NO. 98-1378

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

v.

PEDRO MANZANILLO,

Defendant/Appellant

BRIEF OF APPELLANT

APPEAL FROM CONVICTION IN THE MASSACHUSETTS DISTRICT COURT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291. The defendant was charged in the Massachusetts District Court with criminal violations of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2, and 21 U.S.C. § 853.

Mr. Manzanillo plead guilty on July 29, 1996 and was sentenced on March 13, 1997 in the Massachusetts District Court (*Nathaniel M. Gorton*, J.).

Mr. Manzanillo's appeal was originally procedurally defaulted, but after filing a petition pursuant to 28 U.S.C. § 2255 this court on September 8, 1998 reinstated it.

STATEMENT OF ISSUES

1. Based on the language of the statute, the statutory minimum mandatory sentence contained in 21 U.S.C. 841 applies only to convicted conduct and not to additional quantities related to the offense.

2. The government must show by a preponderance of the evidence that the defendant had the intent and capability to produce an additional agreed-upon quantity of contraband because forcing the defendant to *disprove* intent and capability creates a presumption in favor of the government's position thereby lowering its burden to less than a preponderance in violation of Mr. Manzanillo's due process rights.

3. There was no agreement made between Mr. Manzanillo and the government agent for future transaction on which to base a minimum mandatory sentence.

4. There was insufficient evidence to sentence Mr. Manzanillo for a quantity over 100 grams when he sold just 93 grams.

5. Mr. Manzanillo was prejudiced by his attorney's ineffective assistance of counsel when counsel advised him to plea to a quantity over 100 grams.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On May 5, 1995, after a phone contact, the defendant and his girlfriend met a government agent and supplied the agent with a one-gram sample of heroin. PSI, *Appx. to Br.* at 10-11. On May 9, 1995, the defendant met the agent again and agreed on a beeper code and price for a future transaction. Two days later the agent beeped the defendant using the code, resulting in a transaction for 31 grams of heroin. PSI, *Appx. to Br.* at 11-12. On May 18, 1995 the agent again beeped the defendant using the agreed code, resulting in a transaction for 62 grams of heroin. PSI, *Appx. to Br.* at 12-13. The defendant sold the agent a total of 94 grams.

During their May 18 conversation, the agent and the defendant talked about their business relationship and generally discussed possible future transactions. They did not agree, however, on any terms or specific figures. They did not come to any agreement on price in future transactions, nor when a transaction might occur. While they generally discussed possibilities, they did not agree any quantity in future transactions. PSI, *Appx. to Br.* at 13.

Mr. Manzanillo was thereafter indicted for the sales and conspiracy. With advice of counsel he plead guilty, and accepted responsibility for an amount of heroin between 100 and 400 grams. *7/29/96 Plea Transcript.* at 6-7; PLEA AGREEMENT ¶ 3.a, *Appx. to Br.* at 2. He was sentenced to a mandatory minimum sentence of 5 years, plus probation.

This appeal followed.[1]

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[1]Mr. Manzanillo's appeal was initially procedurally defaulted. It was reinstated, however, by this court on September 9, 1998 after Mr. Manzanillo's petition pursuant to 28 U.S.C. § 2255 established he had not been lawfully notified of his right to appeal.

SUMMARY OF ARGUMENT

Mr. Manzanillo first argues that the minimum mandatory sentence contained in 21 U.S.C. § 841 applies only to quantities actually involved in the violation and does not apply to additional quantities that are related to the offense under the sentencing guidelines.

He then argues that the government must show by a preponderance of the evidence that the defendant had the intent and capability to produce an additional agreed-upon quantity of contraband, and that forcing the defendant to *disprove* intent and capability creates a presumption in favor of the government's position thereby lowering its burden to less than a preponderance in violation of Mr. Manzanillo's due process rights.

He then argues that because there was no agreement as to quantity made between Mr. Manzanillo and the government agent for any future transactions, there was no agreement for future transactions on which to base additional quantities leading to a minimum mandatory sentence.

