1 EXHIBIT B

2 (Partial Transcript of Sentencing Hearing held June 28th,
3 2004, USA v. Ducan Fanfan, Docket 03-47-P-H.)

4 THE COURT: The non lawyers in the courtroom
5 probably have wondered what the lawyers and I have been
6 talking about with recurring reference to Blakely.

7 Last week on Thursday, the United States Supreme Court
8 handed down a decision called Blakely v. Washington in which
9 they, the majority, the court, that is, basically
10 invalidated the state of Washington's sentencing procedures.
11 And ever since Thursday morning, Judges and lawyers and law
12 professors and newspapers and other commentators have been
13 debating what it means for sentencing generally in the
14 United States in a variety of state courts as well as what
15 it means for the Federal Sentencing Guidelines. And that's
16 why we have continually referred to it and what its impact
17 might be.

18 I am not going to await further briefing, it would be I
19 think unfair to this defendant at this point to continue to
20 delay his sentence. He has been convicted now since early
21 last October. I'm aware as I may have said earlier that
22 being confined in a temporary state institution is not the
23 best position even for someone who has been convicted, but
24 rather, there's a desire to get a final assignment to the
25 federal system where there are programs that can be of an

1 advantage rather than simply being housed temporarily in
2 what's basically a rented space that the Marshal Service
3 obtains from our local facilities without a lot of programs
4 available.
5 The lawyers and Judges have had the decision since
6 Thursday, so we've had time to deliberate upon it. I'm not
7 suggesting that more sophisticated arguments can't be
8 provided over the weeks and months ahead, undoubtedly there
9 will be, but they can be addressed in the Court of Appeals.
10 I think that as the trial Judge, sentencing Judge, my
11 obligation is to go ahead and do the best I can with the
12 Supreme Court decision. This case itself has already had at
13 least a couple of rounds of sentencing briefing, and I think
14 it would not be appropriate to delay further. So I'm going
15 to go ahead and rule based upon my understanding of what the
16 Blakely decision means.
17 As Ms. Kazanjian pointed out, Blakely does not deal
18 directly with the federal guidelines. It dealt with the
19 Washington state system. And according to Footnote 9 of the
20 majority opinion, the court said that "Federal Guidelines
21 are not before us, and we express no opinion on them."
22 That's a direct quote.
23 Of course as a subordinate federal Judge, I must
24 faithfully follow the logic and principle of the Supreme
25 Court, and since this is its most recent pronouncement, if

1 it's contrary to earlier First Circuit decisions or even
2 earlier Supreme Court decisions, I must follow it in
3 preference to those earlier statements. So I have to
4 examine carefully what it is that Blakely tells us.
5 According to Blakely, and I'm quoting directly here
6 now, "Our precedents make clear, however, that the
7 'statutory maximum' for Apprendi purposes is the maximum
8 sentence a judge may impose solely on the basis of the facts
9 reflected in the jury verdict or admitted by the defendant."
10 "In other words, the relevant 'statutory maximum' is
11 not the maximum sentence a judge may impose after finding
12 additional facts, but the maximum he may impose without any
13 additional findings. When a judge inflicts punishment that
14 the jury's verdict alone does not allow, the jury has not
15 found all the facts 'which the law makes essential to the
16 punishment,' and the judge exceeds his proper authority."
17 That's the end of the quotation, I've admitted -- I've
18 omitted the various citations.
19 Moreover, the Blakely court in adhering to the
20 principles of its earlier Apprendi decision states at
21 another point, and I quote, "Apprendi carries out this
22 design by ensuring that the judge's authority to sentence
23 derives wholly from the jury's verdict. Without that
24 restriction, the jury would not exercise the control that
25 the Framers intended." That's the end of that quotation.

1 And one other quotation near the end of the opinion,
2 "As Apprendi held, every defendant has the right to insist
3 that the prosecutor prove to a jury all facts legally
4 essential to the punishment."
5 Now if that reasoning of Blakely applies here, all the
6 jury verdict permits us to conclude in this case is that
7 Mr. Fanfan was guilty of a conspiracy and that it involved
8 at least 500 grams of cocaine powder.
9 The verdict from the jury permits no conclusion as to
10 how much above the 500 grams the conspiracy involved. The
11 jury verdict does not permit us to reach a conclusion about
12 crack cocaine. Crack cocaine was not even charged in the
13 indictment. And the verdict does not permit us any
14 conclusion as to this defendant's leadership role in the
15 conspiracy.
16 I certainly have views on those subjects, and I've made
17 my findings earlier this morning. After all, I sat through
18 the trial, I heard the testimony. I've read the presentence
19 report. I heard the testimony at the sentencing hearing
20 today as well as at trial.
21 And I do have views about that which I've expressed in
22 my guideline findings, but if I take solely what I can infer
23 or deduce from the jury verdict, instead of the guideline
24 prison range of 188 to 235 months, based on a total offense
25 level of 36, and a Criminal History Category of I, I would

