

12-208

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

LUT MUHAMMAD,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DEFENDANT-APPELLANT'S INITIAL BRIEF

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STATEMENT OF JURISDICTION

The district court (Alvin W. Thompson, C.J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. This Honorable Court has appellate jurisdiction over the Judgment entered on January 11, 2012 and timely appealed on January 17, 2012, pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Mr. Muhammad asserts that the Judgment is a final order that disposes of all litigation pending before the district court.

STATEMENT OF THE ISSUES

I. Did the district court err in sentencing Mr. Muhammad based upon drug quantities that were neither voluntarily pleaded nor proved to a jury?

II. Did the district court clearly err in finding, for purposes of sentencing, that the Government established by a preponderance of the evidence that Mr. Muhammad purchased over 2.8 kilograms of cocaine base?

STATEMENT OF THE CASE

The Defendant-Appellant, Mr. Muhammad, hereby appeals the Judgment and Sentence imposed pursuant to his plea agreement. Mr. Muhammad was charged with one count of conspiracy to possess with the intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, with six counts of possession with intent to distribute or distribution of 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and with four counts of distribution of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C).

On September 7, 2010, Mr. Muhammad pled guilty to the charges against him in a written plea agreement. The terms of the plea agreement refer to drug quantities and potential sentences that were no longer applicable because of the enactment of the Fair Sentencing Act. The parties did not stipulate to the quantity of the drugs as part of the agreement.

On January 4, 2012, the district court conducted an evidentiary hearing to determine the quantity of cocaine base attributable to the defendant (the “Quantity Hearing”). At the Sentencing Hearing conducted on January 10, 2012, the district court (Alvin W. Thompson, C.J.) found that the amount of cocaine base attributable to Mr. Muhammad exceeded 2.8 kilograms and enhanced his sentence

under § 2D1.1(c) of the United States Sentencing Guidelines. Mr. Muhammad timely filed a Notice of Appeal of his sentence on January 17, 2012.

STATEMENT OF THE FACTS

On December 2, 2009, a federal grand jury sitting in Bridgeport, Connecticut, returned a six-count Indictment against Mr. Muhammad and sixteen co-defendants charging various narcotics offenses. (*See* J.A. Vol. I at 4). On February 3, 2010, the grand jury returned a six-count Superseding Indictment against Mr. Muhammad and other co-defendants. (*See* J.A. Vol. I at 7).

The grand jury returned a twelve-count Second Superseding Indictment on July 9, 2010, charging Mr. Muhammad and the remaining co-defendants with one count of conspiracy to possess with the intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and with six counts of possession with intent to distribute or distribution of 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and four counts of distribution of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C). (J.A. Vol. I at 21-27).

On August 3, 2010, President Obama signed the Fair Sentencing Act of 2010 into law. *See* PUB. L. NO. 111-220, 124 STAT. 2372 (August 3, 2010). The sentencing amendments enacted in the Fair Sentencing Act changed the quantity thresholds for cocaine base, requiring 280 grams or more of cocaine base to trigger

a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(iii). *See* 21 U.S.C. § 841(b)(1)(A)(iii).

On September 7, 2010, more than one month after the enactment of the Fair Sentencing Act, Mr. Muhammad entered into a written Plea Agreement with the Government and pled guilty to each count against him in the Second Superseding Indictment. (J.A. Vol. I at 29). According to the Government’s Sentencing Memorandum, the Attorney General originally took the position that the “Act’s new threshold quantities for mandatory minimum penalties applied only to offense conduct that occurred on or after the date of its enactment.” (J.A. Vol. II at 236). Thus, because of the Government’s flawed interpretation of the law at the time, the Plea Agreement stipulates to a quantity threshold—50 grams—that is too low to satisfy 21 U.S.C. § 841(b)(1)(A)(iii), as amended by the Fair Sentencing Act. (*See* J.A. Vol. I at 30; 21 U.S.C. § 841(b)(1)(A)(iii)). The Plea Agreement also erroneously states that Mr. Muhammad faced a twenty-year mandatory minimum sentence as a consequence of his conspiracy charge under 21 U.S.C. § 841(b)(1)(A) and his prior criminal history. (J.A. Vol. I at 30-31).

