United States of America
First Circuit Court of Appeals

NOs. 2014-1514, -1515, -1516

UNITED STATES OF AMERICA

v.

ANGEL ABNER BETANCOURT-PEREZ

APPEAL FROM PUERTO RICO FEDERAL DISTRICT COURT

REPLY BRIEF OF DEFENDANT

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REPLY BRIEF ON SENTENCING ISSUES

There is indisputably a discrepancy in the plea agreement. As noted by both Mr. Betancourt-Pérez and the government, the total offense levels for the individual drug crimes were 29, 25, and 23, while the grouping calculation, irreconcilably with the sentencing guidelines, uses a total offense level of 24. GOV'T BRF. at 7 (scrivener's error in government's brief says "26" whereas agreement says "24"); DF'S BRF. at 7; *compare* PLEA AGREEMENT (Oct. 18, 2013) §§ 7A-C *with* § 7D, *Appx*. at 10-11.

Although there may be no computative explanation for the discrepancy, not even the government has suggested it was indeliberate; Mr. Betancourt-Pérez pleaded to it in the agreement, the court confirmed it at the change-of-plea hearing, and it was discussed during the sentencing hearing.

The only likely explanation is that the discrepancy was the product of bargaining – a process that makes no claim to substantive rationality. *See United States v. Ruiz*, 536 U.S. 622 (2002) (government offered deep sentencing discount in exchange for non-disclosure); *Corbitt v. New Jersey*, 439 U.S. 212, 221 (1978) ("[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."); *see generally*, Stephanos Bibas, *Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1148 (2011).

Here there was bargaining. Negotiations took cognizance of not only Mr.

Betancourt-Pérez's crimes, but also a more accurate guidelines calculation, and the presence of a litigable search-and-seizure issue. That the bargaining included these other matters – not for their merits – is the reason for Mr. Betancourt-Pérez's pending effort to bring the draft plea agreement to the attention of this court,[1] and for his mention of a search-and-seizure issue even though it was not fully litigated below. As noted in his opening brief, written plea agreements "should be viewed against the background of the negotiations." *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990) (quotation omitted); DF'S BRF. at 15.

As the government suggests, plea agreements are construed according to contract principles, *Santobello v. New York*, 404 U.S. 257, 260 (1971); GOV'T BRF. at 11, although "temper[ed] … with special due process concerns for fairness and the adequacy of procedural safeguards." *United States v. Hamdi*, 432 F.3d 115, 122-23 (2d Cir. 2005); *Mabry v. Johnson*, 467 U.S. 504, 509 (1984) (broken government promise inducing plea implicates due process when it impairs voluntariness and intelligence of plea); *United*

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[1]There is a split among the circuits regarding how parol evidence may be used in the construction of plea agreements. Tina M. Woehr, *The Use of Parol Evidence in Interpretation of Plea Agreements*, 110 COLUM. L. REV. 840 (2010). Although some circuits have been more categorical, others including this Court have taken a softer approach, noting that while "the use of parol evidence to supplement the terms of an unambiguous written plea agreement is ordinarily frowned upon … these rules [are] subject to exception in unusual cases." *Bemis v. United States*, 30 F.3d 220, 222 (1st Cir. 1994) (remanding to determine whether government reneged on promise to put defendant in witness protection program upon release from prison); *Kingsley v. United States*, 968 F.2d 109, 113 (1st Cir. 1992) (remand to determine government's obligation to investigate defendant's outstanding debts); *see also United States v. De La Cruz Castro*, 299 F.3d 5, 13 (1st Cir. 2002) (rejecting defendant's claim of oral agreement "with the prosecution for a shorter term of incarceration than the one contemplated by the written plea agreement"); *United States v. Alegria*, 192 F.3d 179, 186 (1st Cir. 1999) (affirming where no ambiguity in plea agreement, which also comported with plea colloquy).

States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986). Among those principles are that plea agreements must be read in their totality with an eye toward harmonizing their provisions. *Hamdi*, 432 F.3d at 123; DF'S BRF. at 20.

