UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES

v. DOCKET No: 2:03-CR-47
Honorable D. Brock Hornby, U.S.D.J.

DUCAN FANFAN

DEFENDANT'S SENTENCING MEMORANDUM

The defendant, Ducan Fanfan, respectfully submits this memorandum in aid of sentencing in this case. The defendant asks this Court to find that his guideline sentencing range should be 63-78 months followed by a term of supervised release.

FACTS

Mr. Fanfan is 29 years old and has no prior criminal conviction on record. Pre-sentence Report (PSR) (Par. 37-40).

This case arises from a single transaction between Fanfan and a cooperating government agent. According to the trial testimony and the information contained in the Pre-Sentence Report, the government used an unnamed cooperating witness to set up a drug buy in Maine between the cooperating witness and an individual named Vaughn Smith. (PSR par. 2-4). Smith sold approximately one ounce of powder cocaine to an individual identified as Raymond Bean. (PSR p. 3). Bean then brought the cooperating individual to meet an individual identified as Vaughn Smith. (PSR 5-6). Smith sold directly to the cooperating witness in Maine on at least two occasions. Probation concluded that 55.9 grams of powder cocaine was sold by Smith. On March 7, 2003, federal agents visited Smith and informed him that they were investigating

cocaine trafficking in and around York County and that they knew Smith was involved. (PSR 9). Smith agreed to cooperate and consented to a search of his residence, which netted 35.7 grams of cocaine powder. (PDS p.9). Smith told the government that he had $ 7,270.00 in cash hidden in his house. According to Smith, the money was proceeds of this sale of cocaine. (PSR p.9). In addition, Smith told the government that a motorcycle worth an estimated $ 4,000.00 was purchased with proceeds of his powder cocaine sales. (PSR p. 9). The probation officer added the currency together with the estimated value of the motorcycle then divided the total amount by the $1,400 that probation determined Smith charged for an ounce of powder cocaine and attributed 226 grams of powder cocaine to the conspiracy. PSR P. 10). Neither Smith nor Bean knew Fanfan. Fanfan was not mentioned in any of the deals, nor was there any surveillance or telephone monitoring that inculpated Fanfan.

Smith cooperated with the government and agreed to set up his supplier, Joseph Ash. (PSR p. 11). Smith estimated that he had been purchasing cocaine from Ash who resided in Brookline, Massachusetts, then in Maine, for approximately eight months. (PSR P. 11). In November of 2002, Smith claimed he was purchasing ounce quantities of powder cocaine from Ash. (PSR 11). Smith estimated that he purchased about seven ounces of cocaine from Ash. (PSR 11). Smith also claimed that Ash deliver 2.5 ounces of powder cocaine about two weeks before Smith's arrest. (PSR p. 11).

Smith set up Ash on April 2, 2003 where the government seized 194.5 grams of cocaine powder from Ash at the Hannaford Brother Shopping Center in Biddeford, Maine. (PSR 12).

Ash agreed to cooperate with the government and set up his supplier Donovan Thomas. (PSR 13). On April 3, 2003 Thomas met Ash at the McDonald's in Biddeford, Maine. (PSR p. 13). Thomas was arrested and agreed to cooperate with the government. Thomas admitted to

the agents that he sold Ash seven ounces of powder cocaine. Thomas claimed he was "primarily responsible" for supplying Ash for the previous 7 to 8 months." (PSR p 14). Thomas claimed his source of supply was the defendant Ducan Fanfan. (PSR 14).

According to the evidence, Thomas was caught by the DEA and agreed to make a telephone call to Fanfan to induce Fanfan to deliver the drugs to him. At the request and instruction of the government, Thomas placed a recorded call to Fanfan and ordered one kilogram of cocaine powder, and five ounces of cocaine base. (PSR 15). Fanfan agreed to meet Thomas at the Burger King in Somerville, Massachusetts. Fanfan was arrested in Somerville by the federal agents in conjunction with the Somerville police. Police seized 1.25 kilograms of cocaine powder and 281.6 grams of cocaine base from Fanfan. Fanfan was arrested on April 4, 2003. The transaction took place in Somerville, Massachusetts between Fanfan and cooperating agent Thomas. Initially, Fanfan was charged in the Somerville District Court.

Probation met with Ash after Fanfan's arrest. (PSR P. 17). Ash estimated the quantities that he was distributing to Smith from August 2002 until the time of his arrest as follows: 3.5 grams per week in August 2002; In September 2002 and October 2002 Ash sold about one ounce per week. In January, February, and March 2003 Ash sold Smith about 4.5 ounces every two weeks. Based on Ash's estimates the total amount of cocaine supplied by Thomas was 1.05 kilograms of cocaine powder. (PSR 17).

