to violate RICO could be proved without evidence that Morrison knew the alleged conspiratorial agreement was "wrongful." We respectfully disagree with each of these rulings. Just as the Supreme Court, in *Liparota v. United States*, 471 U.S. 419 (1985), held that a person "knowingly" uses "unauthorized" food stamps only if he knows the stamps are *unauthorized*, so too a person "knowingly" sells "contraband cigarettes" only if he knows they are *contraband*. Additionally, a person can be convicted of conspiracy only if he acts "with an understanding of the unlawful character of the conspiracy." *Sand and Siffert*, Instruction 19-6. The court's contrary instructions were erroneous.

A. Facts

The government's theory of prosecution when trial commenced was that Morrison aided and abetted Peace Pipe customers to sell their cigarettes

[27] If separately charged, each CCTA violation carries a potential five-year term of imprisonment. *See* 18 U.S.C. § 2344(a).

off-reservation in violation of the CCTA. Relying on this theory, the district court rejected Morrison's argument that the CCTA was vague as applied, finding that any such concerns were mitigated because aiding and abetting "requires the government to prove that Defendant acted with specific intent." *Morrison I*, 521 F. Supp. 2d at 255-56 (emphasis added). Consistent with this ruling, the court initially instructed the jury, on several occasions, that the government was required to prove Morrison's specific intent to violate the CCTA (e.g., Tr. 418, 1009) and Morrison, in his draft requests to charge, proposed that the jury be instructed, "the Government must prove beyond a reasonable doubt that the defendant did not believe that he had the right to sell untaxed, unstamped cigarettes on the reservation to whomever he pleased, in whatever quantity he pleased…" (Doc. 468 at 113).

After initially ruling that the government had to prove specific intent, however, the district court reversed itself after the government rested, declaring that the government's aiding and abetting theory in fact imposed no greater *mens rea* requirement than does the underlying substantive offense, and that the CCTA was a "general intent" crime that did not incorporate an element of willfulness (Tr. 9495-97). It also rejected Morrison's proposed "good faith defense" instruction (Tr. 9496-97).

Having ruled that neither the CCTA nor the crime of aiding and abetting a violation of the CCTA requires a finding of specific intent, the court instructed the jury with respect to the CCTA Racketeering Acts, as follows, explaining that these acts were not charged as substantive offenses in Count Two, but rather as "intended goals of the conspiracy" (*see* Doc. 769-3, p. 123):

> To prove a substantive violation of Section 2342, the government would be required to prove:
>
> (1) A sale or distribution of contraband cigarettes as alleged in the Racketeering Act under consideration;
> (2) by the defendant, either personally or as an aider and abettor, who acted knowingly.

The court defined "knowingly" as follows:

> A person acts knowingly if he acts intentionally and voluntarily, and not because of mistake, accident, negligence, or some other innocent reason. The government is only required to show the person knew the nature of his acts. The government is not required to prove that the person knew his conduct violated the law.

Doc. 769-3 at 120-21. The court defined "contraband cigarettes" as:

> A quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable state cigarette taxes in the state where such cigarettes are found, if such state requires a stamp…to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes.

Id. at 121 (footnote omitted). It also instructed the jury that, as a matter of law, "tax stamps were required to be affixed to cigarettes sold by Peace Pipe

and/or Smokersden.com as alleged in paragraph 21 of the indictment." *Id.* at 122 (footnote omitted).

The upshot of these instructions was that the jury could find that RAs 5-80 had been proved as conspiratorial objects if it was satisfied that (1) Peace Pipe made the sales described in RAs 5-80; and (2) Morrison knowingly aided and abetted those sales. No further proof was required, since the court defined the cigarettes reflected in the CCTA Racketeering Acts as "contraband cigarettes" and refused to instruct that the jury that Morrison must have any level of understanding that what he was doing was wrong or unlawful.

During deliberations, the jurors focused on the apparent lack of a *mens rea* requirement with respect to the RICO conspiracy count and twice requested clarification – once before the substitution of an alternate juror and once after. As described by the court in its post-verdict decision:

> On April 8 and 9, 2008, the deliberating jury sent two notes concerning the same subject. The first inquiry, marked Court Exhibit 27, reads: "Does the defendant need to know the acts he intends to commit are criminal in nature to be considered entering into a conspiracy as far as Count 2?" The next day, before the Court responded to this inquiry, alternate number 1 was substituted for one of the first twelve jurors, thereby causing deliberations to begin anew. That same day, *i.e.*, on April 9th the newly constituted jury asked, as reflected in Court Exhibit 35, essentially the same question: "As it relates to Count 2, [i]f 2 [a]cts are proven[, d]oes the defendant have to know the acts that are committed are illegal or criminal in

> nature[a]s the definition of conspiracy as charged on page 42 is a partnership for criminal purposes."

Morrison II, 596 F. Supp. 2d at 706-09. [28] The defense argued that the court should instruct the jury "that it may convict Morrison under Count Two (RICO Conspiracy) if and only if it finds, beyond a reasonable doubt that [he], *with an understanding of the unlawful character of the conspiracy*... intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking, citing *Sand and Siffert*, Instruction 19-6 (emphasis in the original)." *Id*. at 706-07. The court, however, declined to give this instruction, finding that conspiracy carries no greater *mens rea* requirement than the underlying substantive offense and that the CCTA has no such intent requirement. Thus, the court instructed the jury, *inter alia*:

> Simply put, the government is not required to prove among the many elements that they must prove beyond a reasonable doubt, they are not required to prove that the defendant knew that the charged conspiratorial goals or the intended racketeering acts violated state or federal law. That is, referring back to your note, that they were, quotes, illegal, close quotes, or quotes, criminal in nature, close quotes.
>
> *So, simply put, the answer to your specific inquiry is no, that's not something that the government has to prove.*

Id. at 708 (citing Tr. 13047-49) (emphasis added).

[28] The jurors understood the court's instructions to, in essence, direct a verdict a guilt, asking, in Court Exhibit 37, "if the defendant doesn't have to know that selling more than 60,000 cigarettes is illegal, and the receipts from the Peace Pipe are proof that more than 60,000 cigarettes are sold, what are we being asked to decided?" Tr. 13026.

B. Discussion

The court's instructions were erroneous in at least two respects. First, they permitted the jury to find that the CCTA offenses alleged in RAs 5-80 had been proved without any finding of *mens rea*, *i.e.*, that Morrison knew the cigarettes sold by Peace Pipe were required to – but did not – bear tax stamps. Second, they permitted the jury to convict Morrison of conspiracy without the required showing that he knew the agreement into which he allegedly entered was "illegal" or "criminal in nature." We discuss each of these errors in turn.

1. Morrison Could Not Properly Be Convicted Under The CCTA Without Proof That He Knew The Cigarettes Sold By Peace Pipe Were "Contraband," *i.e.*, That He Knew They Were Required To – But Did Not – Bear Stamps Reflecting The Payment Of Applicable New York State Taxes (Regardless Whether He Knew That Sales Of Such Unstamped Cigarettes In Fact Violated § 471 Or The CCTA)

The district court's failure to instruct the jury that the government had to prove Morrison knew the cigarettes Peace Pipe sold had to – but did not – bear tax stamps was understandable. The United States Supreme Court has aptly observed: "Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States v. Bailey*, 444 U.S. 394, 403 (1980). This difficulty traces, in part, to the different meanings ascribed to different mental states:

> "Sometimes 'general intent' is used in the same way as 'criminal intent' to mean the general notion of *mens rea*, while 'specific intent' is taken to mean the mental state required for a particular crime. Or, 'general intent' may be used to encompass all forms of the mental state requirement, while 'specific intent' is limited to the one mental state of intent. Another possibility is that 'general intent' will be used to characterize an intent to do something on an undetermined occasion, and 'specific intent' to denote an intent to do that thing at a particular time and place." W. LaFave & A. Scott, Handbook on Criminal Law § 28, pp. 201-202 (1972) (footnotes omitted) (hereinafter LaFave & Scott).

Id. at 404. And "[p]erhaps the most significant, and most esoteric distinction, is that between the mental states of 'purpose' and 'knowledge.'" *Id.* But whatever those ambiguities, one thing is clear: Conduct for which a person may be severely punished with no proof of *mens rea* whatsoever is an "exception[] to the general rule that criminal liability requires an 'evil-meaning mind'" and generally [is] limited to "'violations,' actions punishable by a fine, forfeiture, or other civil penalty rather than imprisonment." *Id.* n.4 (citing: Model Penal Code § 2.05(1)(a)); *see also* LaFave & Scott 218-23.

Such "strict liability" offenses – those that do not require mental blameworthiness or *mens rea*[29] – are limited to a few exceptional statutes or

[29] The term "strict liability" sometimes refers to offenses that require no proof the defendant knew he was committing any of the acts that constitute the offense, and sometimes refers to offenses that require no proof that the defendant acted with *mens rea* – an "evil mind." Here, we refer to the latter definition.

statutory schemes for reasons deeply ingrained in our sense of fundamental fairness. This is "no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Liparota*, 471 U.S. at 425 (*quoting Morissette v. United States*, 342 U.S. 246, 250 (1952)).

The CCTA provides, "It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco."18 U.S.C. § 2342(a). "Contraband cigarettes," in turn, was defined (during the relevant period of time) in 18 U.S.C. § 2341(2) as:

> a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than— [certain enumerated persons or common carriers].

