

10-5145

To Be Argued By:
JONATHAN S. FREIMANN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-5145

UNITED STATES OF AMERICA,
Appellee,

-vs-

LUT MUHAMMAD, aka LUKE MUHAMMED,
aka Lut Billie, aka Lut Mohammad,
CARIBE BILLIE, CHRISTOPHER HORTON,

(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants,

DARIUS McGEE, aka D, aka D Smooth,

Defendant-Appellant.

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Statement of Jurisdiction

The district court (Janet B. Arterton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on December 17, 2010. Joint Appendix (“JA”)10, JA167. On December 20, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA10, JA166. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

- I. Whether the defendant, having been charged with an offense involving five grams or more of crack cocaine and convicted of an offense involving 250 to 275 grams of crack cocaine, was sentenced in accordance with 18 U.S.C. § 841(b)(1)(B), as amended by the Fair Sentencing Act of 2010 (“FSA”), and, if so, whether the *Apprendi* violation created by the district court’s error in declining to apply the FSA was harmless.
- II. Whether the defendant, having knowingly and voluntarily waived his right to appeal any incarceration term that did not exceed 188 months, sacrificed the right to appeal his 120-month sentence?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-5145

UNITED STATES OF AMERICA,

Appellee,

-vs-

DARIUS MCGEE, aka D, aka D Smooth,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Darius McGee, pleaded guilty to conspiring to distribute five grams or more of cocaine base. In doing so, he admitted to distributing between 250-275 grams of cocaine base and knowingly waived his right to appeal if the sentence did not exceed 188 months' imprisonment. The defendant committed this offense before the enactment of the FSA and was sen-

tenced after its effective date. At the government's urging, the sentencing court held that the new, lower mandatory minimum provisions of the FSA did not apply to this case because the offense conduct occurred well before the FSA became law. As a result, the court sentenced him to the ten-year mandatory minimum term required under the pre-FSA version of 21 U.S.C. §841(b)(1)(B).

Now, on appeal, this Court must decide whether to remand the case for re-sentencing in light of the Supreme Court's recent decision in *Dorsey v. United States*, 132 S. Ct. 2321 (2012), which held that, regardless of when the offense conduct occurs, any crack cocaine defendant sentenced after the FSA's effective date should be afforded the benefit of the FSA's reduced penalties. Although the government originally sought a remand here, the Court declined to do so and specifically ordered briefing on the questions of whether the defendant, having pleaded guilty to an offense involving in excess of 250 grams of crack cocaine, was sentenced in accordance with the FSA, and, if so, whether any error in failing to apply the FSA's lower penalties was harmless.

Given that the record indisputably establishes that the defendant's offense involved more than 28 grams of cocaine base, the defendant was certainly sentenced in accordance with the FSA's revised penalties. Moreover, because there is overwhelming evidence establishing that

the defendant conspired to distribute almost ten times the 28 gram threshold, the *Apprendi* violation created by the district court's failure to apply the FSA to the defendant was harmless. Finally, this Court's very recent decision in *United States v. Harrison*, No. 11-1240, slip op. (Nov. 6, 2012), upheld an appeal waiver in an almost identical circumstance as the one here, where the defendant raised a *Dorsey* claim because he was sentenced to pre-FSA penalties after the FSA's enactment.

Accordingly, the defendant's sentence should be affirmed.

Statement of the Case

On February 20, 2009, as a result of this Court's decision holding that a career offender can qualify for a sentence reduction under 18 U.S.C. § 3582(c) based on the November 1, 2007 amendments to the crack cocaine guidelines, the defendant was released early from prison and placed on supervised release. *See United States v. McGee*, 553 F. 3d 225 (2d Cir. 2009) (*per curiam*). On December 1, 2009, a federal grand jury in the District of Connecticut returned an indictment charging the defendant and eight other individuals with narcotics related offenses. Specifically, the defendant was charged in Count One with engaging in a conspiracy to possess with intent to distribute, and to distribute, five grams or more of cocaine base ("crack") between

June and December 2009, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 846. JA3, JA12-JA13.

On April 28, 2010, the government filed a second offender notice under 21 U.S.C. § 851, increasing the mandatory minimum incarceration term under the law applicable at the time to ten years. JA7, JA109-JA110.