Probation then determined the total quantity of cocaine involved in the conspiracy as 1.05 kilograms of cocaine powder based upon Ash's estimates; 194.5 grams together with the 1.25 kilograms of cocaine powder and the 281.6 grams of cocaine base seized from Fanfan after the conspiracy ended. (PSR op. 18).

The total amount of cocaine powder and base attributed to the conspiracy is 2.5 kilograms of cocaine powder plus 281.6 grams of cocaine base. (PSR p.19).

This Court originally conducted a sentencing hearing on June 22, 2004 . Fanfan argued that the his Sixth Amendment rights under the United States Supreme Court's decision in Blakely v. Washington, 124 S.Ct. 2531 (2004), limited this Court's imposition of a sentence to those facts pled in the indictment and found by a jury. This Court agreed with Fanfan and sentenced him to 78 months confinement. The government filed a petition for certiorari before judgment with the United States Supreme Court. The Supreme Court allowed the government's petition. The cases were argued before the United States Supreme Court on October 3, 2004. On January 12, 2005 the United States Supreme Court issued a two-part landmark decision, U.S. v. Booker, 125 S.Ct. 738 (2005). In Part I, the United States Supreme Court upheld this Court's application of its Blakely decision to the United States Sentencing Guidelines and affirmatively held the Sixth Amendment applies to the Untied States Sentencing Guidelines. In Part II of the Booker /Fanfan decision, (the remedial decision) a different majority stunned the legal community by severing out the portion of Title 18 U.S. C. Sec. 3354 (b) that required the mandatory imposition of a guideline sentence; rendering the United States Sentencing Guidelines effective advisory.

The United States Supreme Court remanded Fanfan's case although his sentence was authorized by the jury's verdict and therefore did not violate the Sixth Amendment. The Supreme Court commented that "the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions." Id.

Neither Booker nor Fanfan argued to the Supreme Court that *ex post facto* principles inherent in the Due Process Clause would preclude a sentence greater than that authorized by the

jury's verdict under the Court's revision of the Sentencing Reform Act. They could not make that argument unless and until the District Court actually imposed such a sentence on remand. Thus, the issue was not presented or addressed, and nothing should be read into the Court's silence on the subject. Cf. Booker, 125 S. Ct. at 753-54 (rejecting the government's contention that stare decisis precluded application of Blakely to the Guidelines because in none of the cases cited did the appellant raise the argument that his or her sentence exceeded the sentence authorized by the jury's verdict).

ARGUMENT

I. FANFAN IS ENTITLED TO HAVE BOTH HIS SIXTH AMENDMENT RIGHTS AND HIS RIGHT TO DUE PROCESS PROTECTED WITH THE IMPOSITION OF ANY SENTENCE.

a. Part I of Booker (the Constitutional decision) dictates that Fanfan's sentence may be based only on facts found by a jury beyond a reasonable doubt or admitted to by Fanfan.

In Blakely, and then in Booker's constitutional holding, a majority of the Supreme Court "reaffirm[ed] our holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Id. at 756. As such, Fanfan is entitled to a Guideline sentence applied in compliance with the Sixth Amendment, that is, based only on those facts found by a jury beyond a reasonable doubt or admitted by the defendant. This is because a defendant is entitled to the "benefit" of a new constitutional rule if his case was not yet final when the rule was announced, even though he thought the law was otherwise when he committed the offense. Griffith v. Kentucky, 479 U.S. 314, 327-28 (1987).

b. Part II of Booker (the remedial decision) unexpectedly and indefensibly struck the mandatory provision of the SRA, triggering Ex Post Facto protection, and

mandating that Fanfan be sentenced under the binding guidelines that were in effect when he committed the offense.

While the constitutional protection provided by Part I of Booker must be applied to Fanfan, changes in the law after a defendant's conduct occurred which disadvantage him may not be applied in his case. In Marks v. United States, 430 U.S. 188, 196-97 (1977), the Court held that the Due Process Clause precluded application of standards expanding criminal liability for obscenity announced in Miller v. California, 413 U.S. 15 (1973), but that "any constitutional principle enunciated in Miller which would serve to benefit petitioners must be applied in their case." Therefore, under Ex Post Facto, as applied by the Marks court, the remedial portion of the Booker decision cannot be applied to Fanfan to expand his sentence under the new advisory regimes of the SRA.