Though Mr. Muhammad did stipulate that he participated in a conspiracy to possess and distribute fifty (50) or more grams of cocaine base during a period that spanned from June 2009 through December 2009, the parties did not stipulate to the exact quantity of cocaine in the plea agreement or to an offense level under the

Sentencing Guidelines. (See J.A. Vol. I at 29-36; J.A. Vol. II at 228). The Government recognized in its Sentencing Memorandum that the Fair Sentencing Act applied to Mr. Muhammad and that he “was not charged with, nor did he plead guilty to, an offense carrying a quantity threshold in excess of 280 grams of crack cocaine.” (J.A. Vol. II at 238). Therefore, during the sentencing phase of the litigation, the Government proceeded under 21 U.S.C. § 841(b)(1)(B), which requires a finding of only 28 grams or more of cocaine base. *Id.*; 21 U.S.C. § 841(b)(1)(B)(iii).

On January 4, 2012, the district court held the Quantity Hearing to determine the amount of cocaine base that could be attributed to Mr. Muhammad for the purpose of calculating his offense level under § 2D1.1(c) of the Sentencing Guidelines. (J.A. Vol. II at 88, 90-91). Although the threshold for conviction under 21 U.S.C. § 841(b)(1)(B)(iii) is only 28 grams, counsel for the Government sought to enhance Mr. Muhammad’s sentence by introducing evidence at the Quantity Hearing that he was responsible for well over one hundred times that amount—nearly 4 kilograms. (J.A. Vol. II at 94, 218).

Counsel for Mr. Muhammad disputed this calculation. (J.A. Vol. II at 218). Specifically, defense counsel took issue with 1,040 grams that were attributed to Mr. Muhammad based on purported purchases made during the period between May 15 and August 28 of 2009. *Id.* Defense counsel noted that during this period

the Government had not yet secured a wiretap, and that the Government provided no evidence of recorded conversations pertaining to specific drug purchases. (J.A. Vol. II at 218-19). In addition, the drug ledgers offered by the Government contained no dates that could corroborate the quantity attributed to Mr. Muhammad during this timeframe. *Id.* Defense counsel thus argued that the Government provided insufficient specific evidence regarding the quantity of drugs purchased during this period and relied almost exclusively on the rough estimates of a cooperating co-defendant, whose testimony at the Quantity Hearing varied from prior testimony before the grand jury and at a proffer session.¹ *Id.*

Mr. Muhammad also disputed the Government's claim that \$4,348 in cash seized from his apartment could be used to increase the quantity calculation. (J.A. Vol. II at 219-20). Defense counsel noted that both Mr. Muhammad and his girlfriend, Latosha Smith, had legitimate jobs at the time of the seizure, and that the money could have come from their employment rather than drug sales. *Id.* Based on these arguments, Mr. Muhammad argued that the Government did not establish by a preponderance of the evidence that he purchased more than 2.8 kilograms of cocaine base during the course of the conspiracy. *Id.*

¹ Mr. Muhammad conceded that the Government provided sufficient evidence to establish that he sold approximately 65 grams during this period to a cooperating witness for the Government. (*See* J.A. Vol. II at 259).

Mr. Muhammad raised these objections once more at the Sentencing Hearing, but the district court found them unpersuasive. (J.A. Vol. II at 258-61, 264-68). With respect to the purchases allegedly occurring between May 15 and August 28, the district court concluded that Mr. Muhammad purchased 1,040 grams. (J.A. Vol. II at 266). The court relied upon the testimony of William Pena, a co-defendant, as the basis for its conclusion. (J.A. Vol. II at 266-67).

The relevant testimony, as provided by Mr. Pena on direct examination during the Quantity Hearing, is as follows:

Q. Were you dealing with him in the spring of 2009?

A. Yes.

Q. From the spring of 2009 up until his arrest, was he a regular customer of yours?

A. Yes.

Q. Were there any intervals from the spring of 2009 to your arrest where he was not buying from you?

A. No.

Q. At this point what's he dealing -- what drug was he buying from you?

A. Crack.

Q. Just crack?

A. Mainly crack, yes. He would ask for powder but rarely.

Q. Primarily crack?

A. Yes.

Q. And if it was powder, he'd specify powder?

A. Yes.

Q. When he'd make a purchase, the default -- sorry -- unless he specified otherwise, the understanding was it was crack cocaine?