Mr. Manzanillo then argues that there was insufficient reliable evidence on which to base a sentence for anything beyond the 93 grams he sold to the agent.

Finally, the defendant argues that he was prejudiced by his attorney's ineffective assistance when he was advised to take responsibility for an amount over 100 grams and because the attorney did not contest the other issues contained in this appeal.

ARGUMENT

I. Statutory Minimum Mandatory Sentence Applies Only to Convicted Conduct and not to Additional Quantities Related to the Offense

This court construes the law regarding sentencing *de novo*. *United States v. Muniz*, 49 F.3d 36 (1st Cir. 1995); *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993), *cert. denied* 114 S.Ct. 2714 (1994) ("[t]o the extent that the challenges raise 'pure' questions of law or require interpretation of the guidelines, our review is plenary").

Had Mr. Manzanillo been sentenced according to the guidelines calculation, U.S.S.G. § 2D1.1, he would have received a sentence of 51 to 63 months. He was sentenced according to the 60-month mandatory minimum, however, contained in 21 U.S.C. § 841. The government conceded that pursuant to the plea agreement, but for the mandatory minimum it would have recommended the low end of the guideline range – that is, 51 months. *See 3/13/97 Sent. Transcript.* at 14-15.

The mandatory minimum, however, does not apply to this case. The federal statute under which Mr. Manzanillo was convicted provides that:

> "any person who violates subsection (a) of this section [prohibiting drugs] shall be sentenced as follows:
> . . .
> (B) In the case *a violation* of subsection (a) of this section involving
> . . .
> (i) 100 grams or more of a mixture or substance containing a detectable amount of heroin . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years . . ."

21 U.S.C. § 841(b)(1)(B) (emphasis added).

The statute indicates that the mandatory minimum applies only to "a *violation* . . . involving . . . 100 grams or more," *id.* (emphasis added), and therefore does not apply to a

violation involving less than 100 grams.

The second circuit explicitly construed the statute this way. It said that reasoning from the language, "the statutory mandatory minimum sentences of 21 U.S.C. § 841(b)(1) apply only to the conduct which actually resulted in a conviction under that statute." *United States v. Darmand*, 3 F.3d 1578 (2nd Cir. 1993).

Mr. Manzanillo was convicted of drug sales of 93 grams. There is no minimum mandatory sentence for quantities of heroin under 100 grams. 21 U.S.C. § 841(b)(1)(A).

It is conceded that the guidelines specify a defendant is to be sentenced for all quantities related to the offense for which he was convicted, and not only for the quantity indicated in the indictment. U.S.S.G. § 1B1.3. Thus, if the court finds that additional quantities were related to Mr. Manzanillo's offense, he may be sentenced for those additional quantities in accordance with the guidelines. He may not, however, be sentenced to a minimum mandatory not contained in the guidelines when the statute limits the mandatory minimum to only violations that actually involve the greater quantity.

Thus, the district court may use only the quantity of which Mr. Manzanillo was convicted, but not the additional amount that may have been related to his offense. Accordingly, this case should be remanded to the district court for re-sentencing without regard to any minimum mandatory sentence.

II. Mr. Manzanillo Was Unlawfully Sentenced for a Quantity over 100 Grams When He Sold Just 93 Grams

This court reviews the district court's findings for clear error. *United States v. Wihbey*, 75 F.3d 761, 776 (1st Cir. 1996). Quantities in excess of the amount charged must be proved by a preponderance of the evidence, *United States v. Lindia*, 82 F.3d 1154 (1st Cir. 1996), which the government has the burden of meeting. *United States v. Alicea-Cardoza*, 132 F.3d 1, 6 (1st Cir. 1997); *United States v. Sepulveda*, 15 F.3d 1161, 1198 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2714 (1994).