Booker's remedial holding unexpectedly and indefensibly struck the provisions of the Sentencing Reform Act that made the Guidelines mandatory, and in doing so, raised the maximum from the maximum authorized by the facts established by a plea of guilty or a jury verdict to the U.S. Code maximum. When a new law increases "the possible penalty," it "is ex post facto, regardless of the length of the sentence actually imposed." Lindsey, 301 U.S. at 401-02; see also Weaver v. Graham, 450 U.S. 24, 33 (1981); Miller, 482 U.S. at 432; Garner v. Jones, 529 U.S. 244, 251, 253 (2000); California Department of Corrections v. Morales, 514 U.S. 499, 510 n.6 (1995). The revised statute therefore cannot be applied retroactively, and the defendant must be sentenced under the binding Guidelines in effect when he committed the offense.

A. Ex Post Facto protection under the Due Process Clause is triggered because Part II of Booker was unexpected and indefensible.

There is no dispute that according to the jury's verdict, Fanfan committed this crime before January 12, 2005 the date the United States Supreme Court decided U.S. v. Booker. As

such the ex post facto principles inherent in the Due Process Clause should bar this Court from imposing a sentence any greater than the "Blakleyized" guidelines range- the range calculated on the basis of facts proven to the jury beyond a reasonable doubt.

Although the Ex Post Facto Clause of the Constitution, by its terms applies only to acts by the legislature and not the judiciary, the Supreme Court has made clear "that limitations on ex post facto judicial decision making are inherent in the notion of due process." Rogers v. Tennessee, 532 U.S. 451, 456 (2001). As the Rogers Court explained, the Due Process Clause contains the basic principle of "fair warning" Id. at 457. "Deprivation of the right to fair warning . . . can result from . . . an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on this face." Id. (citing Bouie v. City of Columbia, 378 U.S. 347, 352 (1964)). Thus, the Court held that "if a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,'[the construction] must not be given retroactive effect. Rogers, 532 U.S. at 457 (quoting Bouie, 378 U.S. at 354).

The Due Process and ex post facto principles come into play here because the remedial majority in Booker, through its new interpretation of the SRA, effectively raised the statutory maximum penalty that may be imposed for federal crimes. As Apprendi, Blakely and Booker made clear, "the statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury's verdict or admitted by the defendant." Booker 125 S.Ct. at 749. Thus under the mandatory federal guideline system that was in effect until Booker was decided, the "statutory maximum" sentence was the top of the guideline range, as calculated solely on the basis of the facts found by the jury beyond a reasonable doubt or admitted by the defendant. By judicially striking the provision that had

made the guidelines mandatory, the remedial majority in Booker, , effectively raised the statutory maximum from the top of the un-enhanced guideline range to the maximum allowed under statute for the offense at issue.

This judicial interpretation of the SRA, which expands the criminal penalty for all federal crimes, cannot be applied to Fanfan retroactively to his detriment without violating the ex post facto clause. Like the judicial construction at issue in Bouie, this construction is "clearly at odds with the statute's plain language and had no support in prior [court] decision" Rogers, 532 U.S. at 458. Specifically, the Booker Court's remedial interpretation of Section 3553 meets the Rogers' two-part test for non-retroactivity because it was (1) unexpected and (2) indefensible by reference to the law, which had been expressed prior to the conduct in issue. Id. at 457.

The test for whether Booker was "unexpected" focuses on the remedy decision. There is no dispute that the remedial decision was unexpected. In fact, the remedial decision directly contradicts the plain language of the stricken Section 3553(b)(1) which stated that "the court shall impose a sentence" in accordance with the guidelines. No person reading the SRA could have expected the Court's advisory guidelines construction. In fact, the Supreme Court itself had given Section 3553(b)(1) the exact opposite construction in several cases. See: Stinson v. United States, 508 U.S. 36, 42 (1993)(reaffirming "binding" nature of the guidelines and citing prior cases.). It is equally clear that the remedial majority's construction of Section 3553 is "indefensible by reference to the law which had been expressed prior to the conduct in issue." This point is made clear by the fact the remedial majority, like the state Supreme Court reversed in Bouie, could not cite to a single prior decision to support its construction of the statute. All prior cases from the Supreme Court held that the guidelines were mandatory. As such, there was

nothing in prior law that the Court could rely upon to support its construction of section 3553(b)(1), and therefore it was "indefensible" by reference to prior law.

Accordingly, both prongs of the test for non-retroactivity are met and the Booker remedy cannot be applied to the detriment of Fanfan who committed this offense before the United States Supreme Court decided U.S. v. Booker and Fanfan. Fanfan had no notice by virtue of the plain statutory language and the case law that the guidelines were binding. The Supreme Court in Booker unexpectedly struck that binding language and thereby raised the statutory maximum sentence.