On June 11, 2010, the defendant pleaded guilty to Count One of the indictment and signed a written plea agreement. JA8. In this plea agreement, the defendant stipulated that his offense involved between 250-275 grams of crack cocaine. JA68. He also agreed to waive his right to appeal his sentence if it did not exceed 188 months' imprisonment. JA43, JA70. On December 6, 2010, the district court (Janet B. Arterton, J.) sentenced the defendant principally to 120 months' imprisonment. JA158-JA159.

On December 17, 2010, judgment entered in the defendant's case. JA10, JA167. On December 20, 2010, the defendant filed a timely notice of appeal. JA166.

On May 31, 2010, the defendant filed his brief, in which he argued that the threshold quantities in the FSA should have applied in his case. On August 24, 2011, the government concurred with the defendant's position and filed a motion for a remand to the district court for a full resentencing. On December 1, 2011, the

government filed a motion to hold this appeal in abeyance, pending the Supreme Court's decision in *Dorsey v. United States*, 132 S. Ct. 2321 (2012). After *Dorsey* was decided, the government filed a letter pursuant to Fed. R. App. P. 28(j) again requesting that the case be remanded for a full re-sentencing.

On August 17, 2012, this Court denied the government's motion for remand and directed the government to file a brief addressing two questions: "(1) whether, as a prior felony drug offender who was charged with an offense involving 5 grams or more of crack cocaine and convicted of an offense involving 250 to 275 grams of crack cocaine, McGee was sentenced in accordance with 21 U.S.C. § 841(b)(1)(B) as amended by the FSA; and (2) if so, whether the district court's error in declining to apply the FSA to McGee's sentence was harmless." *United States v. McGee*, No. 10-5145, Order (Aug. 17, 2012).

The defendant is presently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

The charges in this case stem from an Organized Crime and Drug Enforcement Task Force ("OCDETF") investigation that focused on Stam-

ford-area drug trafficking organizations and their New York based sources. During the course of the investigation, the government received court authorization to intercept communications, or wiretaps, over a total of five cellular telephones. JA52.

Two of the intercepted telephones were utilized by a co-defendant, Lut Muhammad. Intercepted telephone calls, along with physical surveillance, revealed that Mr. Muhammad purchased multi-ounce quantities of crack cocaine from a supplier in New York and resold it in smaller quantities to a large customer base in and around Stamford. JA53.

Between August 28, 2009 and October 28, 2009, the defendant was intercepted over Mr. Muhammad's telephones arranging to purchase crack cocaine for resale a total of 28 different times. JA53. Several of those calls involved an unspecified amount, while others involved as much as an ounce of crack cocaine at a time. JA53. Surveillance by law enforcement officers monitored two transactions that took place between the defendant and Mr. Muhammad after being arranged over the telephone. JA53-JA54.

B. The guilty plea

On June 11, 2010, the defendant entered a guilty plea to Count One of the Indictment, which charged him with conspiring to possess with intent to distribute five grams or more of

cocaine base. JA58. In pleading guilty, the defendant entered into a written plea agreement with the government. JA66-JA73.

The plea agreement included a stipulation in which the defendant acknowledged that his offense involved between 250 and 275 grams of cocaine base. JA68. The government noted this stipulation during the change of plea hearing, and the defendant concurred with the government's summary of the plea agreement. JA38, JA41-JA42.

The plea agreement also contained an appeal waiver provision, which provided as follows:

The defendant acknowledges that under certain circumstances he is entitled to challenge his conviction and sentence. The defendant agrees not to appeal or collaterally attack in any proceeding, including but not limited to a motion under 28 U.S.C. § 2255 and/or § 2241, the conviction or sentence imposed by the Court if that sentence does not exceed 188 months, an 8-year term of supervised release, and \$150,000 fine, even if the Court imposes such a sentence based on an analysis different from that specified above. The Government and the defendant agree not to appeal or collaterally attack the Court's imposition of a sentence of imprisonment concurrently or consecutively, in whole or in part, with any other

sentence. The defendant acknowledges that he is knowingly and intelligently waiving these rights. Furthermore, the parties agree that any challenge to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) this waiver.

JA70. During the plea colloquy, the district court reviewed, in detail, the appeal waiver with the defendant, and he confirmed his understanding of that provision. JA43.