A. The Court must Use Especial Caution in Sentencing for Unconsummated Quantities at the Threshold

A small difference in quantity can make an enormous difference in sentence. *United States v. Jimenez-Martinez*, 83 F.3d 488, 491 (1st Cir. 1996); *United States v. Concepcion*, 983 F.2d 369, 386-89 (2nd Cir. 1992) (noting extraordinarily harsh results when unconvicted conduct used to enhance sentence), *cert. denied*, 114 S.Ct. 163 (1993). This court has warned:

> "For sentencing purposes, the government must prove drug quantities by a preponderance of the evidence. Courts must sedulously enforce that quantum-of-proof rule, for, under the guidelines, drug quantity has a dramatic leveraging effect. Thus, relatively small quantitative differences may produce markedly different periods of immurement. This reality informs the preponderance standard, requiring that district courts . . . , where uncertainty reigns, must err on the side of caution."

Sepulveda, 15 F.3d at 1198 (quotations and citation omitted). The Sixth Circuit wrote that in cases in which a small quantity can push the defendant into a minimum mandatory sentence, the district court must

> "err on the side of caution and only hold the defendant responsible for that quantity of drugs for which the defendant is more likely than not *actually* responsible."

United States v. Baro, 15 F.3d 563, 569 (6th Cir. 1994), *cert. denied*, 513 U.S. 912 (citations omitted, emphasis in original); *United States v. Webster*, 54 F.3d 1, 5 (1st Cir. 1995) (specialized requirement of proof of reliability indicates extra caution).

It is at the sentencing guidelines' thresholds when small differences in quantity make the greatest difference in incarcerated times. When the unindicted quantity carries the defendant over the statutory threshold to a mandatory minimum the sentencing court must exercise the most caution in finding the preponderance of the evidence. *See* Johan Bring & Colin Aitken, *Burden of Proof and Estimation of Drug Quantities Under the Federal Sentencing Guidelines*, 18 CARDOZO L. REV. 1987 (1997).

In this case, a mere 6 grams pushed Mr. Manzanillo into a mandatory minimum sentence. It does not appear that the district court proceeded especially cautiously. It simply accepted the government's allegations of extra quantity and sentenced him to the minimum mandatory time.

B. Requiring Defendant to Prove Intent and Capability Violates his Due Process Rights

The guidelines allow sentencing for additional quantities involved in agreed-upon but unconsummated transactions, provided that there is evidence of intent and capability to provide the additional quantity. U.S.S.G. § 2D1.1 *App. Note* 12. The government has the burden of proving the additional quantity by a preponderance of the evidence. *United States v. Alicea-Cardoza*, 132 F.3d 1, 6 (1st Cir. 1997); *United States v. Sepulveda*, 15 F.3d 1161, 1198 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2714 (1994). The guideline note merely specifies the nature of the evidence – intent and capability – that must be proved.

Thus, as part of its burden, the government must prove intent and capability. *United*

States v. Ruiz, 932 F.2d 1174 (7th Cir. 1991). *See United States v. Hendrickson*, 26 F.3d 321 (2nd Cir. 1994); *United States v. Argencourt*, 996 F.2d 1300, 1307 n. 10 (1st Cir. 1993). *Cf. United States v. Lindia*, 82 F.3d 1154 (1st Cir. 1996); *United States v. Wihbey*, 75 F.3d 761 777 (1st Cir. 1996); *United States v. Muniz*, 49 F.3d 36, 39 (1st Cir. 1995).

If the defendant bears the burden of disproving intent and capability as the application note and some cases suggest, however, and the government thus enjoys a presumption,[2] the government's burden is even less then a preponderance, in violation of the defendant's due process rights. In sentencing, proof by *at least* a preponderance of the evidence is necessary to comport with due process. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *United States v. Lindia*, 82 F.3d 1154 (1st Cir. 1996). Because there is no evidence of an additional quantity here, beyond the government's allegation, the reversal of the burden prejudiced Mr. Manzanillo, and thereby violated his due process rights.

