UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	Criminal No: 11-CR-10201-NMG
	)	
	)	
ROBERT A. GEORGE	)	
	)	

Memorandum In Support of Objections to Proposed Guideline Calculations

Now comes the Defendant, Robert A. George, by and through undersigned counsel, and hereby submits that the total offense level should be 18, rather than 26 as calculated by Probation, based on the following analysis:

Offense Level Computation	**Defendant's Submission**	**As Calculated by Probation**
Base Offense Level	16 (a base offense level of 8, but defendant contends that only $100,000 of laundered funds was reasonably foreseeable, resulting in an additional 8 level enhancement to the base offense level, pursuant to the table in §2B1.1)	18 (a base offense level of 8, and probation finds that $200,000 is value of laundered funds, resulting in an additional 10 level enhancement pursuant to the table in §2B1.1)
Specific Offense Characteristics, §2S1.1(b)(1)(A)	0	+ 6 (Probation finding that defendant "knew or believed" that laundered funds were proceeds of or intended to promote controlled substance offense
Specific Offense Characteristics, §2S1.1(b)(2)(B)	+2	+2
Adjusted Offense Level	18	26
Total Offense Level	18	26

I. *Section 2S1.1(b)(1)(A) does not apply because the evidence does not establish that Mr. George "knew or believed" that any of the laundered funds were the proceeds of, or were intended to promote a controlled substance offense*.

Section 2S1.1(b)(1)(A) provides a six-level increase in the otherwise applicable offense level if the evidence demonstrates that a particular defendant "knew or believed that any of the laundered funds were the proceeds of, or were intended to promote an offense involving the manufacture, importation, or distribution of a controlled substance." *See* PSR at ¶83. Here, the government cannot sustain its burden of proof on this issue, and hence there should be no six level upward adjustment of the offense level pursuant to this section.[1] As the Court will recall, at

[1] The defendant acknowledges that existing case law permits the Court to make this finding by a preponderance of the evidence, *see, e.g., United States v. Bucci*, 582 F.3d 108, 119 (1st Cir.2009), but Mr. George respectfully submits that the Fifth and Sixth Amendments to the United States Constitution requires that any such finding (particularly one which results in such a significant increase of the advisory guideline sentencing range) should be made only by a jury utilizing a "beyond a reasonable doubt" standard of proof, and any such determination, under any standard of proof, by the Court violates the rights, privileges and guarantees afforded the defendant by the Fifth and Sixth Amendments. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1997); *Alleyne v. United States*, United States Supreme Court No. 11-9335 (petition for a *writ of certiorari* granted, presenting question whether the Court's decision in *United States v. Harris*, 535 U.S. 545 (2002) should be overruled). Alternatively, and at the very least, Mr. George submits a "clear and convincing" standard of proof must be utilized, particularly given the significant increase imposed by application of §2S1.1(b)(1)(A). *See United States v. Trujillo*, 959 F.2d 1377, 1382 (7th Cir.1992)(suggesting that clear and convincing evidence might be required for extraordinary upward adjustments or departures), *cert. denied*, 506 U.S. 897 (1992); *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.C.Cir.) (same), *cert. denied*, 506 U.S. 901 (1992); *United States v. Shonubi*, 103 F.3d 1085, 1087-92 (2nd Cir.1997) (noting that "a more rigorous standard" may be required when determining disputed aspects of relevant conduct "where such conduct, if proven, will significantly enhance a sentence"); *United States v. Nikrasch*, 25 Fed.Appx. 570, 576 (9th Cir.2001) (noting that while "the preponderance standard generally satisfies due process, it has long been recognized that there is an exception when the sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction"), *citing United States v. Jordan*, 256 F. 3d 922, 927-29 (9th Cir.2001).

trial, the government proceeded on a dual theory of proof, namely that Dardinski's funds derived from either Dardinski's State larceny offenses or drug proceeds, consistent with the Indictment, which charged these alternative "specified unlawful activities." As detailed below, neither the evidence admitted at trial nor cited within the PSR demonstrates that Mr. George knew or believed the funds derived from drugs (as opposed to the State larceny offenses), and, therefore, there should be no 6 level enhancement pursuant to this section:

- On March 18, 2009, in the very first recording, Dardinski told Mr. George, "I got some ***other*** money from – I sold some coke to a guy and I gotta hide **that** money too." Mr. George told Dardinski (1) "Well, the fact is that I don't want to know that stuff because that's illegal," and (2) "I obviously can't help you with something ***like that***." (emphasis added). The language is important. It demonstrates (1) to that point in time, the two of them were discussing other money—*i.e.*, money other than the "coke" money, and (2) Mr. George overtly told Dardinski he would not be involved in any transaction involving drug proceeds.

