UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 02-1190

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY L. PEETE,

Defendant-Appellant,

Appeal From the Final Judgment of Conviction
Entered In The United States District Court
For The Eastern District of Wisconsin,
Honorable Rudolph T. Randa, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ROBERT R. HENAK
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel for the appellant, Jerry L. Peete, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) Jerry L. Peete

(2) David K. Ziemer Law Office
Henak Law Office, S.C.

(3)(i) N/A

(3)(ii) N/A

Dated: _____

_____
Robert R. Henak

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Rules and Statutes

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Appeal No. 02-1190

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

JERRY L. PEETE,

Defendant-Appellant,

BRIEF OF DEFENDANT-APPELLANT

JURISDICTIONAL STATEMENT

Jerry L. Peete appeals from the final judgment of conviction and sentence in this criminal case entered by the district court on June 19, 2000. The district court had jurisdiction under 28 U.S.C. §3231; the Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §1291.

Peete filed his notice of appeal and docketing statement with the district court on January 17, 2002 (R44, R45).[1]

---

[1] Throughout this brief, abbreviations are used pursuant to Fed. R. App. P. 28(e). Documents in the record are identified by the District Court docket sheet number as "R___"; the following ":___" reference denotes the page number of the document. When the document is reproduced in the attached appendix, the applicable appendix page number is also identified as "App. ___."

There are no motions for a new trial or alteration of the judgment, or any other motion which would toll the time in which to appeal pursuant to Fed. R. App. P. 4(b)(3). However, by Decision and Order entered January 10, 2002, the District Court, Hon. Rudolph T. Randa, presiding, granted Mr. Peete relief pursuant to 28 U.S.C. §2255 on the grounds that his prior counsel was constitutionally ineffective in failing to request an extension of time within which to file a notice of appeal pursuant to Fed. R. App. P. 4(b)(4) and in failing to file a notice of appeal within that extended deadline. The district court granted Mr. Peete 10 days from the date of that Decision and Order in which to file a notice of appeal from the judgment of conviction and sentence entered June 19, 2000. (R43; App. 38-42).

There were prior federal appellate proceedings in this case. Specifically, prior counsel filed an out of time notice of appeal (without seeking an extension under Rule 4(b)(4) and beyond the permissible extension under that rule in any event) (R25), which appeal was dismissed by this Court by Order dated December 15, 2000 (R29). *United States v. Jerry L. Peete*, Appeal No. 00-3041.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the charge of felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1) exceeds the scope of federal authority under the Commerce Clause when the only alleged nexus to interstate commerce is that the firearm crossed state lines at some time prior to Peete's possession of it.

2. Whether a sentence of 188 months under Count Four of the superceding indictment violates the constitutional principles underlying *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), given the indictment's failure to allege three prior convictions for violent felonies or serious drug offenses, facts necessary to increase the penalty for the offense to more than 10 years incarceration.

STATEMENT OF THE CASE

On January 19, 2000, a grand jury returned a four-count indictment against Jerry Lee Peete. Counts One through Three charged that he violated 21 U.S.C. §841(a) by knowingly and intentionally distributing cocaine. Count Four charged that he was a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1). (R8). The grand jury returned a superseding indictment alleging the same four charges, but adding reference to 18 U.S.C.§924(e)(1) to Count Four on February 1, 2000 (R21).

Mr. Peete moved, *inter alia*, for dismissal of Count Four on the grounds that §922(g)(1) exceeds Congress' power to regulate interstate commerce under *United States v. Lopez*, 514 U.S. 549 (1995) (R10). Based on this Court's decisions in *United States v. Bell*, 70 F.3d 495 (7th Cir. 1995), and *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 519 U.S. 806 (1996), the Magistrate Judge recommended on March 21, 2000. that the motion be denied (R16:17-20; App. 32-35).