Thus, to prove a transaction was of "contraband cigarettes" the government had to establish it involved (*i*) a quantity in excess of 60,000 cigarettes, (*ii*) which bore no evidence of the payment of State or local cigarette taxes in the State or locality in which the cigarettes are found, (*iii*) where such State or local cigarette taxes are applicable, and (*iv*) where the

State or local government requires an indication of the payment of such cigarette taxes to be placed on the cigarette packages or other cigarette containers.

The trial court's jury instruction regarding the statutory elements of § 2342, read together with its instruction defining "knowingly," properly informed the jury that the government had to prove Morrison's knowledge of the first and second facts described above, neither one of which established *mens rea*, but failed to inform the jury that the government also had to prove Morrison's awareness of the third and fourth facts, which if proved *would have* established *mens rea*.[30] Yet the court provided no cogent reason to interpret the CCTA to require proof of Morrison's "knowledge" of the first and second factual elements but not of the third and fourth.

The question whether the statutory language establishes an offense without proof of *mens rea* – a "guilty mind" – is one of statutory intent, for "[t]he definition of the elements of a criminal offense is entrusted to the

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[30] The question whether Morrison sold the cigarettes even though he understood that there were "applicable" taxes due is to be distinguished from the question of whether sale of such cigarettes violates § 471 and the CCTA; that is, Morrison should not have been held liable if he was unaware of the *fact* that taxes were due because he then would have lacked knowledge of the third and fourth offense elements – but he would have been liable if he knew taxes were due and still sold the cigarettes, claiming ignorance that such a sale violated § 471, because knowledge of § 471 and the CCTA is not an offense element. *See infra* at 61-62; *Liparota*, 471 U.S. 425 (explaining with respect to the crime of receiving stolen goods that the essential "legal element" is that the defendant was aware of the fact that the goods were stolen, but that the defendant need not be aware that receipt of stolen goods was *illegal*. *Id.*at 426 n.9.

legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota*, 471 U.S. at 424 (*citing United States v. Hudson*, 11 U.S. 32 (1812) (footnote omitted)). Of course, the starting point for divining a statute's meaning is its language, *Staples v. United States*, 511 U.S. 600, 605 (1994) (*citing Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). If its meaning is clear from the statutory language, then the inquiry is at an end. *United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998) ("[W]here a statute is plain on its face, the court does not resort to legislative history or to the purpose of the statute to discern its meaning."). If it is not, then legislative history may be helpful to resolve an ambiguity.

When interpreting statutes that include the requirement that the defendant act "knowingly," courts have often addressed "how far down the sentence the word 'knowingly' is intended to travel." *Liparota*, 471 U.S. at 425 n.*7* (*quoting* W. LaFave & A. Scott, Criminal Law § 27 (1972) (giving example)). As applied to the CCTA, does "knowingly" modify only "ship, transport, receive, possess, sell, distribute, or purchase" or does it also modify "contraband cigarettes"? And if it does modify "contraband cigarettes," what burden does this place on the government? The case law answers these questions: absent contrary legislative intent, "knowingly" modifies each of the terms that appear thereafter. *See, e.g.*, *Flores-Figueroa*

v. United States, 129 S.Ct. 1886 (2009) (where aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), imposes an additional two-year sentence where offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," government must prove defendant knew that the "means of identification" in fact belonged to "another person"); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994) (finding age of minority in 18 U.S.C. § 2252 "indisputably possesses the same status as an elemental fact because nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment" and therefore, "the age of the performers is the crucial element separating legal innocence from wrongful conduct"). As applied to the CCTA, then, "knowingly" modifies "contraband cigarettes" and requires proof that the defendant has knowledge of each fact required to establish that the cigarettes were "contraband."

The court appeared to recognize that "knowingly" travelled down the statutory language of § 2342(a) far enough to reach "contraband cigarettes" because it, in fact, instructed the jury that it must find that Morrison "knowingly" – that is voluntarily and without mistake – intended to aid and abet the sale of in excess of 60,000 cigarettes that did not bear tax stamps (Doc. 769-2 at 120-23). This instruction addressed the first and second

factual elements of what comprises "contraband cigarettes." The court, however, declined to also require the jury to determine whether the government proved the third and fourth factual elements, *i.e.*, whether Morrison knew taxes had to be paid on the cigarettes and whether stamps memorializing such payment had to be affixed to the cigarette packs.

It may be that the court's error was in confusing the *legal* issue of whether it was a crime to sell unstamped cigarettes with the *factual* issue of whether Morrison knew taxes were "applicable" (using the language of § 471) to the cigarettes he sold. Whatever the reason, however, the court's truncated instructions not only violated the general rule requiring *mens rea*, but also were contrary to several analogous Supreme Court decisions. For example, in *Liparota* the Court interpreted the food stamp statute, 7 U.S.C. § 2024(b)(1), which provides, "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is subject to a fine and imprisonment. The issue presented – closely analogous to that presented here – was "whether in a prosecution under this provision the Government must prove that the defendant knew that he was acting in a manner not authorized by statute or regulations." 471 U.S. at 420-21. There, the court gave the jury an instruction that did not include a *mens rea* element, and the

defendant objected, arguing, unsuccessfully, that "this instruction required the jury to find merely that he knew that he was acquiring or possessing food stamps; he argued that the statute should be construed instead to reach only 'people who knew that they were acting unlawfully.'" *Id.* at 422-23. The Seventh Circuit affirmed the defendant's conviction but the Supreme Court granted conflict certiorari and reversed. In its decision, the Court relied on the strong presumption, absent contrary legislative intent, that "criminal offenses requiring no *mens rea* have a 'generally disfavored status.'" The Court continued: "Similarly, in this case, the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law." *Id.* at 426 (*citing United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978)).[31]

The Court found further support for its holding in the rule of lenity, observing, "requiring *mens rea* is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Id.* at 427 (*quoting Rewis v. United States*, 401 U.S. 808, 812 (1971)). "Application of the rule of lenity," continued the Court, "ensures that criminal statutes will provide fair

[31] The Court also expressed concern that the government's interpretation would "criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426.

warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Id.*[32]

In its decision in *Liparota,* the Supreme Court emphasized it was not sanctioning an "ignorance of the law" or "mistake of law" defense, but rather it was requiring that the defendant be aware of the "legal element" of the offense. Using as an example the crime of receiving stolen goods, the Court explained that the "legal element" of which the defendant had to be aware was the fact that the goods were stolen; the defendant, however, need not be aware that receipt of stolen goods was *illegal. Id.*, 471 U.S. at 426 n.9. Likewise, Morrison's jury should have been instructed, at least, that it must find he was aware of the "legal element" that the cigarettes Peace Pipe sold in the charged Racketeering Acts were required to bear tax stamps reflecting payment of "applicable" taxes (just like the defendant in *Liparota* had to know he was acting in a manner "not authorized" by statute or regulation or that the recipient of stolen goods must know the goods were stolen), even if he was not aware that the sale of such unstamped cigarettes was *illegal – i.e.*, in violation of either State or federal law.

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[32] This observation is particularly *apropos* given that the district court below initially imposed a *mens rea* requirement that it said vitiated Morrison's vagueness/notice claim.

Here, as in *Liparota*, the statute in question explicitly includes a knowledge element that required proof of *mens rea*. Yet, even the complete absence of statutory language requiring a defendant's knowledge or intent, will not be presumed to create a crime that lacks a *mens rea* element, *i.e.*, "which would require that the defendant know the facts that make his conduct illegal." *Staples*, 511 U.S. at 605 (citing *United States v. Balint*, 258 U.S. 250, 251 (1922) (stating that traditional "scienter" was a necessary element in every crime). In *Staples* the defendant was charged with violating 26 U.S.C. § 5861(d), which makes it a crime punishable by up to ten years to possess an unregistered "firearm" – a term defined elsewhere in the National Firearms Act to include an automatic weapon. The defendant argued he did not know that his firearm – an AR-15 that had been modified to fire in automatic mode like its more sophisticated M-16 cousin – in fact could operate automatically, but the trial court instructed the jury, over his objection, that "[t]he Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation." *Id*. at 604 (footnote omitted).

Notwithstanding the lack of *any* statutory language – even the term "knowingly" – that could be construed to impose a *mens rea* requirement, the Court refused to interpret the statute to dispense with such a requirement, finding that the regulation of firearms did not bring the case within the category of "public welfare offenses" as to which Congress has, in very limited instances (discussed below) dispensed with a *mens rea* requirement. Accordingly, the Court reversed the defendant's conviction, holding "the background rule of the common law favoring *mens rea* should govern interpretation of § 5861(d) in this case despite Congress' silence. *Staples*, 511 U.S. at 619.

This Court followed *Liparota* in *United States v. LaPorta*, 46 F.3d 152, 158 (2d Cir. 1994) (presuming a scienter requirement in statutes that criminalize otherwise innocent conduct, but noting "[a]rson is hardly 'otherwise innocent conduct.'"); *United States v. Figueroa*, 165 F.3d 111, 118 (2d Cir. 1998) (finding "defendants can be found guilty under [8 U.S.C. § 1327 [*i.e.*, assisting inadmissible alien to enter country] provided they have sufficient knowledge to recognize that they have done something culpable"); and *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82 (2d Cir. 2000) (to obtain conviction under that part of Lacey Act, 18 U.S.C. § 42(c), making it a misdemeanor "for any person, including any importer, knowingly to cause

or permit any wild animal or bird to be transported to the United States… under inhumane or unhealthful conditions…" government was required to prove not only that defendant knowingly caused transportation to United States of wild animals, but also that defendant knew conditions under which animals were transported were inhumane or unhealthful).

