UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 04-4613-cr

UNITED STATES OF AMERICA,

Appellee,

-against-

ARIADNA MENDEZ-BURGOS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS APPEAL

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PRELIMINARY STATEMENT

The government submits this memorandum in support of its motion to dismiss the appeal of Defendant-Appellant Ariadna Mendez-Burgos. Mendez-Burgos appeals from a judgment entered in the United States District Court for the Eastern District of New York (Ross, J.), convicting her, upon her entry of a guilty plea pursuant to a plea agreement, of importation of cocaine in violation of 21 U.S.C. § 952(a), and principally sentencing her to 18 months of incarceration.

Because Mendez-Burgos validly waived her right to appeal her sentence, her appeal should be dismissed.

STATEMENT OF FACTS

We set forth only those facts that pertain to the requested relief.

Mendez-Burgos was charged in an indictment with importing cocaine (Count One) and possessing cocaine (Count Two) in connection with her attempt, on March 7, 2004, to pass through Customs at John F. Kennedy International Airport with over 1500 grams of cocaine in her possession. (A 8-9).[1] On April 26, 2004, Mendez-Burgos pleaded guilty to Count One pursuant to a written plea agreement, signed by herself and her attorney, that limited the term of incarceration she could serve to the 20-year maximum term applicable to importations of less than 500 grams of cocaine. See 21 U.S.C. § 960(b)(3).[2] (Exhibit 1, pp. 1-6). Paragraph 2 of the agreement estimated Mendez-Burgos's adjusted offense level to be 22; at Criminal History Category I, this level carried a range of imprisonment of 41 to 51 months. The agreement further specified that if the defendant pleaded guilty before May 10, 2004, the government would move the district court for a one-level

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[1] Parenthetical references preceded by "A" are to the appellant's appendix filed with his brief on the merits. References to "Exhibit 1" are to the exhibit attached to the government's motion to dismiss the appeal filed on December 3, 2004.

[2] The amount of cocaine Mendez-Burgos was carrying otherwise exposed her to a statutory range of imprisonment of five to 40 years. See 21 U.S.C. § 960(b)(2)(B).

reduction that would reduce the range to 37 to 46 months of imprisonment. (Exhibit 1, pp. 2-3).

In connection with the estimated range of imprisonment, the plea agreement contained the following provision:

> The defendant will not . . . file an appeal or otherwise challenge the conviction or sentence in the event that the Court imposes a term of imprisonment of 51 months or below. This waiver is binding on the defendant even if the Court employs a Guidelines analysis different from that set forth in paragraph 2.

(Exhibit 1, p. 3).

During the plea hearing before Judge Ross on April 26, 2004, the following exchange took place:

> THE COURT: And do you understand that in paragraph four of the agreement you have agreed, among other things, not to file an appeal or otherwise challenge your conviction or sentence if I impose a prison term of 51 months or less?
>
> THE DEFENDANT: Yes.

(A 28).

On August 19, 2004, Mendez-Burgos was sentenced to 18 months' imprisonment, and she timely filed a notice of appeal. (A 4, 52, 56). The government moved to dismiss the appeal on December 3, 2004, and Mendez-Burgos's attorney filed opposition papers on January 8, 2005.

ARGUMENT

MENDEZ-BURGOS WAIVED HER RIGHT TO APPEAL

In her opposition to the motion, which was submitted before either United States v. Booker, 125 S. Ct. 738 (2005), or United States v. Crosby, No. 03-1675, 2005 WL 240916 (2d Cir. Feb. 2, 2005) were decided, Mendez-Burgos contends that, in light of the Supreme Court's holding in Blakely v. Washington, 124 S. Ct. 2531 (2004), she should not be held to her explicit waiver of the right to appeal. She argues that because she entered into the plea agreement without being aware of what her rights would be under subsequently-imposed law, the waiver was not knowing and voluntary. For the following reasons, this argument should be rejected and the appeal dismissed.

As described above, Mendez-Burgos agreed not to appeal if her sentence included a term of imprisonment of 51 months or less, and she incontestably received a sentence of 18 months, well below the 51-month figure. It is well established that a defendant's knowing and voluntary waiver of his right to appeal a sentence within an agreed Guideline range is strictly enforceable. See United States v. Djelevic, 161 F.3d 104, 106 (2d Cir. 1998); United States v. Salcido-Contreras, 990 F.2d 51 (2d Cir. 1993) (per curiam); United States v. Rivera, 971 F.2d 876, 896 (2d Cir. 1992). "In no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived

the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless." Salcido-Contreras, 990 F.2d at 53.