On April 4, 2000, Mr. Peete entered pleas of guilty to all four counts of the superceding indictment pursuant to a plea agreement with the government (R36; R18). On June 15, 2000, the District Court, Honorable Rudolph T. Randa presiding, sentenced Peete to concurrent terms of 188 months incarceration on each count, a fine and assessments totaling $1,400 and $2,250 in restitution (the "buy money"). The Court also imposed concurrent terms of three years supervised release on each of the drug counts and five years supervised release on the gun count. (R37:17-23; App. 9-15). That Court entered Judgment on June 19, 2000 (R23; App. 1-7).

On August 8, 2000, Peete's trial counsel, David Ziemer, filed a notice of appeal on Peete's behalf (R25). Because the notice was untimely, however, this Court dismissed that appeal by Order dated December 15, 2000. *United States v. Jerry L. Peete*, Appeal No. 00-3041 (R29).

Mr. Ziemer subsequently asked the District Court to appoint counsel for Mr. Peete in light of Ziemer's failure to file a timely appeal, and Mr. Peete sought leave to proceed *in forma pauperis* (R28; R31; R32). The District Court granted the requests on January 10, 2001 (R30).

On June 15, 2001, Peete filed his petition pursuant to 28 U.S.C.§2255, alleging that he was denied the effective assistance of counsel due to Mr. Ziemer's failure either to file a timely notice of appeal or to file a timely request to extend the time for filing such a notice. That petition also alleged that there was an insufficient factual basis on which to support his plea and conviction under Count Four, and that the

application of 18 U.S.C. §922(g)(1) based on the fact that the firearm crossed state lines before the defendant's possession of it violates the Commerce Clause. (R38).

By Decision and Order entered January 10, 2002, the District Court, Hon. Rudolph T. Randa, presiding, granted Mr. Peete relief pursuant to 28 U.S.C. §2255 on the grounds that his prior counsel was constitutionally ineffective in failing to request an extension of time within which to file a notice of appeal pursuant to Fed. R. App. P. 4(b)(4) and in failing to file a notice of appeal within that extended deadline. The district court granted Mr. Peete 10 days from the date of that Decision and Order in which to file a notice of appeal from the judgment of conviction and sentence entered June 19, 2000. The court did not address Peete's Commerce Clause claim. (R43; App. 38-42).[2]

Mr. Peete timely filed his notice of appeal on January 17, 2002 (R44).

STATEMENT OF FACTS

Count Four, charging Mr. Peete with possession of a firearm by a felon in violation of 18 U.S.C. §922(g)(1) & 924(e), alleged as follows:

> THE GRAND JURY FURTHER CHARGES:
>
> That on or about December 16, 1999, in the State and Eastern District of Wisconsin,
>
> **JERRY LEE PEETE**,

---

[2] The District Court previously had denied the petition and ordered it dismissed on December 10, 2001 (R41). However, that Court subsequently granted Peete's timely motion for relief from that order and judgment (R43; App. 38-42; *see* R42).

> having previously been convicted of a crime punishable by imprisonment for a term exceeding one year did knowingly possess a firearm, to wit: a Daewoo .40 caliber pistol, serial number 400481, which had prior to his possession been transported in interstate commerce, and the possession of which was therefore in and affecting commerce;
>
> In violation of Title 18, United States Code, Section 922(g)(1) and 924(e)(1).

(R21:4).

The factual basis proffered in support of Mr. Peete's plea to this charge necessarily was based on the same theory, i.e., that the necessary jurisdictional element that the firearm was "in and affecting commerce" was satisfied by the fact that, at some unknown time in the past, someone other than Mr. Peete had transported the firearm into Wisconsin from another state (R36:10-11).

SUMMARY OF ARGUMENT

Recent Supreme Court decisions regarding the scope and application of the Commerce Clause dictate that federal criminal jurisdiction cannot legitimately be based on so minimal a thread as the fact that a firearm crossed state lines at some point prior to the defendant's possession of it. *See United States v. Lopez,* 514 U.S. 549 (1995); *United States v. Morrison,* 529 U.S. 598 (2000); *Jones (Dewey) v. United States,* 529 U.S. 848 (2000). Congress has no authority under the Commerce Clause to punish criminally the purely local, non-commercial possession of a gun, even if at some past time that gun crossed a state line for unknown reasons disconnected from its current possession or possessor. Applying 18 U.S.C. §922(g)(1) in such cases usurps local responsibility for purely local problems.