A. Yes.

.....

Q. Starting in the spring of 2009, how much was -- in the beginning of spring 2009, how much was the defendant, Mr. Muhammad, buying from you?

A. July?

Q. In the spring.

A. In the spring. Sixty, 50, 70, 80.

Q. Starting in the spring. But in May of 2009, May and June, what was he buying from you?

A. Probably 50, 40.

Q. And approximately how often would he come to buy?

A. Every four days, five days.

.....

Q. Forty, 50 grams per time when he would come to see you?

A. Yes.

Q. Did that -- from that point until you were arrested, did that number change?

A. Yes.

Q. How did it change?

A. It went up.

Q. Gradual increases or big increases?

A. Gradually.

Q. Was there a point when it went down?

A. Yes.

Q. What happened?

A. I think somebody stole from him and he went down again to buying 50, 60.

Q. At that point what happened?

A. He started buying low again and work his way up again.

Q. Aside from that time, was there ever – aside from when his drugs were stolen, did he ever go down significantly in quantity, how much he was buying from you?

A. Maybe once. Maybe if it was bad he would lose money and would come and buy less.

.....

(J.A. Vol. II at 112-16).

Mr. Pena admitted on cross-examination that he was cooperating with the Government in exchange for receiving a lower sentence. (J.A. Vol. II at 163). Mr. Pena also admitted that during a proffer session with federal agents he stated that

Mr. Muhammad “started to buy 20 to 30 grams” of cocaine base before moving to purchases of 80 grams and higher. (J.A. Vol. II at 167-68).

Based on the evidence introduced at the Quantity Hearing, the district court attributed 3,829 grams of cocaine base to Mr. Muhammad, including 1,040 grams from the disputed period between May 15 and August 28 and 124 grams based upon the cash found in the apartment at the time of his arrest. (J.A. Vol. II at 266, 268). Under § 2D1.1(c) of the Sentencing Guidelines, this quantity provides for an offense level of 36. (J.A. Vol. II at 264; U.S.S.G. § 2D1.1(c)). After granting the Government’s motion for a three-level reduction for acceptance of responsibility, the district court calculated Mr. Muhammad’s offense level to be 33. (J.A. Vol. II at 261, 271). The district court imposed a twenty-year sentence on each of the charged offenses to be served concurrently with credit for time served and an eight-year term of supervised release. (J.A. Vol. II at 298).

On January 17, 2012, Mr. Muhammad filed a Notice of Appeal from the judgment entered by the district court. (J.A. Vol. II at 301). This appeal follows.

SUMMARY OF ARGUMENT

The district court erroneously sentenced Mr. Muhammad based upon drug quantities neither voluntarily pleaded nor proved to a jury. Drug quantities specified under 21 U.S.C. § 841 are elements that must be pleaded or proved to a jury where the quantity of the contraband is used to support a conviction on an

aggravated drug offense. Mr. Muhammad's plea agreement refers to drug quantities and penalties no longer in force at the time of its entry because of the passage of the Fair Sentencing Act.

Rather than renegotiating or correcting the outdated provisions in the agreement, the Government chose to hold Mr. Muhammad to its terms and proceed under 21 U.S.C. § 841(b)(1)(B) instead of 21 U.S.C. § 841(b)(1)(A). Then, during the sentencing phase, the Government sought to secure a similar sentence to the one it originally contemplated by attributing more than one hundred times the quantity of drugs required for a conviction under the terms of the amended statute. Because those quantities were neither pleaded nor proved to a jury, this Court should vacate the procedurally unreasonable sentence imposed upon Mr. Muhammad.

