

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	Criminal Number: 03-47-P-H
)	
DUCAN FANFAN)	

GOVERNMENT'S REPLY SENTENCING MEMORANDUM

NOW COMES the United States of America, by and through its attorneys, Paula D. Silsby, United States Attorney for the District of Maine, Hélène Kazanjian, Assistant United States Attorney and respectfully submits this reply sentencing memorandum.

I. BACKGROUND

The defendant Ducan Fanfan was charged in an indictment with conspiracy to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1). He was convicted by a jury and sentenced on June 28, 2004. At his sentencing the defendant raised the following issues:

- (1) whether the Court should treat the cocaine base the defendant possessed at the time of his arrest as relevant conduct;
- (2) whether the Court should include the cocaine base the defendant possessed at the time of his arrest in its sentencing guideline calculations since the crack was not alleged in the indictment or presented to the jury to consider in its verdict;
- (3) whether the Court should include the cocaine base the defendant possessed at the time of his arrest in its sentencing guideline calculations since the Government has not proved that the substance was crack cocaine;
- (4) whether the Court should include all the powder cocaine calculated by the United States Probation Office and the Government since it does not represent a defendant-specific determination of drug quantity as required under United States v. Colin-Solis, 354 F.3d 101, 103-104 (1st Cir. 2004);

(5) whether Court should include the crack cocaine the defendant possessed at the time of his arrest in its sentencing guideline calculations since the Government purportedly engaged in unlawful sentencing manipulation;

(6) whether the Court lacked venue to consider the crack cocaine in sentencing the defendant;

(7) whether the decision in Blakely v. Washington, 124 S.Ct. 2531 (2004), precluded the Court from applying the role enhancement and relevant conduct provisions of the United States Sentencing Guidelines.

In addition to asking the Court to include the crack cocaine in its drug quantity calculations, the Government urged the Court to apply a four-point role enhancement pursuant to U.S.S.G. § 3B1.1(a).¹

This Court dealt with each of the issues at the sentencing on June 28, 2004, holding that, before considering the implications of Blakely v. Washington, the crack cocaine was appropriately included in the drug quantity calculations, rejecting the various defense arguments against its inclusion. (S. Tr. 79-80, 84-85).² The Court also held that the Government had established that the cocaine base was “crack cocaine.” (S. Tr. 79-80). With respect to the role enhancement, the Court found that before considering the implications of Blakely v. Washington, a two-point role enhancement was warranted. (S. Tr. 80-84). The Court further rejected both the defendant’s venue argument, declaring it “frivolous” (S. Tr. 76), and his sentencing manipulation argument. (S. Tr. 84). The Court concluded that before considering the implications of Blakely v. Washington, the base offense level should be 34, with a two level

¹ The Government also attempted to establish that the defendant had a prior criminal history. The Government does not press that issue at this time.

² The sentencing transcript will be cited as (S. Tr.)

increase for role in the offense and a total offense level of 36, resulting in a guideline range of 188-235 months. (S. Tr. 85).

The Court then proceeded to rule that based on the Blakely v. Washington decision, he could not apply the relevant conduct and role enhancement provisions of the Guidelines. The Government filed a notice of appeal in the Court of Appeals for the First Circuit and a petition to the United States Supreme Court for a writ of certiorari before judgment. The Supreme Court granted the petition and issued its decision on January 12, 2005, vacating Fanfan's sentence and remanding the case to this Court for further proceedings consistent with its decision. United States v. Booker, 125 S.Ct. 738 (2005).

II. DISCUSSION

A. The Defendant's Ex Post Facto Argument is Without Merit.

The only new issue the defendant raises in his Sentencing Memorandum is that the application of the remedial portion of the Supreme Court's Booker/Fanfan decision violates the Ex Post Facto Clause of the United States Constitution. This argument is meritless and has been rejected by the Courts that have addressed it. See United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005); United States v. Gray, 362 F.Supp.2d (S.D. W. Va. 2005).

Defendant Fanfan essentially claims that Booker deprives him of rights that he never had. His argument that his "statutory maximum" was 63-78 months is legally unsupportable. The statutory maximum that pertained to the defendant at the time he committed his offense, was forty years. The United States Constitution provides that "[n]o Bill of Attainder or ex post facto law shall be passed." U.S. CONST. art. I, § 9, cl. 3; see also U.S. CONST. art. I, § 10, cl. 1. The

Ex Post Facto Clause is a limitation upon the powers of the legislature, and, by its own terms, does not apply to courts. Rogers v. Tennessee, 532 U.S. 451, 456, 460 (2001). The Supreme Court has recognized, however, that “limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process.” Id. at 456. In Bouie v. City of Columbia, 378 U.S. 347 (1964), the Supreme Court reversed, on due process grounds, a South Carolina court’s retroactive application of its construction of a criminal trespass statute to prosecute “sit-in” protesters who declined to leave a drug store restaurant that refused to serve them. Reviewing decisions in which the Court had held criminal statutes “void for vagueness” under the Due Process Clause, the Bouie Court emphasized the “basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.” Id. at 350-1; see also Rogers v. Tennessee, 532 U.S. at 457. Deprivation of the right to fair warning, the Court continued, can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. See Bouie, 378 U.S. at 352. For that reason, the Bouie Court concluded 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. Id. at 354 (citation omitted).