Mr. Peete acknowledges, however, that panel decisions of this Court have held to the contrary. The issue accordingly is raised to preserve it for further review, either by this Court *en banc*, or by the Supreme Court. The issue is briefed in more detail by Federal Defender Dean Strang in *United States v. Lester Lemons*, Appeal No. 01-4277, currently pending before this Court.

The constitutional principles underlying the decisions in *Jones (Nathaniel) v. United States*, 526 U.S. 227 (1999) (requiring that any fact (other than prior conviction) that increases the maximum penalty be charged in the indictment), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (same), likewise come into play here regarding Count Four. The maximum sentence for conviction of felon in possession of a firearm under 18 U.S.C. §922(g)(1) is 10 years. 18 U.S.C. §924(a)(2). However, if the defendant has three prior convictions for any combination of violent felonies or serious drug offenses, a mandatory minimum sentence of 15 years applies. 18 U.S.C. §924(e)(1). Under the constitutional principles recognized in *Jones* and *Apprendi*, therefore, the existence of these three prior felonies should have been treated as elements of a greater offense, found by the grand jury, and charged in the indictment. Because the superceding indictment did not allege those necessary elements of the greater offense mandating imprisonment of at least 15 years, the sentencing court should have been limited to a maximum sentence of 10 years on the gun charge.

Mr. Peete again acknowledges, however, that the law currently is against him

on this point. Although a majority of the current members of the Supreme Court agree with him,[3] the contrary decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), has not yet been overruled. Accordingly, this issue likewise is raised solely to preserve it pending reversal of *Almendarez-Torres* by the Supreme Court. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (Court of Appeals must leave to Supreme Court the prerogative of overruling its own decisions).

ARGUMENT

I.

PEETE'S CONVICTION FOR FELON IN POSSESSION OF A FIREARM VIOLATES THE COMMERCE CLAUSE

A. Standard of Review

Because this appeal presents only a constitutional question on undisputed pertinent facts, this Court normally would review the claim *de novo*, as it does questions of law generally. *See United States v. Wilson*, 73 F.3d 675, 678 (7th Cir. 1995), *cert. denied*, 519 U.S. 806 (1996). However, Mr. Peete did not obtain a decision on the issue from the District Court and instead pled guilty to all four counts of the superceding indictment.

Review accordingly is for plain error. *United States v. McKenzie*, 99 F.3d 813, 817 (7th Cir.1996). Error under that standard is reversible only if it is "plain,"

---

[3] *See Almendarez-Torres v. United States*, 523 U.S. 224, 270-71 (1998) (Scalia, Stevens, Souter, and Ginsburg, JJ. dissenting); *Apprendi*, 530 U.S. at 520-21 (Thomas, J., concurring) (acknowledging error in *Almendarez-Torres*, analysis).

meaning clear under current law, and if it affects substantial rights, in that it must be prejudicial and must have affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993); *United States v. Williams*, 272 F.3d 845, 859 (7th Cir.2001), *cert. pending*; Fed. R. Crim. Proc. 52(b). If the defendant can make that showing, this Court has the discretion to correct the forfeited error under Rule 52(b), but "the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 732.

Mr. Peete's guilty plea does not bar review by this Court. *See Bell v. United States*, 70 F.3d 495, 496-97 (7th Cir. 1995). This Court has recognized that "[o]rdinarily, a guilty plea is a waiver of violations, even constitutional violations 'not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.'" *Id.* at 496 (citation omitted). However, where, as here, "the government is precluded from 'haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.'" *Id.* at 496, quoting *United States v. Broce,* 488 U.S. 563, 575 (1989).