Also during the change of plea hearing, the government explained the evidence it would present against the defendant if he proceeded to trial. JA52-JA55. Counsel for the defendant then concurred that the defendant's offense included multiple crack cocaine transactions involving up to one ounce, or approximately 28 grams, *at a time*. JA56 (emphasis added).

The defendant's guilty plea also complied with each of the requirements of Fed. R. Crim. P. 11. Specifically, the guilty plea transcript establishes that the defendant was of sound mind at the time of the guilty plea, JA26-JA28; that under Fed. R. Crim. P. 11(b)(2) the district court "address[ed] the defendant personally in open court and determine[d] that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement),"

JA41-JA42; and that under Fed. R. Crim. P. 11(b)(3) there was a factual basis for the plea, JA50-JA57. The record further establishes that the defendant was advised of each of the following requirements as required under Fed. R. Crim. P. 11(b)(1), to the extent applicable to this case:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath during the plea hearing, JA23;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea, JA30-JA31;

(C) the right to a jury trial, JA30-JA32;

(D) the right to be represented by counsel – and if necessary have the court appoint counsel – at trial and at every other stage of the proceeding, JA24;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses, JA32-JA33;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere, JA34;

(G) the nature of the charge to which the defendant pleaded guilty, JA48-JA49;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release, JA44-JA45;

(I) any mandatory minimum penalty under the statute existing at the time of his guilty plea, JA44-JA45;

(J) the court's obligation to impose a special assessment, JA45;

(K) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances, JA45-JA47; and

(L) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence, JA43-JA44.

C. The sentencing

At sentencing on December 16, 2010, the district court ensured under Fed. R. Crim. P. 32(i)(1)(A) that the defendant and his counsel had read and discussed the Pre-Sentence Report ("PSR"), JA101-JA103. It also ensured under Fed. R. Crim. P. 32(i)(1)(C) and (i)(4)(A) that the defendant was permitted to address any objections to the PSR and to address the court to

speak or present any information to mitigate the sentence, JA101-JA103.

Based on his stipulation that his offense involved between 250 and 275 grams of cocaine base and applying the November 1, 2010 amended crack cocaine guidelines, the court calculated a corresponding offense level of 30, pursuant to U.S.S.G. 2D1.1(a)(5). JA110. The court then subtracted three levels for acceptance of responsibility, resulting in a total offense level of 27. JA111. The court determined that the defendant had a criminal history category of VI, resulting in a guidelines range of 130 to 162 months' imprisonment. JA111-JA112.

The court then noted, however, that it had used a 1 to 1 ratio for powder and crack cocaine penalties for at least one other defendant in the case. JA116-JA117. Here, the court was referring to Clayton Benjamin, who was sentenced to 188 months' incarceration as a career offender, but whose career offender guidelines were governed by the powder cocaine statutory penalties. JA116. Thus, "for the purposes of consistency and eliminating unjustified disparities," the court determined that, absent a mandatory minimum, it would utilize a 1 to 1 ratio for powder and crack cocaine penalties in this case. JA116-JA117. The court calculated a "hypothetical range" using a 1 to 1 ratio of 51-63 months' imprisonment. JA117. As the court later explained, "The only reason that I mentioned the hypothet-

ical sentencing guideline was by way of illustration of the distinction and the disparity that results from what kind of cocaine it is.” JA134.

The court then heard argument regarding whether the threshold quantities in the FSA should be applied retroactively to the defendant’s case. JA117-JA131. The court agreed with the government’s position at that time, relied on governing precedent from this Court and ruled that the FSA should not be applied retroactively because the defendant’s offense conduct occurred about a year prior to the enactment of the statute. JA132. Since the government had filed a second offender notice under 21 U.S.C. § 851, the court held that the defendant was subject to a ten-year mandatory minimum sentence. JA128-JA135. As a result, the district court imposed a sentence of 120 months’ imprisonment, followed by eight years’ supervised release. JA158-JA159.