1 take solely the 500 grams of cocaine, which is a base
2 offense level of 26. I would not be able to make any
3 enhancements available if I looked only at the jury verdict.
4 So with a total offense level of 26, and a Criminal History
5 Category of I, the prison range would be 63 to 78 months.
6 In other words, five or six years instead of 15 or 16 years.
7 So what does Blakely require me as a sentencing Judge
8 to do.
9 The dissenting Justices in Blakely, those who disagreed
10 with the court's holding, as I say disagreed with the
11 holding, but they certainly agreed with the majority on the
12 consequences. According to Justice O'Connor, I'm quoting,
13 "Under the majority's approach," that's the court's
14 approach, "any fact that increases the upper bound on a
15 judge's sentencing discretion is an element of the offense.
16 Thus, facts that historically have been taken into account
17 by sentencing judges to assess a sentence within a broad
18 range -- such as drug quantity, role in the offense, risk of
19 bodily harm -- all must now be charged in an indictment and
20 submitted to a jury." End of quote.
21 According to Justice Breyer, who wrote a separate
22 dissent, I'm quoting, "Thus, a jury must find, not only the
23 facts that make up the crime of which the offender is
24 charged, but also all (punishment-increasing) facts about
25 the way in which the offender carried out that crime." End

1 of quote.

2 I conclude that without those jury findings here, in
3 other words, beyond the conspiracy and the 500 grams of
4 powder, I may not increase the sentence above the 63 to 78
5 month range to the guideline range I found earlier of 188 to
6 235 months.

7 I point out that that conclusion, although perhaps
8 surprising to those of us who have been laboring under
9 guideline sentencing for these many years, that conclusion
10 would not bother the Blakely court.

11 I quote again from the majority opinion, "The Framers
12 would not have thought it too much to demand that, before
13 depriving a man of three more years of his liberty, the
14 State should suffer the modest inconvenience of submitting
15 its accusation to 'the unanimous suffrage of twelve of his
16 equals and neighbours,' rather than a lone employee," that's
17 me, the Judge, "of the State." End of quote.

18 And of course, here we're talking about much more than
19 three years.

20 I have considered this matter at great length, and I
21 see no basis upon which to avoid the reasoning of Blakely
22 just because I'm applying federal guidelines, rather than
23 Washington state guidelines.

24 Indeed, I note that the Solicitor General of the United
25 States, the top government lawyer for the Supreme Court,

1 expressed his concern to the Supreme Court that a holding
2 such as the court came up with in Blakely would jeopardize
3 the Federal Sentencing Guidelines.
4 In Footnote 9 of the opinion, the very footnote where
5 the court said it was not making a ruling one way or the
6 other on the guidelines, the court pointed out, "The United
7 States, as amicus curiae, urges us to affirm. It notes
8 differences between Washington's sentencing regime and the
9 Federal Sentencing Guidelines but questions whether those
10 differences are constitutionally significant."
11 And I proceeded to look at the Solicitor General's
12 brief over the weekend, and I discovered that in the brief,
13 he stated "If the 'facts reflected in the jury verdict
14 alone' are the elements of the offense, petitioner's theory
15 would mandate the application of Apprendi to any facts,
16 other than the offense elements, that increase the
17 defendant's punishment." And of course that's precisely
18 what the court did in Blakely.
19 Returning back to the quotation from the brief, "Such a
20 rule would have profound consequences for the federal
21 Guidelines. As explained more fully below, facts other than
22 the elements of the offense enter into almost all of the
23 calculations under the Guidelines, beginning with the most
24 basic calculations for determining the offender's
25 presumptive sentencing range. A decision in favor of

1 petitioner," Solicitor General goes on, of course that's
2 exactly what Blakely did, he says "could thus raise a
3 serious question about whether Apprendi applies to myriad
4 factual determinations under the Guidelines." End of
5 quotation.
6 And later in the brief he said that despite some
7 differences between the federal scheme and the Washington
8 scheme, such as the ones that Ms. Kazanjian has properly
9 referred to, the location of the Commission, the third
10 branch, its composition, its role, he went on to say, and I
11 quote, "The Commission is fully accountable to Congress,
12 which can revoke or amend any or all of the Guidelines as it
13 sees fit. Congress has in fact exercised its authority to
14 amend the Guidelines. Moreover, the Sentencing Commission
15 exercises authority delegated by Congress, and the
16 Guidelines are binding legislative rules. Thus, it is not
17 entirely clear that the administrative nature of the
18 Guidelines will insulate them from Apprendi." End of quote.
19 So although the Blakely court did not address the
20 federal guidelines, I do conclude that the Solicitor General
21 was exactly correct in his briefing that a decision like
22 Blakely applies to the Federal Guidelines.
23 The Supreme Court said in Mistretta, the very first
24 decision handed down under the guidelines where the attack
25 was on separation of powers and unconstitutional delegation,