This Court's holding in *Bell* on the issue of waiver thus is fully applicable here:

> We will, in the circumstances of this case, consider Mr. Bell's claim. If the statute under which he was prosecuted were now found to be unconstitutional after it seemed unquestionably to be constitu-

> tional for such a long period of time, it would hardly be just to allow his conviction to stand. Furthermore, if there were no constitutional statute to be charged under, there could not be a "valid establishment of factual guilt." Mr. Bell would have possessed the gun, but possessing it would not violate federal law. For these reasons, Mr. Bell's guilty plea will not preclude our review of the issue he wants to air.

Bell, 70 F.3d at 497.

B. The Minimal Nexus to Interstate Commerce Traditionally Required Under 18 U.S.C. §922(g)(1) is Constitutionally Insufficient.

Mr. Peete respectfully submits that Congress exceeded its authority under the Commerce Clause to the extent that it intended to criminalize a felon's mere possession of a firearm which happened to have traveled in interstate commerce sometime in the past. The statute therefore should not be construed to authorize conviction based upon such a meager showing of connection to interstate commerce. To the extent it is construed to require nothing more, it exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States . . .." U.S. Const., Art. I, §8, cl. 3.

Mr. Peete understands that the Supreme Court held as a matter of statutory construction in 1977 that proof the possessed firearm previously traveled in interstate commerce was sufficient to satisfy the nexus between the possession of a firearm by a felon and commerce under the statutory predecessor to 18 U.S.C. §922(g)(1). *Scarborough v. United States,* 431 U.S. 563, 577 (1977). *Scarborough* was based on legislative history and findings that possession of a weapon by a felon inherently

affects or burdens interstate commerce. *Id.* at 571-72, 574-75. It accordingly rejected the claim that Congress intended that the weapon actually be "in commerce" at the time of possession. *See also United States v. Lowe*, 860 F.2d 1370, 1374 (7th Cir. 1988) (mere movement of weapon, as some prior time, across state lines satisfied the commerce element of §922(g)(1)), *cert. denied*, 490 U.S. 1005 (1989).

Scarborough, however, was purely a case of statutory interpretation and did not address the validity of its construction under the Commerce Clause. Three subsequent Supreme Court decisions interpreting the boundaries of Congressional power under the Commerce Clause cast doubt on the continuing vitality of *Scarborough*. *See United States v. Lopez,* 514 U.S. 549 (1995), *United States v. Morrison,* 529 U.S. 598 (2000), and *Jones v. United States,* 529 U.S. 848 (2000). Those decisions reject as constitutionally insufficient connections to interstate commerce similar to those asserted in support of §922(g)(1), as applied in this case.

In *Lopez*, the Court held that Congress exceeded its Commerce Clause authority in enacting 18 U.S.C. §922(q)(1)(A), which criminalized knowing possession of a firearm in a school zone. The Court there noted that there are three broad categories of activity which Congress may regulate under its commerce power: 1) "the use of the channels of interstate commerce;" 2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and 3) "activities having a substantial relation to interstate commerce." 514 U.S. at 558-59 (citations omitted). Under the third category, it is insufficient that an activity merely have some

affect on interstate commerce; "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559.

The Court summarily concluded that banning possession of a firearm in a school zone falls within neither of the first two categories of permissible regulation:

> §922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can §922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.

Id. at 559.

The Court likewise found §922(q) unjustified under the third permissible category covering regulation of activities which substantially effect interstate commerce. Section 922(q) was a criminal statute and had nothing to do with commerce or any sort of economic activity, and that section was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated." *Id.* at 561. The Court also noted that the statute contained no jurisdictional element which would ensure existence of the necessary "substantial affect" on a case-by-case basis. *Id.* Also absent were any congressional findings from which the Court could "evaluate the legislative judgment that the activity in question substantially affected interstate commerce." *Id.* at 563. The Court further found that the link between gun possession and a substantial effect on interstate commerce was too attenuated to support

regulation under the commerce power. *Id.* at 563-67; *see Morrison*, 529 U.S. at 612.