The grouping calculation in the plea agreement, whatever its basis, calls for 51 to 63 months concurrent for the drug crimes, plus 60 months consecutive for the gun. Adding 60 months to a 51-to-63 month sentence equals between 111 and 123 months. In the plea agreement, both the government and the defendant agreed "that any recommendation for a term of imprisonment of less than … 120 months will constitute a breach." PLEA AGREEMENT § 7E, *Appx*. at 11. That is why, in his sentencing memo, Mr. Betancourt-Pérez recommended 120 months, rather than 60 months the government otherwise suggests he could have claimed. SENTENCING MEMORANDUM (Apr. 10, 2014) at 2 (omitted from appendix, but addended to this reply brief). And that is why under the agreement, and as argued in Mr. Betancourt-Pérez's opening brief, DF'S BRF. at 20, the government was constrained to recommend between 120 and 123 months.

In its brief the government makes no attempt to account for the grouping calculation table conspicuously arrayed in the parties' agreement, nor to square its sentencing recommendation with the grouping calculation, nor to resolve the ambiguity between the grouping table and the agreement's other calculations, nor to harmonize the provisions of the plea document in any way. The government modestly ignores the grouping calculation table, feigning it is not there.

Mr. Betancourt-Pérez's understanding of the agreement, explicated in his opening

brief, DF'S BRF. at 19-20, is not "subjective" as the government alleges. GOV'T BRF. at 8, 15.

Rather, it is the only reasonable explanation for the discrepancy, *United States v. Garcia*, 954 F.2d 12, 17 (1st Cir.1992) (defendant's subjective expectations of plea agreement enforceable to extent objectively reasonable), and the only way to harmonize all provisions. Mr. Betancourt-Pérez's understanding accounts for the grouping calculation, for the government's promise to recommend no more than 120 months, for Mr. Betancourt-Pérez's promise to recommend no less than 120 months, for the 60 months consecutive on the gun crime, and for the 10 to 15 year range the court noted during the sentencing hearing. *Sent.Hrg.* at 23.

Because Mr. Betancourt-Pérez's understanding of his sentencing situation was objectively reasonable, within all provisions of the plea agreement, and within the law, it is not accurate to say, as the government has alleged, that his argument put the court in a position such that it "could not possibly have avoided error." GOV'T BRF. at 17. And if the various provisions constitute ambiguity, they must be construed in favor of the defendant. *United States v. McCoy*, 508 F.3d 74, 78 (1st Cir. 2007) ("[A]mbiguity in plea agreements [is] construed against the government.").

Finally, the government argues that the word "additionally," which inaugurates the second paragraph of section 7E of the plea agreement, literally means "plus" in the mathematical sense, and that such meaning undermines Mr. Betancourt-Pérez's appellate argument. GOV'T BRF. at 13. This is not so for two reasons. First, plea agreements

cannot not be read in hyper-technical fashion. *United States v. Garcia*, 698 F.2d 31, 37 (1st Cir. 1983) ("A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language."). Second, even if "additionally" is not merely a drafting segue device, Mr. Betancourt-Pérez's understanding of the agreement appropriately sentences him to 60 months for the gun, consecutive (or "additionally") to the agreed-upon 51-to-63 months concurrent for the drug crimes.

Because the government has not offered a cogent reading of the plea agreement that harmonizes all its provisions, and the sentencing court misread the agreement at the urging of the government, either the government committed breach or the court committed error in sentencing Mr. Betancourt-Pérez beyond the objective terms of his plea.

CONCLUSION

For the foregoing reasons, this Court should remand for re-sentencing with a new judge, and allow Mr. Betancourt-Pérez to withdraw his plea.

Respectfully submitted,

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By his Attorney,

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/s/

Dated: February 12, 2016

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CERTIFICATION

I hereby certify that on February 12, 2016, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X6, and that it contains no more than 1,308 words, exclusive of those portions which are exempted.

/s/

Dated: February 12, 2016

Joshua L. Gordon, Esq.

ADDENDUM

SENTENCING MEMORANDUM (Apr. 10, 2014) (without attachments). 7