The court also heard argument about whether this sentence should run concurrent with, or consecutive to, his sentence for violating supervised release in his previous federal case.² The

² On June 18, 2010, the district court (Janet C. Hall, J.) sentenced the defendant to 24 months’ imprisonment for violating the terms of his supervised release in an unrelated crack cocaine trafficking conviction. *See United States v. McGee*, No. 3:01cr219 (JCH), Judgment (June 18, 2010); *see also* PSR ¶ 54 (which the government has submitted in a separate, sealed appendix).

government noted the defendant's eight prior felony drug convictions, his virtual uninterrupted criminal activity during his adult life, and his likelihood of recidivism in the future. JA151-JA152. The government also pointed out that, rather than embrace the opportunity presented by his early release from his prior crack trafficking conviction, the defendant returned to selling crack just months later. JA148-JA149.

The court discussed the § 3553(a) factors, emphasizing the harm caused to the communities affected by drug dealers, the defendant's lengthy criminal history, and the large quantities of narcotics involved, and ultimately ordered that the sentence run consecutively to the two-year violation of supervised release sentence. JA156-JA159.

Summary of Argument

There is no dispute that, under *Dorsey*, the district court erred in determining that the FSA did not apply to the defendant because he engaged in his offense conduct before the enactment of the statute. But, as this Court pointed out in its order denying the motion to remand, when the defendant pleaded guilty, he stipulated to selling over 250 grams of cocaine base, a quantity that is far in excess of the 28-gram threshold now mandated under the FSA. Thus, he was sentenced in accordance with the new quantity thresholds enacted under the FSA. And there is certainly overwhelming and uncon-

troverted evidence that the defendant's offense involved well over 28 grams of cocaine base. As the government made clear in its factual basis during the guilty plea proceeding, the defendant was involved in approximately 28 separate crack cocaine transactions, some of which involved his purchase and redistribution of 28 grams at a time. Therefore, the district court's failure to apply the FSA to the defendant's case and its resulting *Apprendi* violation was harmless.

Moreover, as this Court very recently held in *Harrison*, the defendant's knowing and voluntary waiver of his appellate rights in this case withstands a valid claim under *Dorsey* that the district court erred by not applying the new crack penalties enacted by the FSA.

Argument

I. The district court sentenced the defendant in accordance with the FSA, and the *Apprendi* error created by the grand jury's failure to allege an FSA quantity was harmless

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

In the FSA, which became law on August 3, 2010, Congress reduced the disparity in penalties imposed upon offenders who dealt in powder cocaine and those who dealt in crack cocaine. The previous statutory scheme “imposed, for example, the same 5-year minimum term upon (1) an offender convicted of possessing with intent to distribute 500 grams of powder cocaine as upon (2) an offender convicted of possessing 5 grams of crack.” *Dorsey*, 132 S. Ct. at 2326. In the FSA, Congress reduced that disparity from 100-to-1 to 18-to-1. *Id.* More specifically, the FSA increased the crack threshold for the five-year mandatory minimum sentence from 5 grams to 28 grams, and it increased the crack threshold for the ten-year mandatory minimum sentence from 50 grams to 280 grams. *See* 21 U.S.C. § 841(b)(1) (Aug. 3, 2010).

There has been no dispute that any crack defendant who committed his offense and was sentenced for that offense prior to the FSA’s enactment cannot benefit from a retroactive application of the new law. *See United States v. Acoff*, 634 F.3d 200, 202 (2d Cir. 2011), *abrogated by Dorsey*, 132 S. Ct. 2321; *United States v. Baptist*, 646 F.3d 1225, 1229 (9th Cir. 2011) (joining “every other circuit court to have considered this question” in holding that the FSA does not “apply to defendants who have been sentenced prior

to the August 3, 2010 date of the Act's enactment"). *Dorsey*, however, addressed whether the FSA's more lenient mandatory minimums applied retroactively to a group of crack defendants, like this defendant, who committed their offenses prior to the FSA's passage, but who were not sentenced until after the FSA became law. Courts of Appeals that addressed the issue prior to *Dorsey* had come to different conclusions regarding whether the FSA's more lenient mandatory minimum provisions should apply to offenders whose unlawful conduct took place before the FSA's effective date, but whose sentencing took place after that date.³ Compare e.g., *Acoff*, 634 F. 3d at 2002 (FSA does not apply to such defendants), *United State v. Fisher*, 635 F.