To be sure, Congress has established certain "public welfare" or "regulatory" offenses in "limited circumstances" that "regulate potentially harmful or injurious items" where the Court "inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense." *Staples*, 511 U.S. at 606. Examples discussed in *Liparota* and *Staples* include the possession of hand grenades, *United States v. Freed*, 401 US. 60 (1971), the transportation of corrosive liquids, *United States v. Int'l Minerals & Chemicals Corp.*, 402 U.S. 558 (1971), and the shipment of adulterated and misbranded drugs by a corporate officer, *United States v. Dotterweich*, 320 U.S. 277 (1943). In such cases the Court has "reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him 'in responsible relation to a public danger,' *Dotterweich*, 320 U.S. at 281, he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to 'ascertain at his peril whether [his

conduct] comes within the inhibition of the statute.' *Balint*, 258 U.S. at 254." *Staples*, 511 U.S. at 607. But the Court in *Staples* declined to extend the rationale of these cases to firearms, because (using *Freed* as an example) unlike hand grenades, "the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples*, 511 U.S. at 610. Thus, whereas the Court in *Freed* construed the hand grenade statute assuming that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act," the Court in *Staples* rejected as "not supported by common experience" the government's suggestion that "one would hardly be surprised to learn that owning a gun is not an innocent act." *Id*. at 610. *See also Liparota*, 471 U.S. at 433 ("The distinctions between these cases and the instant case are clear. A food stamp can hardly be compared to a hand grenade, *see Freed*, nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in *Dotterweich*").

Cigarettes are not hand grenades, corrosive liquids or misbranded drugs and are not even on the same order as the automatic weapons that were the subject of the holding in *Staples*, where the Court declined to dispense with the presumptive *mens rea* requirement. Moreover, the purpose of the CCTA is not to regulate the manner in which a product –

here, cigarettes – is licensed or distributed, as do the public welfare statutes. Rather, its purpose is to deter organized crime involvement in cigarette bootlegging. *See* S. Rep. No. 95-962, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 5518 (the purpose of the legislation "is to provide a timely solution to the serious problem of organized crime and other large scale operations of interstate cigarette bootlegging and to help provide law enforcement assistance and relief to cities and States."); *cf. Balint*, 258 U.S. at 254 (interpreting Anti-Narcotic Act, a tax measure aimed at avoiding the "evil of exposing innocent purchasers to danger from the drug").

Furthermore, there is no reason to assume persons selling cigarettes on reservations would instinctively know their conduct is regulated and that the cigarettes could not be sold without tax stamps. On the contrary, previous to this prosecution, the CCTA and § 471 had *never* been used to prosecute a reservation retailer and, as previously noted, the government's own witnesses who sold unstamped cigarettes on the reservation believed their conduct was lawful (*ante* at 26).

During the time period covered by the indictment, the regulations written to apply § 471 on reservations had been repealed and New York had announced a policy of forbearance against applying § 471 on reservations. And because all sales of unstamped cigarettes by distributors to reservation

retailers are reported to New York State, it is apparent that New York State for years permitted such sales without complaint – in *unlimited* quantities far exceeding those required to sate the most committed Native American chain smokers. Indeed, there is no evidence that the licensed New York State distributors who sold Peace Pipe its cigarettes had *ever* sold cigarettes to reservation retailers bearing tax stamps, a fact of which New York State was well aware. Under these circumstances, no reasonable argument can be made that a reservation retailer such as Morrison would instinctively believe his conduct – like possessing hand grenades – was regulated, even if § 471 and the CCTA were considered "public welfare offenses," which they clearly are not.

The government and the court below relied on cases such as *United States v. Elshenawy*, 801 F.2d 856 (1986) and *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995), which have construed the CCTA not to require proof of *mens rea*. We suggest these cases were incorrectly decided because they wrongly placed the CCTA in the same category as cases such as *Freed* and *Dotterweich* when, in fact, they do not share the essential characteristics that the Supreme Court in *Liparota* and *Staples* taught were in the rarified category of "public welfare offenses." Additionally, nothing in the legislative history of the CCTA suggests that Congress intended the CCTA

to be among the few statutory schemes that dispenses with a *mens rea* requirement, particularly given the serious penalties attendant to violating the CCTA, not to mention a RICO violation based on a pattern of racketeering based on CCTA Racketeering Acts. *See Staples*, 511 U.S. at 618 ("absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.").

In any event, *Elshenawy* and *Baker* are readily distinguished from the instant case because they did not address complex regulatory schemes such as that reflected in § 471, nor ones that created an unacceptable risk of entrapping the unwary. For example, the Ninth Circuit in *Baker* found the "interaction between the CCTA and Washington's tax scheme, on which the CCTA violation is predicated, does not involve a complex regulatory scheme with the potential of trapping unwary merchants trading in cigarettes. The law is quite simple." 63 F.3d at 1492. Similarly, the Sixth Circuit in *Elshenawy* emphasized that because the CCTA was enacted "to deal with the [*off*-reservation] cigarette 'bootlegging' activities of organized crime, activities in which the knowledge of cigarette taxing requirements may be appropriately presumes … 'anyone who is aware that he is in possession of [60,000 *off*-reservation cigarettes] or dealing with them must

be presumed to be aware of the regulation.'" 801 F.2d at 859 quoting *International Minerals and Chemicals Corp.*, 402 U.S. 558, 565 (1971)) (footnote and citation omitted).

In contrast to the state laws implicated in *Baker* and *Elshenawy*, the state law incorporated into the CCTA Racketeering Acts 5-80 – § 471 – may appear simple on its face, but is impossibly complex in its application, having been subject to as many different interpretations as there are interpreters. *See* Point One (addressing vagueness). Further, as we discussed above, the repeal of § 471's implementing regulations, the policy of forbearance and the failure *ever* to prosecute anyone under the CCTA and § 471, all created the reasonable belief in Morrison and others similarly situated that they could sell unlimited numbers of unstamped cigarettes on reservations. Obviously, then, cigarettes in New York were *not* "highly regulated" on reservations in a way analogous to grenades, corrosive liquids and misbranded or adulterated drugs.[33]

Furthermore, subsequent elucidations of § 471 notwithstanding, the fair warning requisite required that § 471 be clear to Morrison "at the relevant time" that Morrison committed the alleged acts. *See Lurie v.*

[33] We note as well that 60,000 cigarettes is five cases, a quantity certainly in line with what an establishment such as Peace Pipe would sell to a reservation bodega or gas station.

Wittner, 228 F.3d 113, 126 (2d Cir. 2000) (citing *United States v. Lanier*, 520 U.S. 259, 266-67 (1997)) ("In each of these guises [*i.e.*, vagueness doctrine, rule of lenity, due process], the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear *at the relevant time that the defendant's conduct was criminal*.") (emphasis added). The fact that this Court felt the need to certify questions concerning the meaning and scope of § 471 to the Court of Appeals, considered together with the Court's many other comments reflecting § 471's ambiguity (as discussed in Point One), evidences that Morrison did not have the requisite "fair warning" of the statute at the relevant time.

In short, neither *Elshenawy* nor *Baker* presented facts or regulatory schemes analogous to those of the instant case and therefore provide no reason to dispense in this case with the strong presumption that serious criminal offenses require proof of *mens rea*. Additionally, for the reasons discussed above, *Elshenawy* and *Baker* were wrongly decided.

Finally, to the extent ambiguity remains – and we believe none does[34] – regarding whether to read the CCTA to dispense with a *mens rea* requirement, the rule of lenity militates against an interpretation that permits

[34] *See Staples*, 511 U.S. at 619 & n.17 (finding it unnecessary to invoke the rule of lenity because Court concludes, "Silence does not suggest that Congress dispensed with *mens rea* for the element of § 5861(d) at issue here.").

a lengthy potential prison sentence to be imposed without proof that Morrison knew Peace Pipe's cigarettes should have – but did not – bear New York State tax stamps.

2. The Court Erroneously Instructed The Jury, In Response To Its Specific Inquiry, That Morrison Could Be Convicted Under Count Two, RICO Conspiracy, Without A Finding That He Understood The Unlawful Character Of The Alleged Agreement To Violate The CCTA.

The district court also erred when it instructed the jury, in response to its inquiry, that Morrison need not have understood that the agreement into which he allegedly entered was "criminal in nature." Although a defendant generally may be convicted of conspiracy absent knowledge that his conduct violates any *particular* state or federal law, he must, at least, understand the general wrongfulness of his conduct. This requirement is reflected in Judge Sand's standard jury instruction on conspiracy, which provides that, to convict a defendant of conspiracy the jury must find that, "*with an understanding of the unlawful character of the conspiracy*" the defendant "intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking." *Sand and Siffert,* Instruction 19-6 (emphasis added). This was the instruction that Morrison asked the Court to give in response to Court Exhibit 35, but which the district court declined to give. The court reaffirmed its decision in its post-trial decision. *Morrison II*, 596 F.Supp.2d

at 710 ("it was not the government's burden to prove that defendant knew that the goal of the conspiracy was 'unlawful' or 'wrong.'") (footnote omitted).

The *Sand* instruction is supported by abundant case law, which follows logically from the rule that conspiracy is a crime that represents a distinct evil and danger to the public, and therefore may be punished separately from the substantive crime that is its object. *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). Thus, the Supreme Court in *United States* v. *Bailey* recognized, in language that it has never repudiated: "In certain narrow classes of crimes... heightened culpability has been thought to merit special attention.... Another such example is the law of inchoate offenses such as attempt and conspiracy, *where a heightened mental state separates criminality itself from otherwise innocuous behavior."* 444 U.S. 394, 405 (1980) (emphasis added). This "heightened mental state" is that which is reflected in the *Sand* instruction, *i.e.*, "an understanding of the unlawful character of the conspiracy." *Cf. Morrison* v. *People of State of California*, 291 U.S. 82, 92 (1934) ("In California as elsewhere conspiracy imports *a corrupt agreement* between not less than two *with guilty knowledge* on the part of each.") (emphasis added).