Moreover, by entering into the plea agreement, Mendez-Burgos availed herself of a significant benefit. The plea agreement offered her a substantially lighter sentence than the five-year mandatory minimum term of imprisonment that normally would have applied because of the amount of cocaine (over 1500 grams) that she was carrying at the time of her arrest. See 21 U.S.C. § 960(b)(2)(A) (setting forth minimum prison term of five years for offenses involving at least 500 grams of cocaine). Indeed, the sentence she ultimately received was even less severe than any of the estimates stated by the court and the government at the time of her plea. The 18-month prison term the court imposed was 42 months below the otherwise applicable statutory minimum and 19 months below the low end of the Guidelines range estimated in the plea agreement and mentioned by the court at the plea proceeding. Having received this windfall, which was conditioned on her adherence to the terms of the plea agreement, Mendez-Burgos should not now be permitted to renege on her own obligations thereunder. See United States v. Morgan, 386 F.3d 376, 381 (2d Cir. 2004) ("the government -- after having made valuable

concessions to secure [defendant's] agreement to the plea" should not be "deprived of its bargain").

There are, of course, limitations on the enforceability of waivers of the right to appeal. The record must clearly demonstrate that the defendant has knowingly and voluntarily waived the right. United States v. Ready, 82 F.3d 551, 557 (2d Cir. 1996). In addition, the waiver is ineffective against a claim that sentencing was based on a constitutionally impermissible factor, United States v. Jacobson, 15 F.3d 19, 22-23 (2d Cir. 1994), although the fact that the defendant seeks to raise a constitutional claim does not except his appeal from the waiver, see Morgan, 386 F.3d at 382 (claim under Apprendi v. New Jersey, 530 U.S. 466 (2000), held subject to waiver).

The crux of Mendez-Burgos's contentions, now that Booker and Crosby have been decided, is that her waiver is invalid because it was executed before she was aware of the rights that these decisions afforded her. See Morgan, 386 F.3d at 381 n.3 (declining to decide whether otherwise valid waiver might be deemed unenforceable against Apprendi claim if defendant could establish that he was unaware of Apprendi at time of entering into plea agreement). This position is without merit.

In Garcia-Santos v. United States, 273 F.3d 506, 509 (2d Cir. 2001), this Court, in upholding an analogous waiver of collateral attack provision, noted, "We have long enforced waivers

of direct appeal rights in plea agreements, even though the grounds for appeal arose after the plea agreement was entered into." (citing United States v. Yemitan, 70 F.3d 746, 747-48 (2d Cir. 1995)). Such a conclusion should hold despite the asserted illegality of the Guideline sentence imposed before the law changed. United States v. Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000) (noting that waivers of appeal obtain "even in circumstances where the sentence was conceivably imposed in an illegal fashion or in violation of the Guidelines, but yet . . . within the range contemplated in the plea agreement"). This accords with Supreme Court precedent that a guilty plea remains valid even if the defendant pleaded guilty to avoid a sentence later found unconstitutionally severe. See Brady v. United States, 397 U.S. 742, 757 (1970) ("A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action."); see also United States v. Ruiz, 536 U.S. 622, 630 (2002) (upholding waiver of right to discovery of impeachment material as condition of plea offer: "this Court has found that the Constitution . . . does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.").

Mendez-Burgos's contention that she did not knowingly and voluntarily enter into the plea agreement and its waiver of the right to appeal is similarly meritless. Under Brady and Garcia-Santos, the fact that she was unaware that two subsequently decided cases -- Booker and Crosby -- would create potential issues for an appeal no more vitiates the waiver of her appellate rights than it creates a basis for her to withdraw his plea. At worst, Mendez-Burgos waived a procedural right that she was not aware would be given to her after her sentence was imposed. See United States v. Green, 2004 WL 1929602, at *1 (9th Cir. Aug. 20, 2004) (unpub. decision) ("defendant's waiver also precludes us from considering her argument based on Blakely");[3] see also United States v. Morgan, 386 F.3d 376, 380-81 (2d Cir. 2004) (waiver foreclosed claim of Apprendi violation); but see United States v. Terrell, 2004 WL 1661018, at *6 (D. Neb. July 22, 2004) ("defendant could not have knowingly waived rights that neither he nor this court knew he had before the Blakely decision"); United States v. Harris, 325 F. Supp.2d 562, 564 (W.D. Pa. 2004) ("Because the foundation of this plea agreement has been thoroughly eroded, the doctrine of frustration of purpose or impossibility of performance may render the agreement nugatory and unenforceable."). However,

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[3] Under Rule 36-3 of the Rules of the United States Court of Appeals for the Ninth Circuit, there are limitations on the citation of unpublished opinions in the courts within the Ninth Circuit but not elsewhere.

the record makes clear that she was fully apprised of the likely consequences of her plea -- consequences that were as likely after Booker as before -- by the terms of the plea agreement and at the plea proceeding and that she was sentenced well below the range estimated by the government in the plea agreement. Under these circumstances, an intervening change of law does not render the plea unknowing. In addition, the resulting sentence was not unexpected and, for the reasons explained above, hardly unfair.

CONCLUSION

For the reasons set forth above, the motion to dismiss the appeal should be granted.

Dated: Brooklyn, New York
February 18, 2005

Respectfully submitted,

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