- The fact that Mr. George and Dardinski were discussing funds other than drug proceeds on March 18, 2009, is consistent with the information provided to Probation by the government in its version of the offense. In particular, according to the version of offense submitted by the government to Probation, the genesis of this investigation was a meeting at the South Shore Plaza whereat Mr. George and Dardinski discussed the funds he received ***as a result of his State larceny offenses***, and Mr. George told Dardinski that he could hide ***that money***—*i.e.*, non-drug proceeds. PSR at ¶7-8 (describing state fraud scheme, the Plaza meeting discussing state fraud proceeds, and averring that "George told the CS that he had a guy who could hide his money"). There is no allegation or averment, anywhere, that Mr. George and Dardinski ever discussed hiding or laundering drug proceeds prior to March 18, 2009. Instead, according to the government, their discussions centered on non-drug proceeds only.

- After Mr. George rejected the March 18th overture, Dardinski ***never again*** raised the subject of drug proceeds in a recorded conversation with Mr. George prior to April 15, 2010, the date of the second (and last) transaction.

- The fact that in late April 2010 and thereafter Dardinski informed Mr. George that he had previously told Hansen that his money derived from drugs is irrelevant because each of those conversations occurred after April 15, 2010,

the date of the second transaction. Hence, *ipso jure*, those conversations cannot prove that Mr. George previously knew or believed that Dardinski's funds derived from drug proceeds, or that he previously agreed to launder drug proceeds, as contrasted with the State larceny offenses. This is particularly so given that the evidence was undisputed that Mr. George ceased all communications with Hansen in April 2009.

- Dardinski had no criminal record for drug distribution, nor did the government ever argue that Mr. George had a basis to believe or know of any history of drug distribution by Dardinski. *Cf. United States v. Blarek*, 7 F.Supp.2d 192, 208 (E.D.N.Y1998) (defendants, interior decorators, "were fully informed of the fact that their client was a notorious drug trafficker").

- The government argued at trial, at length, that Mr. George, at the very least, knew the funds came from Dardinski's State fraud offenses. See, e.g., Transcript, Day 8, at 4 (government arguing that Mr. George "knew [that Dardinski] had defrauded numerous individuals of $700,000"); *Id. at 5* ("And I submit to you that the evidence is clear that at all times this defendant knew that the money came from either drugs or a fraud in which the interstate wires were used"); *Id*. at 7 (again arguing $700,000 derived from state larceny offenses and explaining to jury why there was wire fraud involved); *Id*. at 7-10 (arguing cash from "some form of unlawful activity," as contrasted with drug proceeds); *Id*. at 16 ("Again, the issue for you to decide is did the defendant know Dardinski's money was *from some sort of unlawful activity*" and then arguing at length that Mr. George knew about Dardinski's State larceny offenses) (emphasis added); *Id*. at 17 (noting that defense suggested not a single recording where defendant agreed to launder drug money and arguing that government need not prove that defendant knows all the details of a conspiracy); *Contra* Transcript, Day 8 at 3-4, 10 (arguing agreement to launder drug proceeds and that the April 6th comment regarding "other" money represented agreement to launder drug proceeds).

- The government has noted that government agents had Dardinski inject the March 18th comment regarding "coke" solely to provide a basis for DEA agents to remain involved in this case. PSR at ¶9 ("DEA instructed the CS to tell George that the money he had stashed in various locations was from drug proceeds since DEA could not otherwise be involved with the case if it did not involve drugs or money laundering").