³ Immediately following the enactment of the FSA, the government took the view that the new threshold quantities for mandatory minimum penalties applied only to offense conduct that occurred on or after the date of its enactment. That view was based on the general savings statute, 1 U.S.C. § 109, which provides that the repeal of a criminal statute does not extinguish liability for previous violations of that statute, unless the repealing law expressly so states. But on July 15, 2011, the Attorney General changed this position and concluded that the best reading of Congress's intent, considered in light of the structure and purpose of the FSA and applicable legal principles, is that the new penalties should apply to all federal sentencings that take place on or after the FSA's effective date.

3d 336, 339-340 (7th Cir. 2011) (same) and *United States v. Sidney*, 648 F. 3d 904, 910 (8th Cir. 2011) (same) with *United States v. Douglas*, 644 F. 3d 39, 42-44 (1st Cir. 2011) (FSA applies to such defendants) and *United States v. Dixon*, 648 F. 3d 195, 203 (3rd Cir. 2011) (same).

In *Dorsey*, the Supreme Court determined that the FSA's reduced mandatory minimum sentences for crack-related crimes apply to such defendants. After acknowledging that the "relevant language in different statutes argues in opposite directions," the Court held that Congress intended, by the FSA, to apply with respect to the mandatory minimum sentences the well-established principle that "sentencing judges [are] to use the Guidelines Manual in effect on the date that the defendant is sentenced, regardless of when the defendant committed the offense, unless doing so would violate the *ex post facto* clause" of the Constitution. *See Dorsey*, 132 S. Ct. at 2330, 2332 (internal quotation marks omitted); *see also United States v. Highsmith*, 688 F. 3d 74, 77 (2d Cir. 2012) (recognizing that *Dorsey* abrogates the contrary holding in *Acoff*).

The drug quantity thresholds triggering mandatory minimum sentences are elements of the offenses. *See Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). This Court has held, "Because mandatory minimums operate in tandem with increased maximums in § 841(b)(1)(A) and

(b)(1)(B) to create sentencing ranges that raise the limit of the possible federal sentences, drug quantities must be deemed an element for all purposes relevant to the application of these increased ranges.” *United States v. Gonzalez*, 420 F. 3d 111, 129 (2d Cir. 2005) (internal citations omitted). As a result, drug quantities must be alleged in an indictment. *See United States v. Cordoba-Murgas*, 422 F.3d 65, 66 (2d Cir. 2005) (holding that “admission of quantity in a plea allocation does not constitute a waiver of the required elements of an indictment.”). Where a grand jury indicts a defendant for violating 21 U.S.C. § 841(a) without specifying a drug quantity, that defendant must be sentenced in accordance with the penalties set forth in 21 U.S.C. § 841(b)(1)(C), even if he admits to quantities that qualify for the other, more severe penalties. *See id.* at 66, 69.

But even in the case of an *Apprendi* violation, this Court can engage in a harmless error analysis. Where there is overwhelming and uncontroverted evidence of an element omitted from an indictment, the *Apprendi* violation may be deemed harmless. *See United States v. Confredo*, 528 F. 3d 143, 156 (2d Cir. 2008).

This Court will “review a district court’s factual findings made in the course of imposing a sentence under the guidelines for clear error and the application of the guidelines to those findings for abuse of discretion, in which case [the

Court will] employ a *de novo* standard of review.” *United States v. Ravelo*, 370 F. 3d 266, 269 (2d Cir. 2004). Pure questions of law are subject to review *de novo*. *United States v. Barresi*, 361 F. 3d 666, 671 (2d Cir. 2004). A sentencing court “by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 116 S. Ct. 2035, 2047.

C. Discussion

The Supreme Court in *Dorsey* clarified that the sentencing court, which adopted the government’s position at the time, erred in failing to apply the mandatory minimum provisions of the FSA to the defendant. In *Dorsey*, the Supreme Court held that the new, more lenient mandatory minimum provisions of the FSA apply to offenders who committed their offenses before the Act took effect, but were not sentenced until after its effective date. *See id.*, 132 S. Ct. at 2326, 2335. The defendant falls within the group of offenders covered by *Dorsey*.