1 the court in Mistretta said, and I quote, "Although Congress
2 granted the Commission substantial discretion in formulating
3 guidelines, in actuality, it legislated a full hierarchy of
4 punishment -- from mere maximum imprisonment, to substantial
5 imprisonment, to some imprisonment, to alternatives -- and
6 stipulated the most important offense and offender
7 characteristics to place defendants within these
8 categories." End of quote.
9 It seems to me that makes the Federal Guidelines
10 exactly comparable to the Washington state scheme in all
11 respects material to the Blakely decision.
12 And finally, although the Blakely court said in the
13 footnote I've talked about a number of times now that it was
14 not ruling on the federal guidelines, Justices O'Connor,
15 Breyer, Kennedy, and Chief Justice Rehnquist all agreed that
16 the Federal Guidelines cannot be distinguished.
17 First I'll quote from Justice O'Connor, she says, "The
18 fact that the Federal Sentencing Guidelines," this is a
19 direct quote, "are promulgated by an administrative agency
20 nominally located in the Judicial Branch is irrelevant to
21 the majority's reasoning. The Guidelines have the force of
22 law, and Congress has unfettered control to reject or accept
23 any particular guideline."
24 "The structure of the Federal Guidelines likewise does
25 not provide any grounds for distinction. If anything, the

1 structural differences that do exist make the Federal
2 Guidelines more vulnerable to attack." End of quote.
3 She goes on to talk about the majority's treatment of
4 the state of Washington's guidelines. She says, quote,
5 "suggests that the hard constraints found throughout
6 chapters 2 and 3 of the Federal Sentencing Guidelines, which
7 require an increase in the sentencing range upon specified
8 actual findings -- excuse me, "specified factual findings,
9 will meet the same fate." End of quote.
10 According to Justice Breyer, I quote, "Perhaps the
11 Court will distinguish the Federal Sentencing Guidelines,
12 but I am uncertain how." End of quote.
13 And indeed, I conclude that perhaps the Supreme Court
14 can find a way to explain away Blakely in its language and
15 its reasoning, but as a trial Judge and a sentencing Judge,
16 I cannot. I must take it as it is written. I will leave it
17 to higher courts to tell me it does not mean exactly what it
18 says.
19 Accordingly, following Blakely, I conclude that it is
20 unconstitutional for me to apply the federal guideline
21 enhancements in the sentence of Ducan Fanfan, which is to
22 say, an increase in the drug quantity beyond that found by
23 the jury, or any role enhancement. To do so would
24 unconstitutionally impinge upon Mr. Fanfan's Sixth Amendment
25 right to a jury trial as explained by Blakely.

1 I therefore cannot follow the federal sentencing
2 guidelines in those respects which involve drug quantity and
3 role enhancement. Instead, I'm going to sentence the
4 defendant based solely upon the jury verdict in this case.
5 I point out I'm not making any blanket decision about
6 the federal guidelines. I'm dealing solely with drug
7 quantity and with role enhancement in the context of the
8 case that went to a jury verdict before a jury trial.
9 Now there is one other issue here under the Colon-Solis
10 case that I referred to with the lawyers where the First
11 Circuit has said that in the pre Blakely environment,
12 following a jury verdict as to the scope of a conspiracy,
13 it's still incumbent on the sentencing Judge to decide how
14 much the individual defendant being sentenced is responsible
15 for under the relevant conduct guidelines.
16 Here, the jury was asked to define -- to find the scope
17 of the conspiracy by way of drug quantity, it was not asked
18 that precise question, but I find that there is no other way
19 to interpret its verdict given the facts, testimony, the
20 evidence that was presented to the jury.
21 The whole case against this defendant that the jury
22 heard was that he was the sole source of all of the drugs.
23 And so this is not an instance where the jury could have
24 assigned responsibility to this defendant for amounts some
25 other member of the conspiracy had been involved in he had

1 not, instead, the drugs all originated with him.
2 So if there is a Colon-Solis issue here in this post
3 Blakely environment such that the juries now in the future
4 will have to be asked to make that decision, I find any
5 error is harmless, that the jury beyond any doubt would have
6 found that this 500 grams of powder was attributable
7 directly to this defendant.
8 So the guideline range that I will use as I say is the
9 63 to 78 months.
10 The fine range for that offense level is 12,500 to
11 $125,000.
12 The supervised release is four to five years.
13 I'm going to impose a modest fine below the guideline
14 level because I find he cannot pay the guideline fine, but
15 he can pay a small fine.
16 I'm going to impose the maximum sentence. He was the
17 ring leader of a significant drug conspiracy. And I'm going
18 to impose the maximum term of supervised release.
19 And at this time, the defendant will stand for
20 sentencing.
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