In the more recent Rogers case, however, the Supreme Court emphasized that its holding in Bouie did not extend the Ex Post Facto Clause to the courts through the rubric of due process. Rogers v. Tennessee, 532 U.S. at 458-460. As the Supreme Court explained in Rogers, it “has long been settled by the constitutional text and our own decisions[] that the *Ex Post Facto* Clause does not apply to judicial decisionmaking.” Id. at 462. Nor would such application be desirable,

because “[s]trict application of *ex post facto* principles . . . would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system.” Id. at 461. Accordingly, the Rogers Court concluded that “a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.’” Id. at 462 (emphasis added).

Defendant Fanfan contends that the remedial portion of the Booker decision was “unexpected and indefensible” under the law as it existed at the time he committed the criminal conduct for which he was convicted. As a result, Fanfan argues that the Court is precluded from imposing a sentence greater than that available under the Guidelines without the application of enhancements, which would require, he contends, jury fact-finding. Defendant thus seeks to obtain the benefit of the Sixth Amendment holding of Booker, while ignoring the remedial portion of that opinion.³

Tellingly, defendant Fanfan’s ex post facto argument fails to address the key factor identified in the Bouie and Rogers cases: the principle of fair warning. If the law as it existed when a defendant committed his crime provided sufficient warning of the maximum possible punishment for that crime, and the defendant receives a sentence at or below that maximum, his due process rights have not been violated. At the time defendant Fanfan committed his crimes, the United States Code informed him that he was subject to a maximum term of imprisonment of

³The Booker Court expressly rejected the argument that the existing mandatory Guidelines system could continue to operate by engrafting onto it the Sixth Amendment procedures required by Blakely, reasoning that such a change would “undermine the sentencing statute’s basic aim,” and “would so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand.” Booker, 125 S. Ct. at 759-60.

forty years. Thus, defendant Fanfan had fair warning when he committed his crimes that the punishment for those crimes could be well in excess of 188-235 months imprisonment, the guideline range the Court found to be applicable before considering the implications of Blakely, or 235-293 months, the range the Government urges is the proper guideline range.

Indeed, the only two federal courts to address similar ex post facto arguments thus far have rejected them. In United States v. Duncan, the defendant sought the retroactive application of the Booker holding announced by Justice Stevens, but argued that applying Justice Breyer's opinion retroactively violated the Due Process Clause. See Duncan, 400 F.3d 1297, 1306-1307 (11th Cir. 2005). In evaluating this claim, the Eleventh Circuit looked to the principles announced by the Supreme Court in Rogers to determine whether application of the Booker opinion would violate the due process principles of fair warning. See id. at 1307-1308. The Eleventh Circuit noted that at the time defendant Duncan committed his crime of possessing at least 5 kilograms of cocaine, the U.S. Code informed him that he was subject to a sentence of life imprisonment for that offense. See id. The Guidelines at the time also informed him that the judge would engage in fact-finding to determine his sentence and could impose a sentence up to life imprisonment. See id. Thus, the Duncan Court concluded that the defendant had "ample warning at the time he committed his crime that life imprisonment was a potential consequence of his actions," and that as a result, his due process rights "could not be said to have been violated." Id. at 1307.

The only other federal court opinion addressing an ex post facto argument in the context of Booker reached a similar conclusion. The district court in United States v. Gray noted that:

the defendants in the instant case had fair warning of the potential consequences of their conduct by virtue of the statutory maximums set by the United States

Code. These code sections have long been referenced by the Sentencing Guidelines, judges, and presentence reports. Thus, the surprise that the defendants may have experienced when learning that the Guidelines were no longer a mandatory system is not analogous to the surprise experienced by the defendants in *Bowie* and *Marks* [*v. United States*, 430 U.S. 188 (1977)], who learned that their conduct, innocent when it was done, had become a crime after the fact.

Gray, 362 F.Supp.2d at 728. Similarly, the U.S. Code provided defendant Fanfan with fair warning, at the time he committed his crime, that a sentence of up to forty years imprisonment was a potential consequence of his actions.

In sum, the application of the Supreme Court’s opinion in Booker does not violate Fanfan’s due process rights, and his argument that this Court is precluded from sentencing him to more than 63-78 months imprisonment is therefore without merit.

B. The Defendant Should Receive a Four- Point Role Enhancement.

The Government relies on its argument at Fanfan’s first sentencing in support of the proposition that a four-point role enhancement is appropriate. Specifically, Section 3B1.1(a) of the Guidelines provides that a defendant should receive a four-point increase if “the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive” This Court found at Fanfan’s first sentencing that Fanfan was “clearly an organizer, leader.” (S. Tr. 81). The Court further found that there were five others involved in the criminal activity. (S. Tr. 81). However, the Court held that the Government was required to prove that the five individuals were foreseeable to the defendant and thus, rejected the four-level enhancement and applied a two-level enhancement, stating “[i]f I’m wrong on foreseeability, then the four level enhancement certainly would apply because there were five or more people involved independent of end users, but I will for the moment apply simply the two

level increase.” (S. Tr. 82-84). The Government continues to urge the Court to follow the decisions of the Seventh and Ninth Circuits and apply the four-level enhancement. See United States v. Kamoga, 177 F.3d 617, 621 (7th Cir. 1999); United States v. Dota, 33 F.3d 1179, 1189 (9th Cir. 1994). Furthermore, the Court can and should apply the four-level enhancement based on the fact that the criminal conduct was extensive.

Dated at Portland, Maine this 23rd day of May 2005.

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**UNITED STATES DISTRICT COURT
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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2005, I electronically filed Government's Reply Sentencing Memorandum with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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