The ex post facto clause prohibits the Courts from retroactively applying Booker remedial decision to Fanfan, while the constitution requires that this Court protect Fanfan's 6th Amendment rights under Part I of Booker. See: United States v. Marks, 430 U.S. 188, 191-92 (1977). Because any acceptable sentence must comply with the Sixth Amendment, the appropriate guideline range must be computed upon only those facts found by the jury. In this case, that sentence is 63-72 months; the exact sentence this Court originally imposed.

Fanfan is entitled to have both his right to Due Process and his Sixth Amendment right protected with the imposition of any sentence. The Supreme Court confirmed the propriety of this approach in Miller when the Court issued a decision that expands criminal liability in one respect, but limits criminal liability on constitutional grounds in another respect. Miller v. California, 413 U.S. 15 (1973). Defendants whose conduct preceded the decision were entitled to the beneficial aspects of the decision without the retroactive application of the detrimental aspects. Miller, 430 U.S. at 196-97 (holding Due Process Clause precludes application of standards expanding criminal liability for obscenity under Miller, for offense committed before

Miller was decided, but that nonetheless "any constitutional principal enunciated in Miller which would serve to benefit petitioners must be applied in their case.")

In the Booker decision itself, the Court cited Griffith, 479 U.S. at 328, which requires that constitutional rules that "benefit" defendants be applied to cases not yet final. Griffith, 479 U.S. at 327, 328. The "remedial interpretation of the Sentencing Act" is not itself a constitutional rule. The excised sections were not themselves unconstitutional or held to be unconstitutional, see Booker, 125 S. Ct. at 771 (Stevens, J., dissenting); id. at 797 (Thomas, J., dissenting), nor did the remedial majority contend that its revision of the statute is a constitutional rule, but instead consistently distinguished between its "severance and excision" of the statute and the other majority's "constitutional holding." Id. at 756, 757. As such, this Court must re-impose the 63-78 month sentence.

II. IN THE ALTERNATIVE, EVEN IF THIS COURT WERE TO REJECT THAT EX POST FACTO PROHIBITS APPLICATION OF PART II OF BOOKER TO FANFAN (THE REMEDIAL DECISION), PART I OF BOOKER PROHIBITS EXPANSION OF FANFAN'S SENTENCE TO INCLUDE THE CRACK COCAINE BECAUSE IT WAS NOT PART OF THE SAME COURSE OR CONDUCT, IT WAS UNCHARGED, AND THE JURY DID NOT FIND FANFAN GUILT OF IT.

a. The government conceded that the conspiracy ended when Thomas became a cooperating government witness; as such, any conspiracy that may have existed involved only cocaine hydrochloride.

It is well settled that the government's failure to plead drug quantities in the indictment requires reversal of a defendant sentence. United States v. Jackson, 240 F3d 1245 (10th Cir.), cert denied, 122 S.Ct. 112(2001). In addition, the government 's failure to plead and prove the amount of crack cocaine limits a defendant's punishment to the lowest statutory maximum. United States v. Thomas, 274 F.3d 655(2nd Cir. 2001). Absent the government's charging a

defendant, a sentencing court can consider uncharged conduct if the court determines by a preponderance of evidence that the conduct is relevant and related to the indictment charged.

Relevant conduct includes uncharged quantities that are part of the same "course or conduct." United States v. Terry 240 F.3d 65 (1st Cir. 2001)(holding that uncharged conduct was sufficiently linked to the charged drug transactions). Because drug convictions require "grouping" under section 3D1.2 they are governed by subsection (a)(2) of section 1B1.3, which states that relevant conduct includes all conduct that is part of the same course or conduct or common scheme or plan." Unlike, "non-group able" offenses in subsection (a)(1), this can include conduct outside the offense of conviction. The "same course or conduct" depends on similarity , regularity and time interval between the various acts, and specifically provides that when one of these factors is absent "a stronger presence of at least one of the other factions is required." United States v. Hahn 960 F.2d 903 (9th Cir. 1992).

Here, the government indicted Fanfan on one count of conspiracy to distribute 500 grams or more of a mixture containing cocaine, and no evidence suggested that any conspiracy exited to distribute crack cocaine. Three other alleged members of the conspiracy claimed that they purchased only cocaine hydrochloride. In fact, when Thomas, the co-conspirator turned government agent testified at trial, he claimed that he had never asked Fanfan for crack cocaine prior to being asked to do so by the government. (Vol. I pp 130-134)(Q: Now was he buying powder cocaine? A: Yes. . … But you were providing Joe Ash with powder cocaine. Yes.). As such, there is no question, based on the evidence that the conspiracy, if it existed at all, was to distribute cocaine hydrochloride.