Moreover, the sentencing court must make specific findings that intent and capability exist. *United States v. Wihbey*, 75 F.3d 761 (1st Cir. 1996) ("negotiated amount applies unless the sentencing judge *makes a finding* that the defendant lacked the intent and the capability to deliver") (emphasis added); *United States v. Muniz*, 49 F.3d 36 (1st Cir. 1995).

Here, the government's did not point to any evidence to establish intent and capability, and the district court made no finding that Mr. Manzanillo had the intent and capability to follow through the alleged future transactions.

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[2]In *United States v. Wihbey*, 75 F.3d 761 (1st Cir. 1996), this court made clear that the presumption operates in favor of the government. It wrote that the defendant will be held liable for the additional quantity unless the *defendant* proves lack of *both* intent and capability. *Id.* at 777.

C. Without an Arrangement Between Defendant and Agent for a Specific Quantity, There Is No Agreement on Which to Base an Additional Quantity

One cannot have an intent and capability to follow through on a future transaction unless there are in fact plans for a future transaction. Intent and capability are must be measured against definite plans for a future transaction. What, then, are the requirements to establish that there are plans for a future transaction?

The guidelines provide that:

> "In an offense involving an agreement to sell a controlled substance, the *agreed-upon quantity* . . . shall be used to determine the offense level."

U.S.S.G. § 2D1.1 *App. Note* 12 (emphasis added). It further provides that a quantity is to be excluded if the defendant establishes:

> "that he or she did not intend to provide, or was not reasonably capable of providing, the *agreed-upon quantity* of the controlled substance."

Id. (emphasis added). Thus, at the least, there must be an "agreed-upon quantity." If there is not an "agreed-upon quantity," then there is no agreement, and the defendant cannot mentally form the "intent" or have the "capability" to perform on it. If there is no agreed-upon quantity, there is no future transaction against which to measure the defendant's mental state or criminal abilities. *See United States v. Crespo*, 982 F.2d 483 (11th Cir. 1993) (negotiation with agent not in itself sufficient to prove capability).

Moreover, the guidelines' demand of an agreed-upon quantity is only one element of what needs to be established to show there is a plan for a future transaction – there must be a clear negotiation for the future transaction. A mere response by the defendant to an undercover agent's question concerning cost does not amount to a negotiation. *United States v. Foley*, 906

F.2d 1261 (8th Cir. 1990). Idle talk about drugs, price, or availability likewise is not a negotiation. *United States v. Jewel*, 947 F.2d 224 (7th Cir. 1991). Affirmative responses to the government agent's proposition for further quantities, as a basis for determining that a future transaction is planed, must be regarded with suspicion. *United States v. Crawford*, 991 F.2d 1328 (7th Cir. 1993). While a viable agreement for sale may leave some of its terms open, there must be sufficient agreement that a transaction is to actually take place. *See e.g.,* Uniform Commercial Code § 2-204. Without these details, much of a defendant's conversation with an agent is likely to be mere puffery. *United States v. Barnes*, 993 F.2d 680 (9th Cir. 1993), *cert. denied*, 513 U.S. 827 (1994); *United States v. Salazar*, 983 F.2d 778 (7th Cir. 1993).

In this case, the government did not prove even the minimum necessary to show there was a plan for a future transaction. No specific quantity was agreed upon. Further, there was no date or price established. At most, the government showed a tentative desire to establish an on-going business relationship.

D. Government Must Prove Additional Quantity With Reliable Evidence

The government must show that the evidence in support of the additional quantity is reliable. *United States v. Muniz*, 49 F.3d 36 (1st Cir. 1995); *United States v. Montoya*, 967 F.2d 1 (1st Cir. 1992), *cert denied*, 113 S.Ct. 507; *United States v. Beasley*, 2 F.3d 1551, 1561-62 (11th Cir. 1993), *cert. denied*, 512 U.S. 1240 (must be specific evidence in the record to hold defendant accountable for more than the indicted quantity).

It is not sufficient for the court to rely on the allegations of government agents alone. *United States v. Crespo*, 982 F.2d 483 (11th Cir. 1993). Here, there is nothing beyond the government's allegations, and it thus failed to offer any reliable evidence to prove the additional

quantity.