In *United States v. Morrison,* 529 U.S. 598 (2000), the Court clarified the principles set forth in *Lopez*. *Morrison* addressed the constitutionality of the civil remedy provisions of the Violence Against Women Act of 1994, 42 U.S.C. S13981, and concluded that Congress again exceeded its authority under the Commerce Clause in providing a federal civil remedy for the victims of gender-motivated violence.

The *Morrison* Court clarified that it had "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613. It also explained that Congressional findings alone are not sufficient to sustain the constitutionality of Commerce Clause legislation. The Court expressly rejected Congressional findings that violent crime itself has a sufficient affect on commerce to justify federal action. *Id.* at 615-17.

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is local.

Id. at 617 (citation omitted).

In *Jones (Dewey) v. United States,* 529 U.S. 848 (2000), the Court rejected congressional authority to impose federal criminal liability for arson of an owner-occupied house, even though it was constructed of goods transported in interstate commerce, was financed in interstate commerce, and received on a continuous basis

natural gas transported in interstate commerce. The statute in *Jones* made it a federal crime to damage or destroy, "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. §844(1) (1994 ed., Supp. IV). While construing the statute rather than directly assessing its constitutionality, the Court limited application of the statute to require active employment of the property for a commercial purpose, 529 U.S. at 855, in part to avoid a construction which would be "constitutionally doubtful" in light of *Lopez*. *Id.* at 851, 857-58.

Given the decisions in *Lopez*, *Morrison*, and *Jones*, there can be little doubt that construction of §922(g)(1) consistent with that given its predecessor in *Scarborough* exceeds Congress' authority under the Commerce Clause. As explained in *Scarborough*, construing the statute as covering possession of a weapon which had previously crossed state lines was based, not on the theory that such weapons remained "in commerce," but on Congressional findings that a felon's possession of a weapon inherently affects or burdens interstate commerce. 431 U.S. at 571-72, 574-75. As applied to simple possession of a firearm which previously had traveled across state lines, therefore, the statute can be upheld, if at all, only under *Lopez's* third category of permissible Commerce Clause regulations. *See Lopez*, 514 U.S. at 559.

Yet, the "affects/burdens commerce" theory relied upon in *Scarborough* is exactly the Commerce Clause theory rejected in *Lopez*, 514 U.S. at 568, and

Morrison. 529 U.S. at 615-17. It also should be noted that, even under that invalid theory, Congress only found *an* affect on commerce, *see Scarborough*, 431 U.S. at 571-72, 574-75 & fn. 10, not the "substantial affect" required by the Commerce Clause. *See Lopez*, 514 U.S. at 558-59. As in *Lopez*, therefore, 514 U.S. at 563-67; *see Morrison*, 529 U.S. at 612, the connection between possession of a weapon and a substantial effect on interstate commerce is simply too attenuated to support the regulation.

While §922(g)(1), unlike the statute at issue in *Lopez*, does have a "jurisdictional element," that element does not save it. A "jurisdictional element" does not save a statute when the element itself is insufficient to meet Commerce Clause requirements. As in *Jones*, to construe that element so broadly as to encompass noncommercial, local criminal conduct is squarely at odds with the principles of *Lopez* and *Morrison*. Yet, that is exactly what the *Scarborough* interpretation does. The "jurisdictional element" in §922(g)(1) does not mandate proof of a substantial affect on commerce, and thus does not satisfy Commerce Clause requirements.

See also United States v. Coward, 151 F. Supp. 2d 544 (E.D. Pa. 2001) (concluding that *Scarborough* construction of §922(g)(1) is unconstitutional in light of *Lopez*, *Morrison*, and *Jones*, but court nonetheless bound by contrary circuit authority); *United States v. Sweet*, 2000 WL 1845779 (D. Ore. 2000) (same), *aff'd* 24 Fed. Appx. 831, 2002 WL 5665 (9th Cir. 2002); *cf. United States v. Quintana*, 2000 WL 1855130 (S.D.N.Y. 2000) (expressing doubt as to constitutionality of §922(g)(1)

but deemed bound by circuit precedent).