Moreover,, the government conceded that this conspiracy to distribute cocaine hydrochloride ended when Thomas became a cooperating government informant . (I- 142-

143)(THE COURT: If I understood you correctly, this is two conversations, the first one being with Mr. Ash before this witness was arrested so while the conspiracy was still underway; the second being the conversation with Mr. Fanfan after the conspiracy had terminated. So the coconspirator exception would apply to the first conversation but tot to the second. Did I get it correctly?" MS. KAZANJIAN: That's correct.).

Based on the testimony of the witnesses, and the government's admissions, there is no similarity or regularity between the sales of cocaine hydrochloride within the alleged conspiracy and the uncharged sale of cocaine base after the conspiracy ended. Absent the same course or conduct, the uncharged sale of crack cocaine cannot be considered for the purposes of sentencing Fanfan. Cf. United States v. Nesbitt, 90 F.3d 164 (6th Cir. 1996)(reversal required where the Court failed to resolve whether amounts of drugs were attributable during the time of the conspiracy.); United States v. Hernandez-Santiago, 92 F.3d 97 (2nd Cir. 1996)(reversal required were court failed to make finding as to the defendant's actual agreement).

b. This Court is precluded from sentencing Fanfan as a co-conspirator of any agreement to sell crack cocaine because the government did not allege in the indictment, present to a jury, or prove beyond a reasonable doubt that the substance was crack cocaine.

The record in this case establishes without dispute that the indictment fails to allege any particular quantity of cocaine base attributable to Fanfan. The Complaint under which Fanfan was tried alleges violation of 21 U.S. C. sec. 841 (a)(1), making it unlawful for any person to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a controlled substance. Both the statute and the relevant Guidelines establish a range of penalties of offenses charged under 21 U.S.C sec 841 (a) (1). However, the particular penalty that may be imposed in a given case depends on the nature and quantity of the substance at issue. See e.g. 21 U.S. C. sec. 841(b)(1)(A)(iii).

Because of Fanfan's minimal prior criminal history, the mandatory minimum provision of 21 U.S. C. sec. 841 (b)(1)(A)(iii) and the career offender provision section 4B1.1 of the United States Sentencing Guidelines do not apply. Therefore, Fanfan should be sentenced under the guidelines. Under sec. 2D1.1, this court's sentencing options depended solely on the nature and the quantity of the substance at issue. It is only the form of cocaine base that is identified as "crack" cocaine that justifies the more stringent penalties. See USSG, App C. Amendment 478. Assuming cocaine hydrochloride, the sentencing range under the Guidelines was 63-78 months; for "crack" cocaine the sentencing range under the guidelines is 151-181 months. When combined with the government and probation's request for a four level increase for a role in the offense, Fanfan's guidelines are 235-293 months, well in excess of the statutory maximum and as such, in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000); Arizona v. Ring, 534 U.S. 1103 (2002); Blakely v. Washington, 124 S.Ct. 2531 (2004), and U.S. v. Booker, 125 S.Ct. 738 (2005).

c. This Court should not consider any calculations based upon the guidelines for crack cocaine where the government failed to prove the substance was crack cocaine.

Punishment for violating section 841 depends on the weight of the drugs involved in the offense. A certain quantity of "cocaine base" will trigger much stiffer penalties than an equivalent quantity of " cocaine , its salts, optical and geometric isomers and salts of isomers" United States v. Brisbane, 2004 WL 1047842 (D.C.Cir May 11, 2004).

The sentencing Guidelines define "cocaine base" as meaning only crack, and apply the lower penalties to other forms of cocaine base. U.S.S.G. sec. 2D1.(c)(D)., See United State v. Paiva, 892 F.2d 148 (1st Cir. 1989). All forms of cocaine base other than crack are treated as powder cocaine or cocaine hydrochloride for the purposes of calculating the guideline sentencing range.

See United States v. Abdul, 122 F.3d 4778, 479 (7th Cir.), cert. denied, 118 S.Ct. 643 (1997). Because cocaine and cocaine base carry the same chemical meaning, the statute appears ambiguous, providing two different sets of penalties for the same offense. United States v. Brisbane, 2004 WL 1047842 (D.C. Cir. May 11. 2004). If the ambiguity remains unresolved, the rule of leniency would suggest imposition of the lower sentence. See e.g. United States v. Ray, 21 F.3d 1134, 1140 (D.C. Cir., 1994).