- Consistent with the government's theory of the case and proof, the Court instructed the jury that it need only find that Mr. George conspired to violate one of the two charged specified unlawful activities—*i.e*., wire fraud and/or narcotics trafficking. *See* Transcript, Jury Charge, at 23 ("To convict the defendant of conspiracy, you must unanimously agree that the defendant conspired to commit at least one of the offenses alleged. I instruct you that your verdict must be unanimous as to which object of the conspiracy, if any,

you find the defendant guilty. It is not necessary for the government to prove that the defendant conspired to commit both offenses charged as the objects of the conspiracy"; *Id*. at 24 ("In this case, the government has alleged that the defendant conspired to launder funds derived from the unlawful activity of narcotics trafficking and/or wire fraud").

- Hansen was repeatedly debriefed after he agreed to cooperate on or about June 8, 2010, and he repeatedly told the government during proffer sessions that Mr. George ***never*** told him that Dardinski's funds came from drugs.

- On July 29, 2010, in the initial meeting between Hansen and George (after Hansen agreed to cooperate), Mr. George actually told Hansen that Dardinski did not launder money to do drug deals, but instead laundered money so he could pay his probation fees. PSR at ¶30. Moreover, as noted in the government's version of offense conduct, Mr. George proceeded to tell Hansen that "I never thought he [Dardinski] wanted to do something illegal. I just thought he wanted to wash that money to pay his probation." *Id*.

Clearly, given all of the foregoing, which illustrates but not exhausts the evidence regarding this issue, there is not sufficient proof that Mr. George knew or believed the funds derived from drugs, and hence there should be no 6 level enhancement pursuant to §2S1.1(b)(1)(A).

II. *There is no evidence Mr. George even knew of the April 2010 laundering event, therefore the total value of funds laundered should be $100,000, not $200,000, and therefore the base offense level should be 16, not 18*.

The evidence demonstrated that Mr. George did not speak to Dardinski after December 6, 2009 (or thereabout), and it explicitly established there were no communications between Mr. George and Dardinski in the months leading up to April 2010. The evidence was consistent that Mr. George did not speak to Mr. Hanson after April 2009 until July 2010, after Hansen became a cooperating witness. In short, there was no evidence that Mr. George could reasonably foresee the second $100,000 transaction between Dardinski and Hansen. "In a conspiracy, the amount attributed to a defendant includes not only that which he handled but also the amount he could

reasonably have foreseen would be laundered through the conspiracy." *United States v. Rivera-Rodriguez*, 318 F.3d 268, 273 (1st Cir.2003). Once again, the government bears the burden of proof on this issue. *Id*. While Mr. George found out after the April 15, 2010 transaction that it had occurred, there was no evidence he knew beforehand. Indeed, as the government asserts in the version of offense submitted to Probation, by December 2009, "Hansen seem to have little interest in including George in [the December] transaction, and stated, 'He never figures it out, but I could figure it out. Who do you need to, who, you don't want a check to you? You need a check to someone else?'." PSR at ¶17. The fact of the matter is that from December 16, 2009 to after April 15, 2010, Hansen and Dardinski were dealing exclusively between themselves, Mr. George had no substantive involvement with either Dardinski or Hansen during that time period, and he could not have reasonably foreseen the second $100,000 transaction as he had no basis to know it was occurring. Indeed, in the conversations that post-date April 15, 2010, Mr. George is continually questioning both Hansen and Dardinski as to whether they actually engaged in either transaction. *See, e.g*., PSR at ¶26 (describing April 27, 2010 meeting between George and Dardinski, wherein George asked Dardinski "to 'swear on his kids' that he was doing deals with Hansen and had done two deals with him"); PSR at ¶30 (describing initial meeting between George and Hansen on July 29, 2010, after Hansen agreed to cooperate, wherein George asked Hansen if he actually engaged in transactions with Dardinski). As such, the "value of the laundered funds" should be $100,000, which would result in a base offense level of 16, rather than 18.

Respectfully Submitted,
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By His Attorneys,

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Certificate of Service

I, Robert M. Goldstein, hereby certify that on this date, October 26, 2012, a copy of the foregoing document has been served via the Electronic Court Filing system on all registered participants, including Assistant U.S. Attorney Laura Kaplan.

/s/ Robert M. Goldstein
Robert M. Goldstein