See also United States v. Rawls, 85 F.3d 240, 243 ((5th Cir. 1996) (Garwood, Wiener and Garza, JJ, specially concurring):

> If the matter were res nova, one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce. It is also difficult to understand how a statute construed never to require any but such a per se nexus could "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, ----, 115 S.Ct. 1624, 1631, 131 L.Ed.2d 626 (1995). However, the opinion in *Scarborough v. United States*, 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977), dealing with the predecessor to section 922(g), requires us to affirm denial of relief here. While *Scarborough* addresses only questions of statutory construction, and does not expressly purport to resolve any constitutional issue, the language of the opinion and the affirmance of the conviction there carry a strong enough implication of constitutionality to now bind us, as an inferior court, on that issue in this essentially indistinguishable case, whether or not the Supreme Court will ultimately regard it as a controlling holding in that particular respect.

Mr. Peete acknowledges that current Seventh Circuit authority is contrary to his position on this issue. *E.g.*, *United States v. Wesela*, 223 F.3d 656 (7th Cir.), *cert. denied*, 531 U.S. 1174 (2001); *United States v. Williams*, 128 F.3d 1128 (7th Cir. 1997); *United States v. Bell*, 70 F.3d 495, 497-98 (7th Cir.1995). He notes, however, that those decisions rested on the erroneous view that the jurisdictional element of §922(g) alone saves it under the Commerce Clause. As already discussed, that view is incorrect. Peete understands, however, that correcting that error will take action either by this Court *en banc* or by the Supreme Court.

II.

THE MAXIMUM PERMISSIBLE SENTENCE UNDER COUNT FOUR IS TEN YEARS IMPRISONMENT AND THREE YEARS SUPERVISED RELEASE

Pursuant to 18 U.S.C. §924(a)(2), one convicted of possession of a firearm by a felon in violation of 18 U.S.C. §922(g)(1) is subject to a maximum prison term of 10 years. If that same person had three prior convictions for any combination of violent felonies or serious drug offenses, the applicable prison term is "not less than fifteen years." 18 U.S.C. §924(e)(1). Supervised release of up to three years is authorized for convictions under §922(g)(1), while those under §924(e) are subject to up to 5 years supervised release. *See* 18 U.S.C. §3583(b).

Count Four of the superceding indictment charged Mr. Peete with the knowing possession of a firearm despite "having previously been convicted of a crime punishable by imprisonment for a term exceeding one year," in violation of §922(g)(1) (R21:4). The superseding indictment neither alleged that Peete had previously been convicted of three violent felonies or serious drug crimes, nor did it identify any such prior convictions, although it did include a pro forma citation to 18 U.S.C. §924(e)(1). Still, the District Court deemed §924(e)(1) to apply and sentenced Mr. Peete to 188 months incarceration and 5 years supervised release on Count Four (R37:20; R23; App. 2, 3, 12).

Peete's failure to raise this defect in the court below mandates that review be

for plain error. *E.g.*, *Bell*, *supra*. A sentence on the gun count 50% greater than the statutory maximum plainly affects substantial rights, is prejudicial and affected the outcome of the district court proceedings.[4] The only significant question, therefore, is whether it was, in fact, error.

In *Jones (Nathaniel) v. United States*, 526 U.S. 227, 243 n.6 (1999), the Supreme Court held that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).[5] The proviso to this general constitutional requirement that all facts increasing the maximum sentence be charged in the indictment is based on *Almendarez-Torres v. United States*, 523 U.S. 224

---

[4] Given the concurrent, 188 month sentences on the remaining counts, the direct, practical effect of this error is less dramatic, resulting in a two-year increase in Peete's supervised release. However, if reversal is granted on this ground, it draws into question the knowing and voluntary character of Peete's plea agreement. It is one thing to stipulate to inclusion of questionable quantities of drugs under the Guidelines when one knows it can have no effect on the ultimate sentencing range. It is something quite different to enter into such a stipulation when it actually increases the presumptive guidelines sentence, especially when, as here, the defendant denied involvement with the 5 to 15 kilograms of cocaine alleged (*see* R37:12-13).