The pertinent language of the *Sand* conspiracy instruction has, in fact,

been approved repeatedly in this Court and its district courts, *see e.g.*, *United States* v. *Jackson*, 180 F.3d 55, 72 (2d Cir. 1999) (extortion conspiracy);[35] *United States* v. *Torres*, 901 F.2d 205, 244 (2d Cir. 1990) (drug conspiracy);[36] *United States* v. *Pena*, 1990 WL 103970 at *3 (S.D.N.Y. Jul. 18, 1990) (drug conspiracy),[37] as well as in courts outside this circuit, *see*,

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[35] The court in *Jackson* said:

> In its instructions on the conspiracy count, the district court made clear that a defendant could not be found guilty on that count unless he or she was aware of the unlawful nature of the agreement. Thus, it informed the jury, *inter alia*, that in order to convict a given defendant on that count, it must find that that defendant entered into the alleged conspiracy with criminal intent, *i.e.*, with "aware[ness] of the generally unlawful nature of his or her acts" … *i.e.*, that the defendants acted "with an understanding of the unlawful character of the conspiracy, intentionally engaged, advised, or assisted in it for the purpose of furthering one or both of its unlawful objects".

[36] The court in *Torres* instructed:

> To find that a defendant was a member of a conspiracy, you must find that the government has proven beyond a reasonable doubt that he knowingly and intentionally participated in it. If a defendant, with an understanding of the unlawful character of the conspiracy, intentionally engages, advises, or assists, for the purpose of furthering the illegal undertaking, he thereby becomes a knowing and willful participant, a conspirator.

[37] The court in *Pena* said:

> The second element of conspiracy, individual membership, is proven if the Government can show that the defendant "knowingly and intentionally" participated in the conspiracy found in the first element. If the defendant did, with an understanding of the unlawful character of the conspiracy, intentionally engage, advise, or assist, for the purpose of furthering the illegal undertaking, he thereby became a knowing and willful conspirator.

(citations omitted).

e.g., *United States* v. *Ray*, 61 Fed. Appx. 37, 57 (4th Cir. 2003) (drug conspiracy); *United States* v. *Childress*, 58 F.3d 693, 706-09 (D.C. Cir. 1995) (drug conspiracy); *see also United States v. Rojas*, 2008 WL 5329006, *3 (D.Conn. Dec. 19, 2008) (court instructed jury, "In sum, a Defendant *with an understanding of the unlawful character of the conspiracy*, must have intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking") (emphasis added).

During the proceedings of April 10, 2008, the district court cited, as authority for denying the defendant's requested instruction, the Supreme Court's decision in *United States* v. *Feola*, 420 U.S. 671 (1975) and this Court's decision in *United States* v. *Ansaldi*, 372 F.3d 118, 128-29 (2d Cir. 2004). *Feola*, however, merely established that the charge of conspiracy does not alter the *jurisdictional* element of the substantive crime of assaulting a federal office that is the object of the conspiracy; it did not address the traditional requirement that a conspirator act with wrongful intent. In *Feola* the defendant was charged with assaulting a federal officer in violation of 18 U.S.C. § 111. To establish the jurisdictional element of the substantive crime, the government did not have to prove that the defendant knew the officer was a *federal* officer, and the *Feola* Court held that a

defendant charged with conspiracy likewise need not know the officer was a *federal* officer. 420 U.S. at 687 ("The general conspiracy statute, 18 U.S.C. § 371, offers no textual support for the proposition that to be guilty of conspiracy a defendant in effect must have known that his conduct violated federal law.") (footnote omitted). *Feola* did not depart from the traditional view – reaffirmed in *Bailey* - that to be a conspirator one must act with a corrupt motive.[38]

In *Ansaldi*, a prosecution for conspiracy to distribute GBL, a "controlled substantive analog," this Court rejected the defendant's argument that he was entitled to a "good faith" instruction, which the Court said amounted to a "mistake of law" defense. The defendants were not entitled to such an instruction because, "Knowledge of, or intent to violate, the law is simply not an element of this offense." 372 F.3d at 128. The *Ansaldi* court was not presented with the issue presented here, *i.e.*, whether the government must prove that an alleged conspirator understood the *generally*

[38] The *Feola* court in fact acknowledged that where the defendant could not appreciate that his conduct was wrongful, conviction might be inappropriate: "For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent." 420 U.S. at 686 (footnote omitted). Likewise, what would be Morrison's "criminal intent" if he believed his conduct was lawful?

unlawful character of his conduct. This point is indisputable since the jury in *Ansaldi* was in fact instructed that, to prove conspiracy, the government must prove that defendants each "willfully" joined that conspiracy, and that "[a]n act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something the law forbids; *that is to say with bad purpose either to disobey or to disregard the law."* (*Ansaldi* jury instructions at Tr. 2197, reviewed on Westlaw) (emphasis added). Thus, neither *Feola* nor *Ansaldi* in any way undercuts the numerous Supreme Court and circuit cases that support the jury instruction that the defense requested in response to Court Exhibit 35.

In its decision denying Morrison's motion for a new trial, the district court added to its previous analysis of the issue. It did not mention, however, let alone seek to distinguish, this Court's decisions in *Torres* or *Pena*, or the cited Supreme Court's decisions. And in *Jackson* it sought – unsuccessfully we submit - to distinguish on the facts, but did not address the legal principle for which it was cited. *Morrison II*, 596 F.Supp.2d at 710 n.47. As for *Sand*, the court took the curious and erroneous view that the requested language would not have addressed the jury's question, explaining:

> A fair reading of Court Exhibit 35 indicated that the jury sought clarification regarding the mens rea required under Count Two;

> more specifically, did the term in the Court's instruction "a partnership for criminal purposes" indicate that the defendant had to know that the charged goal of the conspiracy was unlawful, or would it be sufficient if the proof established that the defendant was aware of the goal of the conspiracy (which goal was, in fact, illegal), and armed with knowledge, he knowingly and intentionally joined the conspiracy with the specific intent to advance that goal. Simply adopting the language proposed by defendant, or repeating the Court's language regarding conspirators being involved in a "partnership for criminal purposes" would not have been responsive to the jury's expressed concern.

Id. at 707 (footnote omitted). We respectfully disagree. Court Exhibit 35 asked, "As it relates to Count 2, if 2 acts are proven. Does the defendant have to know the acts that are committed *are illegal or criminal in nature.* As the definition of conspiracy as charged on page 42 is a partnership for criminal purposes" (emphasis added). The defendant's request that the court instruct the jury, consistent with *Sand*, that the defendant must have "*an understanding of the unlawful character of the conspiracy*" was *directly* responsive to the jury's question of whether the defendant must know his conduct is "illegal or criminal in nature." The court's finding that the defense's requested instruction was not responsive to the jury's query reflects a hyper-technical, tortured and ultimately inaccurate parsing of the lay jury's request and Morrison's requested response.

In its post-trial decision the trial court also discussed for the first time this Court's decision in *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

Morrison II, 596 F.Supp.2d at 709-10. The defendant in *Cohen* was charged with bookmaking in violation of 18 U.S.C. § 1094 and a related conspiracy. He argued on appeal that the trial court erroneously told the jury to disregard his alleged good-faith belief that his conduct was lawful, and argued that *People v. Powell*, 63 N.Y. 88 (1875) "requires proof of a corrupt motive for any conspiracy to commit an offense that is *malum prohibitum*, rather than *malum in se*." This Court disagreed, and held that "whatever remains of *Powell* does not apply to this case." 260 F.3d at 71-72. The question posed in *Cohen* - whether Cohen was entitled to acquittal if he harbored a "good faith belief" that his conduct was *lawful* - is an issue distinct from whether, to be convicted of conspiracy, the government must prove the defendant had a general understanding of the conduct's "unlawful character." We acknowledge, however, that *Cohen* contains language suggesting that not all conspiracy charges require proof of the defendant's intent to act with a corrupt motive. Certainly, however, this Court in *Cohen* did not intend to create an all-encompassing rule that – contrary to explicit Supreme Court precedent - whenever a substantive offense lacks a *mens rea* element a related conspiracy charge can be proved without any finding that the defendant acted with some knowledge of wrongdoing.

In fact, in the nine years since *Cohen* was decided it has never been

cited by any court other than the court below for such a proposition.[39] *Cf. United States v. Hassan*, 578 F.3d 108, 124 (2d Cir. 2009) (on rehearing) (where government charges conspiracy to import khat, a leaf that may contain cathinone – a Schedule I controlled substance – or cathine – a schedule IV controlled substance – government must prove defendant knew he was importing or distributing a substance he understood was controlled). The *Hassan* court, in ruling that conspiracy is a specific intent crime, cited *United States v. Morgan*, 385 F.3d 196, 206 (2d Cir. 2004). *Morgan*, in turn, cited this Court's decisions in *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984) and *United States v. Friedman*, 300 F.3d 111, 124 (2d Cir. 2002)[40] and concluded, "Here, the government had to establish to the

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[39] *Cohen* cited the 1985 draft of the Model Penal Law as receding from the rule that conspiracy requires a corrupt motive. Yet the previous version of the Model Penal Law had been cited by the Supreme Court in *United States v. Bailey*, as support for the proposition that, with respect to attempt and conspiracy "a heightened mental state separates criminality itself from otherwise innocuous behavior." 444 U.S. at 405. The Supreme Court has not retracted this statement and we therefore would think it remains binding on the lower courts. Curiously, the amended Model Penal Law discusses the courts' supposed retreat from the rule of *People v. Powell* (discussed in the text above) but not the contrary Supreme Court decisions.