E. Evidence in this Case Is Not Sufficient for Mr. Manzanillo to Be Held Responsible for Quantities in Future Unconsummated Transactions

In this case, the evidence is insufficient to hold Mr. Manzanillo responsible for any quantity beyond that which actually changed hands.

On May 5, 1995, after a phone contact, the defendant met a government agent and supplied the agent with a one-gram sample of heroin. PSI, *Appx. to Br.* at 10-11. On May 9, 1995, the defendant met the agent again and agreed on a beeper code and price for a future transaction. Two days later the agent beeped the defendant using the code, resulting in a transaction for 31 grams of heroin. PSI, *Appx. to Br.* at 11-12. On May 18, 1995 the agent again beeped the defendant using the agreed code, resulting in a second transaction for 62 grams. PSI, *Appx. to Br.* at 12-13. Mr. Manzanillo thus sold the agent a total of 94 grams of heroin.

During their May 18 conversation, the agent and the defendant talked about their business relationship and generally discussed possible future transactions. They did not agree, however, on any terms or specific figures. They did not come to any agreement on price in future transactions, nor when a transaction might occur. Most important, while they generally discussed possibilities, they did not agree on any quantity for a future transaction. PSI, *Appx. to Br.* at 13. Their talk was at most idle. As such, there was no agreement, and no proved intent or capability to perform.

The indictments against Mr. Manzanillo contain no indication of price, date, or quantity.

The government here made no attempt to show that its evidence of an alleged agreement was reliable. Beyond the allegations of the government agent, there is no evidence that the

alleged negotiation took place, what it comprised, or that it resulted in a cognizable agreement.

Accordingly, the district court erred in sentencing Mr. Manzanillo to any penalty beyond that based on the 94 grams he sold to the agent.

F. In Cases Where Defendants Have Been Sentenced For Additional Quantities, the Government Had Reliable Evidence of an Agreement for a Future Transaction and of the Additional Quantity

By contrast, in cases where defendants have been sentenced for negotiated quantities the government has been reliably able to demonstrate, with real evidence, that there was a plan for a future transaction at a specified quantity, and that the defendant had the intent and capability to follow through on the agreement.

In *United States v. Argencourt*, 996 F.2d 1300 (1st Cir. 1993), there was a taped conversation between the defendant and the government agent to supply a quantity of cocaine. In *United States v. Legarda*, 17 F.3d 496 (1st Cir. 1994), *cert. denied*, 513 U.S. 820, there was a tape recording of the transaction at which future deals were discussed, and testimony by the government agent showing that the defendant specifically agreed to provide additional drugs in a future transaction. In *United States v. Muniz*, 49 F.3d 36 (1st Cir. 1995), there was a video tape of the conversation of the unconsummated negotiation and evidence from two witnesses as to both intent and capability. In *United States v. Wihbey*, 75 F.3d 761 (1st Cir. 1996), there was testimony from three witnesses about the negotiated amount for future unconsummated transactions, that the defendant had the specified quantities available, and that he wanted to go through with the deal. In *United States v. Marrero-Rivera*, 124 F.3d 342 (1st Cir. 1997), the government produced the beeper with the message on it indicating the amount negotiated, and the testimony of the person who transmitted the message. In *United States v. Blanco*, 888 F.2d

907 (1st Cir. 1989), there was evidence contained in indictments of greater quantities, and it was acknowledged that the amount actually sold was intended as a mere sample for the greater quantity. In *United States v. Montoya*, 967 F.2d 1, (1st Cir. 1992), *cert denied* 113 S.Ct. 507, the government offered informants who had knowledge of the defendant's capability to supply a further quantity and bases for estimating how much that might be.