Here, the government introduced a certificate of analysis claiming the substance contained 49% cocaine base. (Appx A). No evidence suggested the substance was crack. As such, the evidence offered by the Government does not support a finding that the substance was crack as defined by the guidelines. United States v. James, 78 F.3d 851 (3rd Cir), Cert denied 519 U.S. 844 (1996)(reversal required where no proof that cocaine base was crack cocaine for enhanced penalty to apply). Because the government failed to prove the substance was crack, this Court is prohibited from sentencing Fanfan under the guideline applicable to crack.

In addition, any sentence imposed must consider the goal of the Sentencing Commission to avoid disparity. Although the guidelines were intended to reduce unwarranted sentencing disparity across the country between similarly situated defendants, there are some guidelines, which, as the Sentencing Commission itself has noted, increase disparity. As such, the district court's consideration of sentencing factors in 3353(a)(6)- the need to avoid unwarranted sentencing disparity" strongly supports imposing a sentence below the guideline range. See *Presumptively Unreasonable: Using the Sentencing Commission's Words to Attack the Advisory Guidelines*, by Anne Blanchard and Kristen Gartman Rogers. The one to one hundred quantity ratio of cocaine base to cocaine powder under the guidelines according to the Sentencing Commission, leads to a substantial unwarranted disparity in sentencing that has increased the gap

in the average sentences between racial groups. This disparity is unwarranted because as the Commission has reported, "the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. U.S. Sentencing Commission, Fifteen Years of Guideline Sentencing, pp xv-xvi (Nov. 2004)[1] The Commission's own findings, now after Booker, support a trial judge's decision to sentence defendants convicted of trafficking in crack cocaine under the lower guideline for cocaine powder. See: U.S. v. Thomas (Attached).

Calculating all the substances as cocaine powder or hydrochloride, Fanfan at a maximum, is responsible for 781.6 grams of cocaine hydrochloride. His Base Level Offense is 26. The guideline range is 63-78 months.

d. The Court should find that the quantity of cocaine for which Fanfan is accountable is 781.6 grams of cocaine powder.

The government and the Probation Officer contend that this court should find that the weight attributable to Mr. Fanfan is 6,132 kilograms of marijuana equivalent. (PSR p. 19). This figure is based on the total weight of the alleged conspiracy as a whole and does not represent a defendant specific determination of drug quantity as required by United States v. Colin-Solis, 2004 WL (1st Cir. 2004). We submit that the government has not shown by a preponderance of reliable evidence that the weight attributable to Fanfan exceed 781.6 grams of cocaine powder.

First, we submit that the amount of cocaine that the government has shown regarding the earlier part of the conspiracy is based on the estimates of Ash, which conflict with the estimates of Smith. This court cannot use more than the minimum, rather than an average, especially in the absence of corroborating evidence. See United States v. Sepulveda, 15 F.3d 1161, 1196-99 (1st Cir. 1993). (reversing sentence based on average of number of trips and weights); Untied States

[1] The Commission's 15 year Report is available eon their web site at http:// www.ussc.gov/15_year/15year.htm

v Welch, 15, F.3d. 1202, 1215 (1st Cir. 1993 (same). Furthermore, this case presents the same problem fond in Sepulveda; the estimates were provided during trial testimony and the prosecutions focus was on convicting Fanfan not upon "fixing the precise quantity of drugs for which each defendant might be held responsible. " Sepulveda, 15 F.3d at 1198.

Fanfan submits that this Court should not include the amounts bought and sold between Ash, Smith and Thompson. There is no evidence supporting an inference that the amount was reasonably foreseeable to Fanfan. United States v. Colin Solis, 2004 WL (1st Cir. 2004).

The problem of proof involved in the government's use of averages and extrapolation comes into even sharper focus with respect to estimates for drugs not seized. Cf. United States v. Howard, 80 F.3d 1194 (7th Cir. 1996) (reversal require where the district court relied upon the probation officer's estimates of drug quantities without corroboration). The total amount of drugs seized from Fanfan was 781.6 grams of cocaine. The rest of the figures provided are based on pure speculation. Smith and Ash's account of the amounts bought and sold conflict. Smith fixed the amount he bought from Ash at about seven ounces. Ash claimed he sold Smith 1.05 kilograms of powder cocaine. It stretches credibility to the breaking point to believe that Ash's recollection of the number of transactions per month and the exact weight of the transactions more than a year after the fact could provide the level of certainty necessary to a determination that "has a dramatic leveraging effect." Sepulveda, 15 F.3d at 1198. There is no apparent reason why Ash would have remembered these transactions, much less how much they weighed.