On December 1, 2009, the grand jury indicted the defendant using the pre-FSA mandatory minimum thresholds. Specifically, the defendant was charged in Count One with conspiring to possess with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 846. JA3, JA12-JA13. On April 28, 2010, the government filed a second offender notice under 21 U.S.C. § 851, increasing

the mandatory minimum incarceration term to ten years and the maximum term to life under the pre-FSA statutory penalties. JA7, JA109-JA110. On June 11, 2010, the defendant pleaded guilty to Count One. JA8. But he was not sentenced until December 16, 2010, after the FSA was enacted. As a result, the threshold charged by the grand jury and established by virtue of the guilty plea was the five gram quantity set out in the pre-FSA statute, not the 28 gram quantity set out in the FSA.

There is no dispute that, under *Apprendi*, the drug quantity threshold triggering a mandatory minimum sentence is an element of the offense. See *Gonzalez*, 420 F.3d at 129. Therefore, the district court's failure to apply the higher post-FSA crack threshold created an *Apprendi* violation. By holding that it was bound by the ten-year mandatory minimum provided for in the pre-FSA version of 21 U.S.C. § 841(b)(1)(B), the district court sentenced the defendant based on an element that was not charged by the grand jury. More specifically, he was sentenced to a term of incarceration that would only be triggered if the threshold crack quantity of 28 grams was charged and proven.

Still, there is no dispute that the defendant's conduct here involved between 250 and 275 grams of crack cocaine. He stipulated to this quantity in his plea agreement and, at the time of his guilty plea, agreed to the government's

factual basis, which included the allegation that he had engaged in approximately 28 separate crack cocaine transactions some of which individually involved about 28 grams. Thus, he was certainly sentenced “in accordance” with the FSA’s higher crack thresholds. He distributed almost ten times the amount of crack cocaine necessary to trigger the ten-year penalty under the FSA. And though there was certainly an *Apprendi* violation in this case, it was harmless under this Court’s precedent.

In fact, the error here is similar to the one analyzed in *Confredo*, 528 F. 3d at 156. There, the Court, in addressing an indictment’s failure to allege that a defendant committed his offense while on pretrial release, under 18 U.S.C. § 3147, stated, “The Supreme Court has ruled that an *Apprendi* violation concerning an omission from an indictment is not noticeable as plain error where the evidence is overwhelming that the grand jury would have found the fact at issue.” *Id.* at 156 (*citing United States v. Cotton*, 535 U.S. 625, 631-34 (2002)); *see also United States v. Gyanbaah*, No. 10-2441, slip op. (Nov. 8, 2012) (“When there is ‘overwhelming’ evidence in support of the missing indictment element, the grand jury surely would have found the missing element, and the right to be tried on only charges returned by the grand jury is not violated.”). The Court noted that that the defendant had admitted the disputed element during

his plea colloquy and held that the *Apprendi* violation was harmless. *See Confredo*, 528 F.3d at 156. The harmless error analysis appears to hinge on whether there was any “doubt the grand jury would have found” the omitted element. *Id.* The Court also noted that the defendant had “ample notice, prior to his plea, that he faced an enhancement.” *Id.*

Similarly, there is no doubt in the case at bar that the grand jury would have found that the defendant’s offense involved 28 grams or more of crack cocaine. As discussed during the plea colloquy, the government had evidence to prove that between August 28, 2009 and October 28, 2009, the defendant was intercepted arranging to purchase crack cocaine for resale a total of 28 different times. JA53. Several of those calls involved an unspecified amount, while others involved as much as 28 grams of crack cocaine at a time. JA53. Surveillance by law enforcement officers monitored the defendant completing at least two of the pre-arranged deals. JA53-JA54; *see also* PSR ¶¶ 30-33. The defendant stipulated in his plea agreement to being liable for nearly ten times the omitted amount, and admitted in the plea colloquy to multiple crack cocaine transactions including those that involved up to one ounce, or approximately 28 grams, at a time. JA56. The evidence that the defendant’s conduct involved more than 28 grams of crack cocaine is overwhelming and uncontroverted. Further, as

in *Confredo*, this defendant had ample notice prior to his plea that he faced the mandatory minimum sentence imposed by the sentencing judge. Therefore, the grand jury's failure to charge the threshold amount utilized by the sentence court was harmless.

II. The defendant knowingly and voluntarily waived his appellate rights

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the 'Statement of Facts' above.