[40] The Court in *Friedman* explained:

> Charges of both conspiracy and "aiding and abetting" require the Government to prove, beyond a reasonable doubt, that the defendant knew the specific nature of the conspiracy or underlying crime. *See, e.g., United States v. Samaria*, 239 F.3d 228, 235 (2d Cir. 2001) (conspiracy); *United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990) (aiding and abetting). Proof that the defendant knew that *some* crime would be committed is not enough. *See United States v. Pipola*, 83 F.3d 556, 562 (2d Cir. 1996). Rodriguez argues that the evidence was insufficient for a reasonable jury

jury's satisfaction beyond a reasonable doubt that Morgan knew that she was engaged in a conspiracy to import into the United States some controlled substance. *See e.g., United States v. King*, 345 F.3d 149, 152 (2d Cir. 2003) (*per curiam*); *United States v. Collado-Gomez*, 834 F.2d 280, 280 (2d Cir. 1987) (*per curiam*)." *Morgan*, 385 F.3d at 206.[41]

The government and the district court's position that a defendant may be convicted of RICO conspiracy – here based on CCTA Racketeering Acts – absent any evidence of *mens rea*, would permit the imposition of a twenty-year sentence upon evidence of nothing more than an agreement between two people to do something they may believe is entirely lawful, if the object of the agreement in fact violates § 471 and the CCTA. There need not even be an overt act; an agreement – even unspoken – would be sufficient. It is difficult to believe Congress intended this result and this Court's sanction of such a rule would be surprising and unfortunate.[42]

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to conclude beyond a reasonable doubt that he had specific knowledge of the plan to extort Kovach.

[41] *Hassan's* citations to, and reliance on, several Second Circuit cases belies the district court's position that *Hassan* is "*sui generis* to khat prosecutions, given the largely unintelligible statutory scheme and concomitant due process concerns implicated in such prosecutions" (GA 206 n.47). Of course, New York Tax Law § 471 similarly presents a "largely unintelligible statutory scheme and concomitant due process concerns" as reflected in this Court's decision in *Golden Feather* and the district court's eventual dismissal of Count Two as unconstitutionally vague as applied.

[42] We cannot help but note the irony of the district court's position regarding this issue juxtaposed with its separate instruction to the jury that it should not expect to find direct evidence of the conspiratorial agreement because "[f]rom its very nature a

For these reasons, this Court should find that the district court's jury instructions with respect to both the CCTA Racketeering Acts and also the conspiracy charge of which they were a part, were erroneous. Accordingly, should the Court reverse the district court's order dismissing Count Two, it should nonetheless grant Morrison a new trial thereon.

Point Five

THE TRIAL COURT ERRED WHEN IT RULED THAT THE NATIVE AMERICAN STATUS OF PEACE PIPE'S CUSTOMERS WAS NOT AN ELEMENT BUT RATHER AN AFFIRMATIVE DEFENSE TO THE CCTA RACKETEERING ACTS AS TO WHICH MORRISON BORE THE BURDEN OF PRODUCING EVIDENCE

It is undisputed that under the CCTA, the on-reservation sale of cigarettes by Native Americans to Native Americans for their own consumption is not a crime; only if the purchaser is a non-Native American might the sale be criminal. Despite the fact that the Native American status of the purchasers was, thus, a critical fact that literally could separate legal conduct from illegal conduct, the court rejected defense arguments that it was an essential element of the crime to be proven by the government

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conspiracy is often secret in its origin and execution" (Doc. 769 at 45). This instruction would have meaning only if conspiracy in fact *is* an agreement to do something the conspirators know is wrong; otherwise, secrecy would be unnecessary. And so the government got the windfall of an instruction that the jury should not expect to find direct evidence of the charged conspiracy because conspiracies by (their wrongful) nature are secretive, while the jury was also told that it need not find that Morrison believed his conduct was wrongful at all.

beyond a reasonable doubt. The district court ruled, rather, that the Native American status of the purchaser was an affirmative defense and, finding that the defense had not come forth with evidence the purchasers were Native Americans, instructed the jury that while the CCTA would not apply to sales by Peace Pipe to Native Americans, the jury was not called upon to decide whether the sales had been to Native Americans.

The court's ruling erroneously placed the onus on Morrison to disprove the non-Native American status of the purchasers, and its instruction to the jury effectively allowed it to presume the sales were made to non-Native Americans. This deprived Morrison of his fundamental constitutional right to have each element of the charges against him proven beyond a reasonable doubt.

A. Facts

The court's proposed jury instructions with respect to RAs 5-80 acknowledged that the CCTA would not apply to sales by Peace Pipe to Native Americans, but then advised the jury it nonetheless was not its job to make this determination:

> A sale by Peace Pipe or SMOKERSDEN.COM of what otherwise would be contraband cigarettes to Native American(s) is not illegal. However, you are not being called upon to determine whether the claimed conspiracy to make the sales listed in Racketeering Acts Four through Eighty were to be made to Native Americans or

non-Native Americans.

The court explained it was treating the Native American status of the purchaser as an "exemption" from the definition of "contraband cigarette" and that "in that type of situation the defense is required to come forward and indicate the individual falls within some kind of [exempt] category." (Tr. 11567).[43] Morrison pointed out in a letter filed the following day that "*Native Americans are not among the exempt categories* [of § 2341(2)][44] but rather are among those persons permitted to possess cigarettes 'which bear no evidence of payment of applicable State or local taxes' pursuant to applicable state law and related official pronouncements and regulations, as well as under controlling Supreme Court law." (Doc. 681 at 3 (emphasis in original) (citation omitted).) Accordingly, even if proof of membership in an exempt category as set forth in § 2341(2)(A-D) were an affirmative defense to a CCTA violation (a proposition with which Morrison disagrees), such was not the case with respect to the government's burden to prove that a sale was not to a Native American.

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[43] Morrison noted to the court the apparent inconsistency between the court's suggestion, on the one hand, that he had to present evidence that the *recipient/purchaser* of the cigarettes was within one of the listed exemptions from the definition of "contraband cigarettes" and the court's view, on the other hand, that "contraband cigarettes" describes the status character of the cigarettes in the hands of the *possessor/seller* (Tr. 11571).

[44] The text of § 2341(2) is set forth at p. 58, *ante*.

The court adhered to its ruling adding that, in addition to the reasons it had previously stated, another factor in determining "whether the exemption in the statute is part of the cause of action, or an element of the crime that must be established, or whether it is more appropriately labeled as an affirmative defense," is "would it be easier for the defendant to have the necessary information or the government?" (Tr. 111626-27). The court subsequently gave the drafted instruction. *See* Jury Instructions, Doc. 769 at 122 n.11.

In its written decision denying Morrison's Rule 29 motion, the court stated:

> It is undisputed that both (a) on-reservation sales to Native Americans for their own consumption, and (b) possession, for instance, by a "common carrier" (§ 2341(2)(B)) represent "exempt[ions]." (Def.'s Mem. of Law in Supp. at 59.). Placing the onus on a defendant to come forward in the first instance, thereby putting the exemption issue in play, "does not offend due process." *Murray*, 618 F.2d at 901. Moreover, treating the exemption as an affirmative defense dovetails with the language of § 471(1) which provides in relevant part that "[i]t shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof." And finally, *McKelvey* instructs that exempting language gives rise to an affirmative defense whether found in "a proviso or other distinct clause whether in the same section or elsewhere." 260 U.S. at 357.
>
> In sum, since there was no evidence placed before the jury to suggest that any of the purchasers may have been Native Americans, and given that the onus of at least initially

> broaching the subject to the jury rested with defendant for the reasons indicated, the Court concludes that it properly instructed the jury concerning the CCTA portion of the charge. Defendant has furnished no authority suggesting a contrary conclusion. Defendant's motion to vacate the conviction on Count Two on this ground is denied.

Morrison II, 596 F.Supp.2d at 716.

B. The Court Erred In Finding That The Non-Native American Status Of The Purchasers Of Cigarettes Is Not An Element Of The CCTA, 18 U.S.C. § 2342

The court's ruling that the non-Native American status of on-reservation purchasers of cigarettes is an affirmative defense is contradicted by "Supreme Court authority, decisions of other circuits, policies underlying [the statute], practicalities of criminal prosecution, and established principles of statutory construction." *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001) (*en banc*)..

In ruling at the charge conference (Tr. 11567-69) and in its decision on Morrison's Rule 29 motion that Morrison bore the burden of coming forward with evidence of purchasers' non-Native American status, the court relied principally on *McKelvey v. United States*, 260 U.S. 353, 356-57 (1922), for the proposition that "exempting language gives rise to an affirmative defense whether found in 'a proviso or other distinct clause whether in the same section or elsewhere,'" and *United States v. Hill*, 935 F.2d 196, 200-01 (11th Cir. 1991), which holds, generally, that a defendant

bears the burden of going forward with "clear and convincing evidence" of an affirmative defense. *See Morrison II*, 596 F.Supp.2d at 716, *see also United States v. Murray*, 618 F.2d 892, 901 (2d Cir. 1980) (same); *United States v. Carr*, 582 F.2d 242 (2d Cir. 1978) (same).