"[W]holly conclusory findings . . . cannot be said to command a preponderance of the evidence. " Sepulveda. 15, F.3d at 1119. Here, the further leap to extrapolate a net weight is insupportable. 'The potential for grave error where one conclusory estimate serves as the multiplier for another may undermine the reasonable reliability essential to a fair sentencing

system." United States v. Rivera-Maldonado, 194 F.3d 224, 232 (1st Cir. 1999). "Generally speaking, the smaller the sampling, the less reliable the resulting probability estimate." Id. at 231. (vacating sentence where, inter alia, "inferential leap . . . founded on the bare assumptions . . . that the quantities involved in the crack cocaine sales . . . closely resembled those in the controlled buys."). See also United States v. Shonubi, 998 F2d. 84, 89, (2nd Cir. 1993) (finding insufficient basis for inference that each of the seven trips involved same amount of heroin); United States v. Hewitt, 942 F.2d 1270 (8th Cir. 1991) (finding insufficient basis for inferring that six additional cocaine deliveries that codefendant reported the defendant had made involved same quantities as the two trips to which the defendant admitted).

In Shonubi, the court held that, despite evidence that the defendant made eight trips that were part of the same course of conduct, and the reasonable inference that the defendant imported heroin on each of the trips, the evidence was insufficient to prove that he transported the same amount of heroin on each trip. Therefore, the court held that the only amount that could be used to calculate the defendant's sentence was the amount seized at the time of the defendant' arrest, since "only speculation links appellant to any importation of drugs beyond 427.4 grams." Shonubi, 998 F.2d at 89. Drug quantity is to be derived from all acts that were part of the same course or conduct or common scheme or plan as the offense of conviction." U.SSG Sec. 1B1.3(a)(2). The essential inquiry is not what the defendant knew but what acts were reasonably foreseeable by him. United States v. Colon-Solis, F3d. (1st Cir. 2004). Thus each coconspirator is responsible not only for the drugs he actually handled, but also for the full amount of drugs that he could reasonably have anticipated would be within the ambit of the conspiracy. See USSG sec. 1B1.3(a)(1)(B), comment (n.2) and United States v., Sepulveda, 15 F.3d 1161, 1197 (1st Cir. 1992).

Fanfan submits that at most, the court should find a weight of 781.6 grams of cocaine powder, based on the single controlled delivery. Therefore, the maximum sentence of imprison would be twenty years.

Under the sentencing guidelines, U.S.S.G. section 2D1.1 Fanfan's base level offense is 26 and his sentencing range is 63-78 months. .

e. This Court should not consider evidence of the uncharged sale of cocaine base where the government engaged in sentencing factor manipulation in violation of Fanfan's rights to Due Process and a fair trial.

Fanfan is entitled to a decrease in his offense level because the government engaged in sentencing factor manipulation. United States v. Ocasio, 914 F.2d 330, 332-33 (1st Cir. 1990). The First Circuit has expressed its concern particularly in sting operations that "exploitative manipulation of sentencing factors by government agents [may sometimes] overbear the will of a person predisposed only to committing a lesser crime. United States v. Connell, 960 F.2d 194-97 (1st Cir. 1992). The burden of showing sentencing factor manipulation, by a preponderance of the evidence, rests with the defendant. Untied States v. Morillo, 8 F.3d 864, 871 (1st Cir. 1993); United States v. Daivd, 940 F.2d 722, 239 (1st Cir. 1991), cert denied, 502 U.S. 1046 (1992). .

Here, the government indicted and investigated this alleged conspiracy as a conspiracy to distribute 500 grams or more of a derivative of cocaine. The government conceded at trial, and in submissions to this Court, that the conspiracy ended when Thomas agreed to speak to the government and as such, became a government agent. United States v. Flemmi, 402 F.3d 79, 1st Cir. Mass (2005)(the conspiracy cannot continue when all of the participants, with the exception of the defendant are government agents). Thomas, then at the direction of and with the encouragement of other agents, placed a call to Fanfan and ordered more cocaine hydrochloride than he had ever purchased during the life of the alleged conspiracy. In addition, Thomas at the

direction of other agents, ordered cocaine base, a substance outside the agreement of the alleged conspiracy for the sole purpose of increasing Fanfan's exposure under the sentencing guidelines. There is no dispute that the other three members of the alleged conspiracy agreed to sell cocaine hydrochloride only.