B. Governing law and standard of review

In *United States v. Gomez-Perez*, 215 F.3d 315 (2d Cir. 2000), this Court outlined the procedure for appellate counsel to follow where a defendant waives his appellate rights in a plea agreement, yet nevertheless files a notice of appeal. As the Court explained, the government may file a motion to dismiss the appeal based on the waiver, in an effort to "reap its bargained-for benefit." *Id.* at 318. In response, appellate counsel for the defendant should then file a response, limited to a discussion of whether there is any "basis to contest the validity of the waiver." *Id.* at 319. If counsel believes there is no such basis, then counsel should file an *Anders* brief

that addresses only the limited issues of: (1) whether defendant's plea and waiver of appellate rights were knowing, voluntary, and competent; or (2) whether it would be against the defendant's interest to contest his plea, *see id.*; and (3) any issues implicating a defendant's constitutional or statutory rights that either cannot be waived, or cannot be considered waived by the defendant in light of the particular circumstances.

Id. at 319 (citations omitted).

This Court has long recognized that “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.” *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir. 1993) (dismissing defendant's appeal consistent with waiver in plea agreement); *see also United States v. Monsalve*, 388 F.3d 71, 72 (2d Cir. 2004); *United States v. Djelevic*, 161 F.3d 104, 106 (2d Cir.1998) (“It is by now well-settled that a defendant's knowing and voluntary waiver of his right to appeal a sentence within an agreed upon guideline range is enforceable.”). A waiver is generally enforceable against the defendant as long as the record

clearly demonstrates that the defendant knowingly and voluntarily waived his right to appeal. See *United States v. Granik*, 386 F.3d 404, 411 (2d. Cir. 2004) (holding that although defendant had reservations regarding calculation of his sentence, he willfully and knowingly waived his right to appeal); *United States v. Morgan*, 386 F.3d 376, 378-79 (2d Cir.) (upholding enforceability of appellate waiver, which magistrate judge had discussed at length to ensure defendant was waiving his rights knowingly and voluntarily), *aff'd on reconsideration*, 406 F.3d 135 (2d Cir. 2004) (appeal waivers enforceable against *Booker/Fanfan* claims).

Exceptions to the enforceability of appellate waivers “occupy a very circumscribed area of our jurisprudence.” *Gomez-Perez*, 215 F.3d at 319. “Mindful of the benefit of reduced litigation sought by the government, [this Court has held] that counsel submitting an *Anders* brief in these situations is restricted to the narrow subset of issues previously outlined.” *Id.* at 320.

C. Discussion

The defendant knowingly and voluntarily entered a plea agreement that contained a valid and enforceable waiver of his appellate rights. The defendant’s sentence was below the threshold set in that waiver, and, as such, it triggered the waiver. In short, the defendant secured the benefit of his plea agreement, and the valid ap-

pellate waiver should be enforced. *See Salcido-Contreras*, 990 F. 2d at 53.

The defendant suggests that his waiver is not enforceable because he did not know that Congress would be lowering the penalties for the conduct that formed the basis for his conviction. *See* Def. brief at 12. This Court has held that the inability to foresee a change in the law does not supply a basis for failing to enforce an appeal waiver. *See Morgan*, 406 F. 3d, at 137 (holding that “the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements.”). Indeed, in *United States v. Harrison*, No. 11-1240, this Court has very recently addressed and rejected an identical attempt to void an appeal waiver based on the change in the law brought about by the decision in *Dorsey*. In *Harrison*, the Court explicitly reaffirmed that a plea agreement cannot be nullified “by a change in the law after the agreement is executed,” and that “[a] defendant’s inability to foresee that subsequently decided cases would create new appeal issues does not supply a basis for failing to enforce an appeal waiver.” *Id.*, slip op. at 2-3 (emphasis in original; internal quotation marks omitted).

As such, because the defendant received a sentence that triggered his enforceable appeal waiver, this Court should dismiss the instant appeal.

Conclusion

For the foregoing reasons, the defendant's appeal should be dismissed, and his sentence should be affirmed.

Dated: November 16, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Jonathan S. Freimann". The signature is fluid and cursive, with a large initial "J" and "S".

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 5,792 words, exclusive of the Table of Contents, Table of Authorities, and this Certification.

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