In addition, the district court erred in finding that the Government established by a preponderance of the evidence that over 2.8 kilograms of cocaine base were attributable to Mr. Muhammad. The Government adduced no specific evidence regarding the quantity of contraband purchased by Mr. Muhammad between May 15 and August 28 of 2009. Although Mr. Pena provided vague estimations regarding the frequency and average amount of purchases allegedly made during this period, the testimony regarding the quantity varied so widely that accurate approximation was impossible. Thus, the evidence regarding the quantity

of contraband purchased during this period lacks sufficient specificity to support the enhanced sentence imposed pursuant to § 2D1.1(c) of the Sentencing Guidelines. Likewise, the district court should not have attributed 124 grams based upon cash seized from Mr. Muhammad. Because Mr. Muhammad and his girlfriend lived in the apartment and had gainful employment at the time, the district court clearly erred in disregarding a plausible legal explanation for the cash found at the apartment.

ARGUMENT

I. THE DISTRICT COURT ERRED IN SENTENCING MR. MUHAMMAD BASED UPON DRUG QUANTITIES NEITHER VOLUNTARILY PLEADED NOR PROVED TO THE JURY.

A. Standard of Review

This Court reviews a challenged sentence for procedural and substantive unreasonableness. *United States v. Archer*, 671 F.3d 149, 161 (2d Cir. 2011). Whether a district court commits a procedural error in its interpretation of the Guidelines is a question of law, which is reviewed *de novo*. *Id.*

B. Argument on the Merits

The district court erred procedurally in sentencing Mr. Muhammad based upon drug quantities neither voluntarily pleaded nor proved to a jury. Drug quantities specified under 21 U.S.C. § 841 are elements that must be pleaded or proved to a jury where the quantity of the contraband is used to support a

conviction on an aggravated drug offense. *United States v. Gonzalez*, 420 F.3d 111, 115 (2d Cir. 2005). Hence, a guilty plea, standing alone, without a defendant's stipulation or admission to the quantity of the contraband, cannot be used to support a conviction under § 841(b)(1)(A) or (b)(1)(B). *See id.*

In *Gonzalez*, the defendant agreed to sell a confidential informant one kilogram of crack cocaine. *Id.* at 1165. The defendant provided the informant with a small sample of the cocaine base to demonstrate its quality. *Id.* However, before the parties could consummate the arranged kilogram transaction, the defendant fled the scene, avoiding arrest and seizure of the proffered drugs. *Id.*

The defendant was charged with and pled guilty to conspiracy to distribute and possess with intent to distribute fifty grams or more of cocaine base. *Id.* The defendant disputed the quantity of the drugs involved during the plea negotiation as well as during the plea allocution. *Id.* at 116-17.

At a subsequent hearing on the drug quantity, the government introduced recorded telephone conversations in an effort to demonstrate that the defendant conspired to sell a kilogram of cocaine base. *Id.* at 118. The defendant, for his part, argued that he never intended to sell the kilogram of crack. *Id.* Instead, he claimed that he intended to sell the informant a counterfeit, non-controlled substance he called "nacona." *Id.*

The district court found that the defendant lacked credibility and that the government carried its burden regarding the quantity of the cocaine. *Id.* After the court rendered its ruling, the defendant moved to withdraw his plea. *Id.* at 118-19. Though troubled by the circumstances surrounding the plea, the district court denied the motion. *Id.* The district court thereafter sentenced the defendant to 240 months of incarceration based on the mandatory minimum sentence required under § 841(b)(1)(A). *Id.* at 119-20. The defendant appealed the denial of his motion to withdraw his plea. *Id.*

This Court reversed the decision. *Id.* at 120. It explained that the drug quantity is an element of an aggravated drug offense. *Id.* at 124. As such, a defendant cannot be convicted pursuant to § 841(b)(1)(A) or (b)(1)(B) unless the statute's prescribed drug quantity is proved beyond a reasonable doubt to a jury or admitted by the defendant. *Id.* at 125.

Under *Gonzalez*, Mr. Muhammad's sentence cannot be sustained. As in *Gonzalez*, the Government charged Mr. Muhammad with conspiracy to possess with the intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. § 841(b)(1)(A). (J.A. Vol. I at 21-22). Mr. Muhammad pled guilty to the charges brought, but, as in *Gonzalez*, the parties did not stipulate to the exact quantity of drugs at issue. (*See* J.A. Vol. I at 29-36; J.A. Vol. II at 228). Moreover, the factual basis for the Plea Agreement cannot support his conviction

because its terms refer to statutory provisions and penalties not in force at the time of entry.