Cocaine base is not introduced by any member of the conspiracy during the pendency of the conspiracy. It is only after the conspiracy ended that government agents introduced cocaine base. The difference in Fanfan guidelines due to the agents request for crack cocaine after the conspiracy ended jumps exponentially from 63-78 months for the cocaine hydrochloride to 188 to 235 months when calculating the sentence including the cocaine base if it is determined to be crack cocaine. The agents were successful in tripling Fanfan's maximum sentence and subjecting him to mandatory minimum sentence with the inclusion of the cocaine base as crack. The government agent's conduct in this case constitutes "extraordinary misconduct" cf. U.S. v. Nelson –Rodriguez,319 F.3d 12 (1st Cir. 2003). As such, this court should disregard any reference in Fanfan's sentencing to the guidelines for crack cocaine and sentence Fanfan under the guidelines for cocaine hydrochloride.

f. On Remand, Any Sentence Enhancement Must be Proved Beyond a Reasonable Doubt

The Sentencing Commission (pre-Booker) stated in its commentary to the U.S.S.G. sec. 6A1.3 that it "believes that the use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns…" But, as Justice Thomas points out in his dissent in Booker, "the Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the

basis of facts found by the jury or admitted by the defendant. " Booker, 125 S Ct. at 798 n. 6 (Thomas, J. dissenting). As such, to protect Fanfan's Fifth Amendment rights, after Booker, Fanfan could request on remand that all facts that would increase his sentence beyond that which could have been lawfully imposed based on the facts found by the jury, be proven beyond a reasonable doubt. The preponderance standard has no statutory basis particularly where the government is attempting to raise the guideline range through acquitted or uncharged conduct, like the relevant conduct introduced against Fanfan. Fanfan's Fifth Amendment concerns can best be avoided by requiring proof beyond a reasonable doubt, but cannot be protected at all absent remand. Cf. Jones v. United States, 526 U.S. 227, 229 (1999)(interpreting federal carjacking statute "in light of the rule that any interpretive uncertainty should be resolved to avoid serious questions about the statute's constitutionality"). Nothing in Booker prohibits this Courts from applying a higher burden of proof than the preponderance standard.

III. THIS COURT LACKS VENUE TO SENTENCE FANFAN

The right to be tried in the appropriate venue is one of the constitutional protections provided to defendants by the Sixth Amendment. United States v. Scott, 270 F.3d 30 (1st Cir. 2001). The burden of showing proper venue is on the government, which must do so by a preponderance of the evidence. United States v. Lanoue, 137, F.3d 656, 661 (1st Cir. 1998).

Prior to 1999, the First Circuit endorsed the use of "key verb" approach to determine venue. United States v. Gorrgacardakos, 988 F.2d 1289, 1293 (1st Cir. 1993). The key verb approach analyzed the key verbs in the statute defining the criminal offense in order to determine the scope and the relevant conduct. Id. In 1999, the Supreme Court decided United States v. Rodriguez-Moreno, 526 U.S. 275 (1999). In Rodriguez-Moreno, the Supreme Court held that venue must be determined from the nature of the crime alleged, determined by analyzing the

conduct constituting the offense and the location or locations of the commission of the criminal acts. If the crime consists of distinct parts, taking place in different localities, then venue is proper wherever any part can be proved to have taken place. Id. This concept was codified in part in 18 U.S. C. sec. 3237 (a)(1994) which provides: Except as otherwise expressly proved by enactment of Congress, any offense against the Untied States begun in one district and completed in another, or committed din more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.

Here, the conspiracy charged was begun, committed and completed in Maine before any telephone call was placed to Fanfan. The actual transaction between Fanfan and government agent Thomas occurred in Somerville, Massachusetts after the initial conspiracy concluded. Fanfan was not charged with any substantive offense in Maine because Maine lacked jurisdiction over the substantive count. Because the Maine conspiracy ended before Thomas placed the call to Fanfan in Massachusetts, combined with the fact the uncharged sale of cocaine took place in Massachusetts, this Court lack sufficient nexus with the defendant to properly assert venue over the crime. As such, this court lacks proper venue to sentence Fanfan.

CONCLUSION

For all of the above stated reasons, this Court should:

1. Find that the government failed to properly plead and submit the issue of drug quantity to the jury, failed to establish the substance was crack cocaine, and engaged in sentencing factor manipulation
2. Protect Fanfan's Sixth Amendment and Due Process rights by re-imposing this Court's original sentence: 63-78 months confinement followed by a term of supervised release.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2004, I electronically filed Defendant's *Sentencing Memorandum* with the Clerk of Court, using the CM/ECF system which will send notification of such filing to the following:

Hélène Kazanjian, AUSA

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