The court's reliance on *McKelvey* is misplaced, as *McKelvey* provides no guidance on whether the "exempting language" is an element or an affirmative defense. As one court explained:

> [A] close reading of *McKelvey* reveals that it only holds that an exception need not be alleged in an indictment. It does not, however, provide any guidance on how to determine whether a fact is an element or an exception. *McKelvey* merely notes that an exception may be "in the same section or elsewhere."

United States v. Prentiss, 206 F.3d 960, 973 (10th Cir. 2000) ("*Prentiss I*"), *modified on other grounds on rehearing en banc*, 256 F.3d 971 (10th Cir. 2001) ("*Prentiss II*").[45]

Contrary to the court's finding here, the fact that a provision in a statute is clothed as an "exemption" or "exception," sometimes referred to as a "negative," does not end the inquiry in determining whether it creates an affirmative defense or an element of the crime. There is, in fact, no general

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[45] The *Prentiss II* court, on rehearing *en banc*, found that the failure to allege Indian status in the indictment was subject to harmless error analysis and remanded the case back to the original panel . *Id.* at 985. On remand, the original panel found that the error was not harmless. *See Prentiss III*, 273 F.3d 1277 (10th Cir. 2001). *Prentiss II* was later partially overruled on other grounds not relevant here. *See United States v. Sinks*, 473 F.3d 1315 (10th Cir. 2007).

rule, in *McKelvey* or elsewhere, that the government is not required to prove a negative; on the contrary, the government is required to "prove all the essential facts entering into the description of a crime, and where the charge is grounded on a negative proposition or where the negative proposition is an essential element of the crime the burden is on the state to prove the charge." *Jencks v. United States*, 226 F.2d 540, 549 (5th Cir. 1955). In *United States v. Cook*, 84 U.S. 168 (1872), the Supreme Court held that even an "exception" may be so intertwined with the definition of the offense as to require it to be alleged in the indictment:

> Where a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defence and must be shown by the accused.

Id. at 173-74.

Thus, "*McKelvey's* general provision/proviso dichotomy is only one interpretive aid among several that should be applied in parsing statutes that define offenses." *Prentiss II*, 256 F.3d at 979 (citing *United States v.*

McArthur, 108 F.3d 1350, 1354 (11th Cir. 1997)).

In *Prentiss II* the court noted, that "in determining whether a provision of a statute constitutes an element or an affirmative defense, courts have considered a variety of factors, including: (1) the breadth or narrowness of the provision; (2) whether "one can omit the exception from the statute without doing violence to the definition of the offense"; (3) the legislative history; and (4) "whether the defendant or the government is better situated to adduce evidence tending to prove or disprove the applicability of the exception." 256 F.3d at 980 n.8. (*quoting McArthur*, 108 F.3d at 1353). Likewise, in *United States v. Mayo*, 705 F.2d 62, 74-76 (2d Cir. 1983), this Court considered virtually the same four factors in determining that a provision in the federal firearms statute (18 U.S.C. § 921(a)(3)) exempting antique firearms was an affirmative defense, referencing: (1) the text of the statute; (2) its legislative history; (3) the parties' relative abilities to present evidence on the issue and; (4) the structure of the statute generally. *Mayo*, 705 F.2d at 74-76. *See also United States v. Durrani*, 835 F.2d 410, 420-21 (2d Cir. 1987) (finding a provision in the Arms Export Control Act [22 U.S.C.A. § 2778] excluding "official use" from State Department licensing requirements for the export of certain arms was an affirmative defense).

The *Prentiss I* and *II* decisions, however, are particularly instructive here because they specifically involved, as does the present case, the issue of whether the defendant's and/or victim's Native American status (referred to in the *Prentiss* decisions as "Indian/non-Indian status") was an element of the crime and, thus, had to be pleaded in the indictment. In *Prentiss*, the unique "complex considerations of sovereignty and guardianship Congress faced when drafting the statute" compelled the court's conclusion that the victim and defendant's Indian/non-Indian status *were* elements of 18 U.S.C. § 1152 (the "Indian Country Crimes Act"). *Prentiss I*, 206 F.3d at 973; *cf. United States v. Bruce*, 394 F.3d 1215 (9th Cir 2005) (finding *defendant's* Indian status an affirmative defense under § 1152).

The statute in the *Prentiss* cases, 18 U.S.C. § 1152, provided as follows:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> ***This section shall not extend to offenses committed by one Indian against the person or property of another Indian***, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Prentiss I, 206 F.3d at 966. (emphasis added).

Noting that § 1152 is "part of a complex jurisdictional scheme involving the interaction of three statutes," the court found that "it is the interaction of these statutes which reveals that the Indian status of the defendant and victim are elements rather than exceptions." *Prentiss I*, 206 F.3d at 973-74. The court continued, stating, "Because the Indian status of the defendant and the victim are indispensable to establishing federal jurisdiction in this statutory scheme, they must be alleged in the indictment and proven at trial." *Id*.

On *en banc* review, the court agreed that an offense under the statute could not be "accurately and clearly described" without reference to the Indian status of the defendant and the non-Indian status of the victim. *Prentiss II*, 256 F.3d at 979-80 (*quoting Cook*, 84 U.S. at 173). After an extensive analysis of the unique sovereignty, historical and other issues implicated in crimes committed on-reservation (*id*. at 974-77), and noting that the government had the means to prove both victim and defendant status as Indian or non-Indian (*id*. at 977-78), the Court found that:

> Supreme Court authority, decisions of other circuits, policies underlying § 1152, practicalities of criminal prosecution, and established principles of statutory construction support the conclusion of the panel opinion. Thus, the Indian/non-Indian statuses of the victim and the defendant are essential elements

> of the crime of arson in Indian country under 18 U.S.C. §§ 81 and 1152. The government must allege them in the indictment.

Id. at 980; *accord United States v. Torres*, 733 F.2d 449, 454-55 (7th Cir. 1984) (court found that as a "jurisdictional requisite" under U.S.C. §§ 1152 and 1153, the government was required to prove the Indian status (or non-status) of the defendant and victim, and that the crime occurred in Indian territory).

Like § 1152, the CCTA is "part of a complex jurisdictional scheme involving the interaction" of federal and state statutes – here, § 2342 and N.Y. Tax Law §§ 471 and 471-e - implicating as well Supreme Court law and New York State policy. As Morrison argued below, "*Native Americans are not among the exempt categories* [of § 2341(2)(A-D)] but rather are among those persons permitted to possess cigarettes 'which bear no evidence of payment of applicable State or local taxes' pursuant to applicable state law and related official pronouncements and regulations, as well as under controlling Supreme Court law." Doc. 681 at 3.

In this light, similar to § 1152, it is impossible to "accurately and clearly describe" an offense under the CCTA in New York State without reference to the Native American status of the purchaser of cigarettes. *Prentiss II* at 979-80. Indeed, as discussed in Point One, "New York lacks the authority to tax cigarettes sold to tribal members for their own

consumption." *Milhelm Attea*, 512 U.S. at 64 (*citing Moe*, 525 U.S. at 475-81). If the purchaser is a reservation Native American, there is no crime. Thus, the Native American status of the purchaser is critical; it is, in fact, so inextricably intertwined with the offense that it constitutes an essential element rather than an affirmative defense. Indeed, to hold otherwise would result in an interpretation of the CCTA that would call into question the statute's constitutionality, as the CCTA would then permit prosecution of persons who fail to produce evidence that they are members of the class that may not lawfully be prosecuted, thus requiring them to prove their innocence. The "shifting of the burden of persuasion with respect to a fact the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Patterson v. New York*, 432 U.S. 197, 215 (1977). Courts should not interpret a statute in a way that raises questions regarding the statute's constitutionality. *Jones v. United States*, 526 U.S. 277, 239 (1999) (*quoting United States ex rel. Attorney General v. Delaware & Hudson Co.* 213 U.S. 366, 408 (1909)); *Able v United States*, 88 F.3d 1280, 1298 (2d Cir. 1996); *see also United States v. X-Citement Video, Inc.*, 513 U.S. at 73 (finding scienter requirement applied to age of minority, an "elemental fact" under § 2252, since age of the performer "separate[ed] legal innocence from wrongful conduct.").

The court also found that treating Native American status as an exemption "dovetails with the language of 471(1)" which places the burden of proof that cigarettes are not taxable on the person in possession of the cigarettes. 596 F.Supp.2d at 716 (GA 210). As an initial matter the question whether the Native American status of the purchaser is an element of the offense is one of federal law, not state law, as the Racketeering Acts in question are charged under federal statute – the CCTA, 18 U.S.C. § 2341 *et seq*. Under the Indian Trader Laws (25 U.S.C. § 261), passed pursuant to Congress's power to regulate trade with Indian Tribes under the U.S. Constitution Art 1 § 8, cl. 3, reservation Indian purchasers are exempt from state tax. *Milhelm Attea*, 512 U.S. at 70. Accordingly, the exemption of such purchasers from the reach of § 471 – and the concomitant right of reservation retailers to sell them untaxed cigarettes – is not a matter of legislative grace but rather of federal statutory and constitutional imperative. Requiring a criminal defendant to prove he sold untaxed cigarettes to a person who is a member of this exempt class violates due process, by requiring the defendant to disprove a fact the non-existence of which precludes prosecution. *Patterson*, 432 U.S. at 215; *see also Lucas v. United States*, 163 U.S. 612, 617 (1896) (Indian status of

victim, necessary to the court's jurisdiction, was a question that should have gone to jury as one of fact and not of presumption).