Mr. Muhammad stipulated in the Plea Agreement that the conspiracy involved 50 grams or more of cocaine base. (*See* J.A. Vol. I at 30). Yet, after the passage of the Fair Sentencing Act, the statutory provision at issue required 280 grams or more of cocaine base to support a conviction. *See* 21 U.S.C. § 841(b)(1)(A)(iii).² As the Government candidly admits in its Sentencing Memorandum, Mr. Muhammad “was not charged with, nor did he plead guilty to, an offense carrying a quantity threshold in excess of 280 grams of crack cocaine.” Therefore, the statutory provision underlying Count I of the Second Superseding Indictment, which refers to 21 U.S.C. § 841(b)(1)(A), varies from the statutory provision underlying the Judgment entered on Count I, which refers to 21 U.S.C. § 841(b)(1)(B). (*Compare* J.A. Vol. I at 21-22 *with* J.A. Vol. II at 298).

Not only did Mr. Muhammad enter into the Plea Agreement under an inapplicable statutory provision, 21 U.S.C. § 841(b)(1)(A), he did so under the threat of the draconian penalties provided by its terms prior to amendment by the Fair Sentencing Act. The Plea Agreement states that Mr. Muhammad would be subject to a mandatory minimum sentence of 20 years of incarceration under §

² The United States Supreme Court recently ruled that the Fair Sentencing Act applies to criminal defendants whose conduct occurred prior to its enactment. *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012).

841(b)(1)(A). (J.A. Vol. I at 31). Yet, as the Government concedes in its Sentencing Memorandum, that mandatory minimum sentence did not apply after the amendments to § 841(b)(1)(A). (J.A. Vol. II at 238).

Instead of correcting the flaws in the Plea Agreement or renegotiating its terms in light of the more lenient statutory scheme, the Government chose to proceed under § 841(b)(1)(B) instead of § 841(b)(1)(A). *See id.* It appears that the Government assumed that the 50 grams to which Mr. Muhammad pled guilty would satisfy the new 28-gram threshold under § 841(b)(1)(B).

This is correct as a matter of arithmetic. However, Mr. Muhammad pled guilty under the wrong statutory provisions and under the menace of a mandatory minimum sentence that Congress had found “unfairly long.” *Dorsey*, 132 S. Ct. at 2333. It is safe to assume that Mr. Muhammad stood at a decided disadvantage during the plea negotiations because the Government mistakenly informed him that his baseline sentence could not vary from the 20-year mandatory minimum sentence. The district court nevertheless relied upon the factual basis set forth in the Plea Agreement to convict Mr. Muhammad.

It is unclear from the record whether the change in the law was ever adequately explained to Mr. Muhammad or whether he would have agreed to the plea if he had been apprised of the correct state of the law. What is clear is that he entered into his plea bargain under the terms of an oppressive statutory scheme no

longer in force at the time of his plea. This casts a long shadow over the voluntariness of his plea and, by extension, the factual basis for his conviction.

Equally troubling, the Government does not appear to have announced prior to the plea that it intended to substantially enhance Mr. Muhammad's penalty by introducing evidence purporting to show that he purchased more than 2.8 kilograms of cocaine base. The original Presentence Report concluded that Mr. Muhammad only could be held criminally liable for 2.6 kilograms of cocaine base. (J.A. Vol. III at 311). The Government had no need to introduce any additional quantity evidence under its interpretation of the law at the time of the plea, as a 20 year sentence was mandated by § 841(b)(1)(A) prior to the Fair Sentencing Act.

However, after belatedly concluding that the Fair Sentencing Act applied to Mr. Muhammad, the Government realized that it needed to attribute more than 2.8 kilograms—more than one hundred times the amount of drugs required for conviction under § 841(b)(1)(B)—in order to reach the 20-year sentence it envisioned at the time of the plea. Thus, on December 21, 2011, the Government provided an addendum to the Presentence Report stating that Mr. Muhammad would be subject to liability for the additional 1,040 grams. (*See* J.A. Vol. III at 323). Because Mr. Muhammad had already pleaded guilty, the Government only needed to offer enough evidence of this unconvicted conduct at the Quantity Hearing to meet its burden by a preponderance of the evidence.