Pursuant to the plea agreement, Peete had an offense level of 34 under the Guidelines, resulting either from his status as an "armed career criminal" under U.S.S.G. §4B1.4 or from his alleged involvement in between 5 and 15 kilograms of cocaine (base offense level of 32, U.S.S.G. §2D1.1(c)(4), plus two levels for weapons possession, U.S.S.G. §2D1.1(b)(1)). But for application of §924(e), the former would not apply, *see* U.S.S.G. §4B1.4(a), making a legal challenge to inclusion of quantities from seemingly unrelated transactions much more attractive.

[5] While *Apprendi* reaffirmed *Jones'* requirement that all elements of the offense be charged in the indictment, it did not directly address that issue because the Indictment Clause has not been applied to the states. 530 U.S. at 477 n.3.

(1998), which held that prior convictions are mere sentencing enhancements rather than elements of an offense.

Under the general principles recognized in *Jones* and *Apprendi*, Count Four of the superceding indictment is insufficient to authorize imposition of more that a 10 year sentence because it does not allege the prior offenses necessary for imposition of any greater sentence. In short, it did not allege the "fact[s] . . . that increase[] the maximum penalty for [the] crime." *See also United States v. Reese*, 92 U.S. 214, 232-33 (1875) ("[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted").

The continuing validity of the exception to this principle for prior convictions is doubtful at best. That exception is directly contrary to the general principles in *Jones* and *Apprendi*, *see* 530 U.S. at 487 (*Almendarez-Torres* "an exceptional departure from the historic practice we have described"), and a majority of the current members of the Supreme Court have voiced opposition to that exception. In addition to the four dissenters in *Almendarez-Torres*, 523 U.S. at 270-71 (Scalia, Stevens, Souter, & Ginsburg, JJ.,dissenting), who argued that prior convictions are elements of the offense which have to be pled and proven in order for the district court to have authority to impose a sentence greater than the statutory maximum, Justice Thomas, the fifth vote for the majority in *Almendarez-Torres*, has since repudiated that decision, *see Apprendi*, 530 U.S. at 520-21 (Thomas, J. concurring).

Also, although the continued validity of *Almendarez-Torres* was not directly

decided by the Court in *Apprendi*, the Court signaled its belief that that decision stood, at best, on shaky grounds:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

530 U.S. at 489 (footnote omitted).

Still, the fact remains that the Supreme Court did not overrule *Almendarez-Torres*, and this Court does not have the power to do so. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). *Almendarez-Torres* directly controls here. Accordingly, Mr. Peete must raise the issue solely to preserve it pending action by the Supreme Court. *See also Dahler v. United States*, 259 F.3d 763, 765 (7th Cir.2001) (holding that *Apprendi* did not overrule *Almendarez-Torres*); *United States v. Collins*, 272 F.3d 984, 987 (7th Cir. 2001).

CONCLUSION

For these reasons, Mr. Peete respectfully asks that the Court reverse his judgment of conviction and sentence, vacate the conviction under Count Four, and

remand for resentencing on the remaining counts.

Dated at Milwaukee, Wisconsin, March 5, 2002.

Respectfully submitted,

JERRY L. PEETE, Defendant-Appellant

HENAK LAW OFFICE, S.C.

Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 5,260 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

_____

Robert R. Henak

TABLE OF CONTENTS TO APPELLANTS' APPENDIX

CIRCUIT RULE 30(c) STATEMENT

The items required by Circuit Rules 30(a) & (b) have been bound with appellant's brief.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2002, I caused 15 hard copies of the Brief and Appendix of Defendant-Appellant Jerry L. Peete, and one copy of the Brief on digital media, to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of that document and one copy of the Brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Government, Paul L. Kanter, Office of the United States Attorney, 517 E. Wisconsin Ave., Rm. 530, Milwaukee, WI 53202.

_____

Robert R. Henak
State Bar No. 1016803