Rather than interpret the CCTA and § 471(1) in a way that calls its constitutionality into question, these statutes can more logically be interpreted to maintain constitutional fidelity by not reading the burden-shifting language relied on by the district court in isolation, but rather in tandem with the language that "no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax." The state is without power to impose tax on reservation Indians and, therefore, § 471 and the CCTA may not require a defendant in a criminal prosecution to prove a defendant or purchaser's exempting status, however statutes such as § 471 may be interpreted in the civil context.

None of the other factors considered by the district court compels a different result. The Native American status of cigarette purchasers was not, as suggested by the court, uniquely within Morrison's knowledge. Indeed, Morrison had no greater ability than the government to identify the non-Native American status of the persons to whom it was alleged he had conspired, between 1996 and 2004, to sell unstamped cigarettes. Since the so-called "Attea regulations" and its various incarnations were not in effect during the time period covered by the indictment, no rules were extant that

required or otherwise encouraged reservation retailers to distinguish between sales to Native Americans and non-Native Americans. Certainly then at trial, Morrison may not be presumed to have had any information at his disposal to prove the status of those to whom unstamped cigarettes were sold. Additionally, since the government had seized Peace Pipe's computers it had access to the same records as did Morrison. Under these circumstances, any conclusion that Morrison had better access at trial to information regarding his purchasers' ethnicity simply assumes, illogically, that he should have instituted an ad hoc storewide policy between 1996 and 2004 to keep such records in anticipation of thereafter being prosecuted and required to satisfy the burden the court placed on him.

Additionally, while not definitive, the structure of the statute suggests that Native American status is different than the listed exceptions in paragraphs A through D of § 2341(2). The placement of the phrase "if the State or local government requires a stamp," *within* the definition of "contraband cigarettes," rather than in the exceptions in paragraphs A through D of § 2341(2) suggests it is an essential part of the definition of contraband, and thus an element rather than a defense.

In short, sovereignty, relevant Supreme Court precedent, and applicable federal and state law, regulations and policy all establish that the

non-Native American status of the purchaser is not an affirmative defense, but rather an essential element of the CCTA that the government was required to prove beyond a reasonable doubt. The court's erroneous instruction deprived Morrison of his fundamental rights to a jury trial and due process under the Sixth and Fourteenth Amendments.

Point Six

THE TRIAL COURT CONSTRUCTIVELY AMENDED COUNT EIGHT WHEN IT INSTRUCTED THE JURY, OVER OBJECTION, THAT IT SHOULD DETERMINE WHETHER THE CHARGED FIREARM *"WAS SHIPPED OR TRANSPORTED IN INTERSTATE OR FOREIGN COMMERCE,"* WHEN COUNT EIGHT IN FACT CHARGED THAT MORRISON DID *"KNOWINGLY AND INTENTIONALLY POSSESS [THE FIREARM] IN AND AFFECTING INTERSTATE COMMERCE"*

Count Eight charged that Morrison, having previously been convicted of a felony, "did knowingly and intentionally possess in and affecting commerce a firearm…" in violation of 18 U.S.C. § 922(g). Superseding Indictment at ¶ 36, GA 107.[46] Morrison objected to the court's proposed instruction that the "in and affecting commerce" element could be satisfied by evidence that the firearm "was shipped or transported in interstate or foreign commerce." This instruction, Morrison argued, reflected an alternate – but uncharged – basis for jurisdiction under § 922(g) (Doc. 684

[46] Morrison was acquitted of Count Nine, which contained an identical charge with respect to a different firearm.

at 4 (citing proposed instructions at 136).) The court rejected this argument on the purported authority of *Scarborough v. United States*, 431 U.S. 563 (1977) (Tr. 11940-42). The court's final jury instructions, which included the objected-to language (Doc. 769-2 at 142), broadened the possible bases for conviction from that which was alleged in the indictment, thus constructively amending the indictment. *United States v. Miller*, 471 U.S. 130, 138 (1985). "Constructive amendment is a *per se* violation of the Fifth Amendment." *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (citing *United States v. Roshko*, 969 F.2d 1, 5-6 (2d Cir. 1992)).

> Title 18 U.S.C. Section 922(g)(1) forbids a felon to:
>
> > ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

In *haec verba* § 922(g)(1) may be violated in three ways, for a felon may not:

> 1. "ship or transport" any firearm or ammunition "in interstate or foreign commerce"; or
> 2. "possess" any firearm or ammunition "in or affecting commerce"; or
> 3. "receive" any firearm or ammunition that "has been shipped or transported in interstate or foreign commerce."

Count Eight of the indictment charged Morrison *solely* with the second of the three alternative means of violating § 922(g)(1) – knowingly

and intentionally possessing the charged firearms "in and affecting commerce." The court's instruction that the jury could find the statute violated by evidence that Morrison possessed a gun that "at any time prior to the date charged in the indictment" had "crossed a state line or the United States border," Doc. 769 at 142, therefore permitted the jury to convict Morrison of a crime not charged in the indictment. Any different conclusion would require a finding that Congress either said precisely the same thing in different ways, or that the alternative means of violating § 922(g) presented to the jury – possess a firearm that "at any time" had "crossed a state line"– is a subset of the charged conduct. The first possibility makes no sense at all, as there is no reason to believe Congress spoke redundantly. *See e.g.*, *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (noting that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (internal quotation marks omitted)). The second possibility – which would also create a useless and irrational redundancy – is belied as well by the fact that the first two means of violating the statue relate to the *defendant's present conduct* and the third relates to the *past conduct* of a *third party*.[47]

The starting point for any discussion of statutory intent must be the

[47] We note as well that the first two jurisdictional bases are not separated from one another but are separated from the third by a semicolon.

language of the statute itself. If the language is clear there is no reason to look elsewhere. *United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998). Section 922(g)(1) unambiguously prohibits three distinct activities. A person may not "ship or transport" a weapon in "interstate or foreign commerce;" or "possess" a weapon "in or affecting commerce;" or "receive" a firearm that "has been shipped or transported in interstate or foreign commerce." On its face, the first activity describes a defendant's active transport of a weapon using the channels of interstate or foreign commerce. The second forbids the defendant's mere possession – rather than the transport – of a firearm so long as that mere possession is either "in" commerce or "affecting commerce." And the third activity forbids a defendant to "receive" a firearm that had previously been transported by a third party in interstate or foreign commerce. These are distinct activities, and charging a defendant with having participated in one is not the same as charging him with having participated in another, unless one were to irrationally assume, contrary to accepted standards of statutory construction, that Congress said the same thing three different ways. *United States v. Awan*, 607 F.3d 306, 313 (2d Cir. 2010) ("Canons of [statutory] construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.") (citations omitted).

Indeed, the statutory bases for liability now found in § 922(g)(1) had previously been spread across different subsections of § 922 and elsewhere that unquestionably described disparate conduct. *See generally Barrett v. United States*, 423 U.S. 212 (1976). Enacted as part of the Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213, then-section 922(g), prohibited felons and others from shipping or transporting any firearm in interstate commerce. Then-section 18 U.S.C. § 2(b) prohibited these same persons from causing firearms to be shipped interstate. And then-section 922(h) prohibited such persons from "receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." *See Barrett*, 423 U.S. at 213. Present-section 922(g)(1) brought these disparate prohibited activities (with changes not here relevant) under the umbrella of a single subsection, but maintained the distinction between the different means of violating the law.

The defendant in *Barrett* was charged with violating the previous 18 U.S.C. § 922(h), which prohibited certain persons, including convicted felons, from "receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[48] Defendant argued that the evidence at trial was insufficient because it merely established that he

[48] Present § 922(h) prohibits conduct identical to that prohibited by § 922(g)(1), but is aimed at employees who know their employers are persons described in § 922(g).

purchased the gun from a local dealer and that this purely intrastate transaction did not have the interstate nexus intended by Congress, notwithstanding that the dealer had obtained the gun from another state. The Supreme Court disagreed, finding that the statutory language "means exactly what it says." 423 U.S. at 216 (internal quotations and citation omitted). The Court further noted that Congress's careful use of different tenses in the statutory language of the various provisions of § 922 to convey different meanings evidenced the care with which the statute was constructed:

> It is to be noted, furthermore, that while the proscribed act, "to receive any firearm," is in the present tense, the interstate commerce reference is in the present perfect tense, denoting an act that has been completed. Thus, there is no warping or stretching of language when the statute is applied to a firearm that already has completed its interstate journey and has come to rest in the dealer's showcase at the time of its purchase and receipt by the felon. Congress knew the significance and meaning of the language it employed. It used the present perfect tense elsewhere in the same section, namely, in § 922(h)(1) (a person who "has been convicted"), and in § 922(h)(4) (a person who "has been adjudicated" or who "has been committed"), in contrast to its use of the present tense ("who is") in §§ 922(h)(1), (2), and (3). The statute's pattern is consistent and no unintended misuse of language or of tense is apparent.