In all these cases, the government was able to show by reliable evidence that the negotiation actually took place and that an agreement resulted, that the agreement was for a definite quantity and in some cases a specified price and time, and that the defendant had the intent and capability to perform. In Mr. Manzanillo's case, however, there is nothing more than the agent's allegations – which lack specificity as to quantity, price, time, intent, and capability. Accordingly, with the extra measure of caution that must be applied, the government has not shown by a preponderance that Mr. Manzanillo should be held responsible for any more than the 94 grams he sold to the agent.

III. Mr. Manzanillo Was Prejudiced by the Ineffective Assistance of His Attorney

This court may review ineffective assistance of counsel without the issue being raised below when the factual basis for the allegation is apparent on the face of the record. *United States v. Natanel*, 938 F.2d 309 (1st Cir. 1991).

A Defendant is denied his right to counsel when the attorney's performance falls below an objective standard of reasonableness such that "'there is a reasonable probability . . . that the result of the proceeding would have been different,'" and that the defendant suffered prejudice. *Scarpa v. Dubois*, 38 F.3d 1, 8 (1st Cir. 1994); *Strickland v. Washington*, 466 U.S. 668 (1984).

Mr. Manzanillo accepted responsibility for a quantity of heroin between 100 and 400 grams. *7/29/96 Plea Transcript.* at 6-7; PLEA AGREEMENT ¶ 3.a, *Appx. to Br.* at 2. The evidence, however, shows that at most 94 grams were transacted. The plea agreement was signed by the defendant and his attorney, thus making clear it was signed with the advice of counsel

A five-year mandatory minimum sentence arguably applies for quantities over 100 grams. Mr. Manzanillo's attorney did contest the paucity and unreliability of the evidence offered to prove the supposed additional quantity upon which the mandatory minimum sentence was imposed, nor that the government failed to meet its burden concerning intent and capability to produce the additional quantity. In addition, the attorney did not bring to the court's attention the law showing that minimum mandatory sentence does not apply unless the violation itself was for more than 100 grams.

A defendant is prejudiced by ineffective assistance of counsel when his attorney is "seemingly unaware" of the relevant law. *Suveges v. United States*, 7 F.3d 6, 10 (1st Cir. 1993).

While it is not ineffective assistance for failing to object to a minimum mandatory sentence when the court cannot impose less, *Santana v. United States*, 98 F.3d 752 (3rd Cir. 1996), the defendant is prejudiced when, as here, the court should not have imposed the mandatory minimum, and the government expressed its intention to otherwise seek less.

The attorney's ineffectiveness is further shown by his apparent advice to the defendant that he should accept responsibility for his leadership role in the drug conspiracy. PLEA AGREEMENT ¶ 3.c, *Appx. to Br.* at 2. Even the probation department, whose job is not to advocate for the defendant, found insufficient evidence of a leadership role. PSI, *Appx. to Br.* at 29-30.

It is not clear why Mr. Manzanillo's first attorney advised him to enter such an agreement. It is clear, however, that his *second* attorney recognized the ineffectiveness of the first attorney and attempted to rectify the situation. He complained about the prior attorney, *3/13/97 Sent. Transcript.* at 9-10, and filed a motion to withdraw the plea. DEFENDANT'S MOTION TO WITHDRAW AND VACATE HIS PLEA OF GUILTY, *App. to Br.* at 32-33. The second attorney ultimately decided to leave the plea intact, *3/13/97 Sent. Transcript* at 3, because the government at that late stage was unwilling to negotiate. *Id.* at 10.

Had Mr. Manzanillo's original attorney not allowed his client to plea to the additional quantity, there is a reasonable probability that his sentence would have been less. Accordingly, this case should be remanded for re-sentencing without regard to the additional quantity.

CONCLUSION

Mr. Manzanillo requests that this court remand his case to the district court for re-sentencing without regard to the additional quantity alleged by the government.

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

Respectfully submitted,
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Dated: August 6, 2000

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I hereby certify that on August 6, 2000, a copy of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to Michael D. Ricciuti, Assistant United States Attorney.

Dated: August 6, 2000

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B) and that it contains no more than 3,948 words.

Dated: August 6, 2000

Joshua L. Gordon, Esq.

APPENDIX

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