The Government ultimately secured the sentence it sought. However, it did so using drug amounts neither voluntarily pleaded by Mr. Muhammad nor proven before a jury of his peers. Under *Gonzalez*, his conviction is procedurally unreasonable and must be vacated.

II. THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT THE GOVERNMENT ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THAT MR. MUHAMMAD PURCHASED 2.8 KILOGRAMS OF COCAINE BASE DURING THE COURSE OF THE CONSPIRACY.

A. Standard of Review

At a sentencing hearing, the burden is on the Government to prove the facts in support of a Guidelines application by a preponderance of the evidence. *Archer*, 671 F.3d at 161. This Court reviews a district court’s factual conclusions for clear error. *Id.* A court commits clear error when the appellate court is “left with the definite and firm conviction that a mistake has been committed.” *Id.* (citation and quotation omitted).

B. Argument on the Merits

The district court lacked a sufficient evidentiary basis for its factual conclusion that Mr. Muhammad purchased in excess of 2.8 kilograms of cocaine base during the course of the conspiracy. In order to impose a quantity-based enhancement, the district court must base its findings on “specific evidence” that demonstrates the required quantity of contraband. *United States v. Shonubi*

(“*Shonubi I*”), 998 F.2d 84, 89 (2d Cir. 1993); *United States v. Shonubi* (“*Shonubi II*”), 103 F.3d 1085, 1090 (2d Cir. 1997); *United States v. Martinez*, 133 F. App'x 762 (2d Cir. 2005).

The defendant in the *Shonubi* decisions made eight trips to Nigeria. On his return from the eighth trip, the defendant was arrested for smuggling 427.4 grams of heroin into the United States. *Shonubi I*, 998 F.2d at 86. After a jury trial, the district court enhanced his sentence based on a finding that he imported 3,419.2 grams of heroin. *Id.* at 87. The district court reached this factual conclusion by multiplying the 427.4 grams by eight, the number of trips made to Nigeria. *Id.* at 87.

This Court reversed the enhancement. *Id.* at 90. It observed that case law “uniformly requires specific evidence—*e.g.*, drug records, admissions or live testimony—to calculate drug quantities for sentencing purposes.” *Id.* at 89. Though the *Shonubi I* Court agreed with the sentencing court’s finding that the trips to Nigeria were part of the same course of conduct as the smuggling offense, it rejected the district court’s factual findings regarding the quantity, which were “necessarily predicated on surmise and conjecture.” *Id.* at 89, 90. Accordingly, as the findings were clearly erroneous, it remanded the matter for resentencing. *Id.* at 91.

On remand, the district conducted an extensive hearing in an effort to determine the amount of the heroin attributable to the defendant. *Shonubi II*, 103 F.3d 1085 at 1088. It took testimony from various experts on statistical analysis, examined reports of heroin quantities seized from 117 Nigerian heroin swallows arrested at the same airport during the relevant period, and even surveyed federal judges to obtain their opinions concerning the practice of heroin swallowing. *Id.* In the end, the district court again concluded in a 177 page opinion that the defendant carried between 1,000 and 3,000 grams of heroin during the course of his eight trips to Nigeria and sentenced him accordingly. *Id.*

This Court once again reversed the district court. *Id.* at 1087. The *Shonubi II* Court reiterated that reliance on unconvicted conduct for the purpose of quantity-based sentencing enhancement requires “specific evidence” that “points specifically to a drug quantity for which the defendant is responsible.” *Id.* at 1089-90. The items of evidence introduced, though they related specifically to the defendant, were not “‘specific evidence’ of the drug quantities carried by Shonubi on his prior seven trips.” *Id.* In the absence of such specific evidence, this Court vacated the sentence and remanded the matter for resentencing. *Id.* at 1093.

Here, as in *Shonubi I*, the district court relied upon evidence necessarily predicated on surmise and conjecture to support the amount it attributed to Mr. Muhammad between May 15 and August 28 of 2009. The district court did not

rely on drug records or ledgers or on admissions offered in support of the quantity at issue during this period. Though the Government introduced the live testimony of Mr. Pena, his testimony is too vague to support any finding regarding the quantity purchased by Mr. Muhammad. (*See* J.A. at 111-115).