423 U.S. at 216-17.

In *Scarborough*, upon which the district court relied when it denied Morrison's application to limit the jurisdictional element of § 922(g) to the

theory charged in the indictment (Tr. 11940-42),[49] the Court interpreted 18 U.S.C. App. § 1202(a) (Part of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968) and contrasted Congress's hasty drafting of Title VII (of which § 1202 was part) with the care it took in drafting Title IV of the Omnibus Crime Control Act, of which 18 U.S.C. § 922 is part. Section 1202(a) provided that any person who was (among other things) a felon, and "who receives, possesses, or transports *in commerce or affecting commerce…*" a firearm shall be punished (emphasis added). The Court found that proof that a possessed firearm had traveled at some time in interstate commerce was sufficient to show that the firearm was possessed

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[49] The government asserts, "Morrison did not dispute that those Glocks were possessed 'in or affecting interstate commerce,' as that was also stipulated to by the parties" (Gov. Br. at 15 n.6, citing McKenna Stipulation, GX-310 at ¶ 405). The McKenna Stipulation is not included in the government's appendix, and the government provides no transcript reference for this representation. The stipulation in fact was read into the record, at Tr. 4333 and does not support the government's representation. Paragraphs 4 and 5 of the stipulation provide:

> 4. Government's Exhibit 306: A, was manufactured in Austria by Glock GmbH; B, was imported into the United States by Glock, Inc., located in Smyrna, Georgia; C, was sold by Glock, Inc. to RSR Group, Inc., located in Rochester, New York; D, was sold by RSR Group, Inc., to Tee Dee Rifle and Pistol Range, Inc., located in Medford, New York; and, E, was sold by Tee Dee to Allison Stewart on September 2, 1999.
>
> 5. Government's Exhibit 308: A, was manufactured in Austria by Glock GmbH; B, was imported into the United States by Glock, Inc., located in Smyrna, Georgia; C, was sold by Glock, Inc. to Tee Dee, located in Medford, New York, and, D, was sold by Tee Dee to Allison Stewart on September 16th, 1999.

In any event the record references in the text accompanying to this footnote demonstrate that Morrison timely objected to the jurisdictional instruction.

"in commerce or affecting commerce" for purposes of the charged statute. The *Scarborough* court rejected the defendant's argument that to satisfy the element of "in commerce or affecting commerce" under § 1202(a) the government had to prove "that at the time of the offense the possessor must be engaging in commerce or must be carrying the gun at an interstate facility." 431 U.S. 568-69. The defendant argued that his interpretation was obvious from the plain language of the statute, particularly when contrasted with language used in 18 U.S.C. § 922(h) – Part of Title IV of the Omnibus Crime Control Act – which used the present perfect tense, as it prohibited a convicted felon from receiving a firearm "which *has been* shipped or transported in interstate or foreign commerce." *Id*. at 569 (emphasis added). As the Court acknowledged, it had interpreted the last quoted language, in *Barrett*, to "denote an act that has been completed." 423 U.S. at 216.

The *Scarborough* court rejected this argument, however, finding "it is not very meaningful to compare Title VII with Title IV," because Title VII (of which the statute considered in *Scarborough* was part) "was a last–minute amendment to the Omnibus Crime Control Act enacted hastily with little discussion and no hearings," and was "not the product of model legislative deliberation or draftsmanship." *Id.* at 569-70. Title IV (of which § 922(g)(1) is part), by contrast, "is a carefully constructed package of gun

control legislation. *It is obvious that the tenses used throughout Title IV were chosen with care.*" *Id.* (emphasis added).

Scarborough unambiguously finds that the carefully crafted language used to describe the bases for jurisdiction under the subsections of 18 U.S.C. § 922 should be afforded its plain and unambiguous meaning. And the plain and unambiguous meaning of the carefully crafted language of 18 U.S.C. § 922(g)(1) requires that distinctions be drawn between each of the three ways that the statute may be violated. These distinctions were obliterated by the district court's interpretation, which equated the charged language – "possess in or affecting commerce"— with uncharged language – "crossed a state line."

The district court also cited this Court's decision in *United States v. Sanders*, 35 F.3d 61 (2d Cir. 1994) which, in turn, cites *United States v. Carter*, 981 F.2d 645 (2d Cir. 1992). The arguments that were presented by the defendants in each of the cited cases are not entirely clear from the text, but do not appear to have included the issue of statutory interpretation raised here. In *Carter* the defendant presented a constitutional vagueness claim, arguing he could not know from the statutory text of § 922(g) that "a felon may not possess a firearm that has ever crossed a state line." *Id.* at 647. For reasons not clear, the decision does not mention that the statute explicitly

forbade the defendant to "receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Instead, the court broadly interpreted the phrase "in or affecting commerce" to include possession of a firearm or ammunition that previously had travelled in interstate commerce – based ostensibly on the Supreme Court's decision in *Scarborough*, even though *Scarborough* in fact had interpreted the language of a different statute and had taken pains to distinguish the more careful wording of § 922.

To the extent, however, this Court finds that *Sanders*, *Carter* and other cases reached a conclusion contrary to that espoused here, we respectfully ask that the panel hearing this appeal poll the active judges of this Court to determine whether the meaning of the jurisdictional language of § 922(g) should be reevaluated. *See United States v. Abad*, 514 F.3d 271, 274 & n.4 (2d Cir. 2008). This Court observed in *Carter*, "The phrase 'in or affecting commerce' has become a jurisdictional term of art that indicates a Congressional intent to assert its full Commerce Clause power." 981 F.3d at 647 (citing *Scarborough*, 431 U.S. at 571). This may have been a reasonable interpretation of the quoted phrase at it was used in 18 U.S.C. App. § 1202(a) – the statute at issue in *Scarborough* – since this phrase provided the *only* basis for jurisdiction under § 1202(a). It is not, however, a

reasonable interpretation of the identical language in 18 U.S.C. § 922(g), which includes *three* bases for jurisdiction, since it would – absurdly – render the other two statutory bases for jurisdiction superfluous. If prior case law is determined, on reflection, to have created such an absurdity, the error, we respectfully suggest, should be corrected not ignored.

For these reasons, the trial court's instruction to the jury to determine whether the government proved that the firearm had been shipped or transported in interstate commerce deviated from, and therefore constructively amended Count Eight, in violation of Morrison's Fifth Amendment rights. Finally, assuming *arguendo* that Morrison possessed, or constructively possessed, the firearm charged in Count Eight, there was no evidence that he did so "in and affecting commerce" since the unloaded and unused gun was merely sitting in a desk draw or safe; accordingly, Count Eight should be dismissed, rather than remanded for retrial. *Burks v. United States*, 437 U.S. 1 (1978).

Point Seven

THE COURT'S INSTRUCTION THAT 18 U.S.C. § 922(g) IS VIOLATED BY THE POSSESSION OF A FIREARM THAT HAD CROSSED STATE LINES AT ANY TIME IN THE PAST PERMITTED CONVICTION IN VIOLATION OF THE COMMERCE CLAUSE

In Point Six above we argue that the trial court constructively amended the indictment when it instructed the jury that Morrison could be convicted under Count Eight if he possessed the identified firearm after it had traveled in interstate commerce. This instruction was flawed for the additional reason that the mere movement of a firearm between states, at an undetermined point in time, is insufficient to establish jurisdiction under the Commerce Clause. U.S. Const. Art. 1, § 8, cl. 3.

The contrary view, which we acknowledge has repeatedly been expressed by this Court, *see, e.g.*, *United States v. Lucky*, 569 F.3d 101, 108 (2d Cir. 2009); *United States v. Pitre*, 294 Fed.App. 690 (2d Cir. 2008) (summary order) traces back to the Supreme Court's decision in *Scarborough*, 431 U.S. 563, interpreting a predecessor statute. We of course recognize this Court's obligation to follow *Scarborough* unless and until it is overruled.

Thus, to preserve this important constitutional issue we suggest that Morrison's conviction under Count Eight should be reversed as having been

obtained in violation of the Commerce Clause.

Point Eight

THE USE OF ACQUITTED CONDUCT TO DETERMINE MORRISON'S SENTENCE VIOLATED HIS FIFTH AND SIXTH AMENDMENT RIGHTS

In his presentence memorandum, Morrison objected to the Probation Department's use of acquitted conduct – including the robbery of Jesse Watkins, the arson of Thomasina Mack's car and the Sherwin Henry murder – to determine his Sentencing Guidelines, arguing that such use violated his Fifth and Sixth Amendment rights (Doc. 839, pp. 19-23). Thereafter, the district court granted Morrison's motion to dismiss Count Two, which eliminated the count as to which the acquitted conduct was considered "relevant conduct" under U.S.S.G. § 1B1.3 for purposes of determining Morrison's adjusted offense level. Nevertheless, the district court found, by a preponderance of the evidence, that Morrison was responsible for these crimes and considered them as appropriate sentencing factors under 18 U.S.C. §§ 3553 and 3661 (Sentencing Transcript at 77). The court then sentenced Morrison to the maximum ten years' imprisonment permitted under the remaining Count of conviction – Count Eight, charging Morrison with being a felon in possession of a weapon in violation of 18 U.S.C. § 922(g).

We reiterate our Fifth and Sixth Amendment objections to the use of acquitted conduct to determine Morrison's sentence, but recognize that this Court has repeatedly upheld the practice against constitutional attack. *See e.g, United States v. Gomez*, 580 F.3d 94, 105 (2d Cir. 2009). Accordingly, we do not further develop our arguments in opposition to this practice, but rather raise the issue to preserve it should further review be necessary.

CONCLUSION

For all the foregoing reasons the Court should affirm the district court's dismissal of Count Two or, if not, grant a new trial thereon. The Court should reverse the conviction under Count Eight and dismiss the charge or grant a new trial thereon. In the alternative, the Court should remand for resentencing without consideration of acquitted conduct.

Dated: New York, New York
January 14, 2011

Respectfully submitted,

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Typeface Requirements, and Type Style Requirements

1. As a consolidated brief, filed on behalf of Rodney Morrison in response to the government's appeal and in support of Morrison's appeal, this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because the combined brief contains 31,560 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii), and Morrison's motion to file an oversized brief was granted on January 13, 2011.

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and (6) because this brief has been prepared in a proportional typeface using Microsoft Word for Mac in 14 point Times New Roman font.

Dated: New York, New York
January 14, 2011

/s/

Yvonne Shivers