At no point does Mr. Pena refer to a specific amount purchased on a specific day during this timeframe. *See id.* Mr. Pena acknowledges that he testified that Mr. Muhammad purchased quantities as low as 20 grams. (J.A. Vol. II at 167). Mr. Pena admits that Mr. Muhammad bought some quantity of powder cocaine, which would not support the quantity enhancement, as well as the cocaine base. (J.A. Vol. II at 113, 164, 167). He also admits that the quantity purchased by Mr. Muhammad fluctuated; he testified that if Mr. Muhammad lost money he would purchase less, but did not specify how much less. (J.A. Vol. II at 115).

In spite of the vagueness of Mr. Pena's testimony, the district court accepted the Government's invitation to determine the quantity by averaging the weight of cocaine base allegedly bought by Mr. Muhammad on each trip—40 to 50 grams—and multiplying this amount by an estimated number of trips taken to the purchase drugs from the Pena organization—one trip every four to five days—to arrive at the figure of 1,040 grams.³ (*See* J.A. Vol. III at 323; J.A. Vol. II at 266).

³ The Second Addendum to the Presentence Report states that it uses a “conservative estimation” of 100 grams per week. (J.A. Vol. III at 323). This estimate is not conservative. If Mr. Muhammad took one trip every five days and

Such haphazard averaging of drug quantities is impermissible under the law of this Circuit. In *United States v. Martinez*, 133 F. App'x 762 (2d Cir. 2005), for instance, this Court rejected the attribution of more than 150 kilograms of cocaine to a defendant reached by averaging three quantities known to have been smuggled by the defendant and multiplying that average by the number of trips taken. *Id.* at 764. The *Martinez* Court found that the “average quantity of cocaine” was not “specific evidence” of the quantity of cocaine actually transported by the defendant. *Id.*

As in *Martinez*, the district court here resorted to averaging the amount of drugs because it lacked *specific* evidence regarding the actual quantity involved in each of the purported purchases arising during the disputed timeframe. Because this averaging does not meet the “specific evidence” requirement, the district court clearly erred in attributing the 1,040 grams to Mr. Muhammad.

In addition, the district court erred in attributing 124 grams of cocaine based on the amount of cash seized in Mr. Muhammad’s apartment. The Government did not dispute that Mr. Muhammad lived with his girlfriend. Nor did it dispute that both Mr. Muhammad and his girlfriend both had jobs at the time of seizure,

purchased 40 grams each trip, then he would buy 8 grams per day. 8 grams multiplied by 95 days, the length of the disputed period, equals 760 grams—not 1,040 grams. However, neither method of calculation satisfies the specificity required under relevant precedent.

which provides a plausible explanation for the presence of the cash seized at the time of his arrest.

The Government relied upon *United States v. Jones*, 531 F.3d 163 (2d Cir. 2008), at the Quantity Hearing. (J.A. Vol. II at 217). That case, however, is readily distinguishable because (1) the money in *Jones* was seized at an uninhabited apartment that served no purpose besides the manufacture and distribution of crack, and (2) the defendant had no other means of employment that could be a legitimate source of the money. *Id.* at 177. By contrast, Mr. Muhammad and his girlfriend lived in the apartment where the money was seized, and both had jobs at the time of the seizure. Accordingly, because the district court ignored a plausible legal explanation for the presence of the money, its finding that the money came from drug proceeds is clearly erroneous.

This Court should reverse the clearly erroneous findings of the district court described herein and remand this matter for further proceedings.

CONCLUSION

Based upon the foregoing arguments and legal authority, Defendant-Appellant, LUT MUHAMMAD, respectfully requests that this Honorable Court vacate the Judgment and Sentence and remand this matter to the district court.

DATED this 25th day of July, 2012.

Respectfully submitted,

/s/ Robert L. Sirianni

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 2012, I filed the foregoing with the Clerk of the Court and served opposing counsel with a copy via Federal Express.

/s/ Robert L. Sirianni

ROBERT L. SIRIANNI, ESQUIRE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman Font.

/s/ Robert L. Sirianni

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