

# 10-2865(L)

*To Be Argued By:*  
JONATHAN S. FREIMANN

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

**Docket Nos. 10-2865(L)**  
**10-4109(CON)**  
**10-5145(CON)**

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

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**SUR-REPLY BRIEF**  
**FOR THE UNITED STATES OF AMERICA**

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aka Ghost,

*Defendants,*

CLAYTON BENJAMIN, aka Compton,  
TERRENCE SPANN, aka BOAST,  
DARIUS MCGEE, aka D, aka D Smooth,

*Defendant-Appellant.*

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PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-5145

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

DARIUS MCGEE, aka D, aka D Smooth,

*Defendant-Appellant.*

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

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**SUR-REPLY BRIEF  
FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

The defendant, Darius McGee, in pleading guilty as a second offender to conspiracy to distribute five grams or more of cocaine base, stipulated that he distributed between 250-275 grams of cocaine base. And there was overwhelming evidence to support this stipulation. This Court has asked the parties to determine whether the defendant, who received the mandatory mini-

imum ten-year incarceration term, was sentenced in accordance with the Fair Sentencing Act of 2010 (“FSA”) and, if so, whether the court’s failure to apply the FSA penalties was harmless.<sup>1</sup>

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, under this Court’s recent decision in *United States v. Harrison*, 699 F.3d 158 (2d Cir. 2012), the defendant’s appeal waiver is enforceable despite his valid claim that he was sentenced to pre-FSA penalties after the FSA’s enactment.

Accordingly, the defendant’s sentence should be affirmed.

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<sup>1</sup> In its order, the Court authorized the government to file a sur-reply brief. Supplemental Appendix (“SA”)32.

## 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**

In his reply brief, the defendant failed to address the specific questions raised by this Court. Instead, he simply argued that the trial court should have applied the FSA at the defendant's sentencing and that failure to do so could not have been harmless, as it resulted in a the imposition of a pre-FSA mandatory minimum sentence.<sup>2</sup> The defendant did not address the arguments made by the government in its brief.

The government has conceded that the defendant falls within the group of offenders covered by *Dorsey v. United States*, 132 S. Ct. 2321 (2012). The government has also conceded that, under *Apprendi v. New Jersey*, 120 S. Ct. 2348

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<sup>2</sup> The defendant, in his reply brief, states several times that a five-year mandatory minimum incarceration term would apply to him under the FSA. But if this Court finds that the failure to allege a post-FSA threshold in the indictment requires a remand so that the defendant can be sentenced under the FSA, he will be subject to the new penalty provision of 21 U.S.C. § 841(b)(1)(C), which requires no threshold quantity and imposes no mandatory minimum.

(2000), the FSA drug quantity threshold triggering a mandatory minimum sentence is an element of the offense and that the district court's failure to apply the higher post-FSA crack threshold created an *Apprendi* violation. See *United States v. Gonzalez*, 420 F. 3d 111, 129 (2d Cir. 2005). The analysis, however, does not end there.

Even in the case of an *Apprendi* violation, where there is overwhelming and uncontroverted evidence of an element omitted from an indictment, that violation can be deemed harmless. See *United States v. Confredo*, 528 F. 3d 143, 156 (2d Cir. 2008). In his reply brief, the defendant claims that the error was harmful because it may have resulted in a greater sentence. But that analysis, by focusing exclusively on the sentencing, examines the wrong proceeding in his case. This Court has made clear that an *Apprendi* violation can be harmless “where the evidence is overwhelming that the *grand jury* would have found the fact on issue.” *Confredo*, 528 F. 3d at 156 (internal citations omitted) (emphasis added); cf. *United States v. Nkansah*, 699 F.3d 743, 752 (2d Cir. 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.”) (emphasis added). The harmless error analysis hinges on whether

there was any “doubt the grand jury would have found” the omitted element. *See Confredo*, 528 F. 3d at 156.

As in *Confredo*, there is no doubt in this case that the grand jury would have found that the defendant’s offense involved 28 grams or more of crack cocaine. It is undisputed that the government had evidence that the defendant arranged to purchase crack cocaine for resale a total of 28 different times and that some of those transactions involved as much as 28 grams of crack cocaine at a time. Joint Appendix (“JA”)53. The defendant also stipulated in his plea agreement and admitted in the plea colloquy to nearly ten times the FSA threshold quantity. JA56. He not only had ample notice that he faced the pre-FSA penalties, but he actually believed he was pleading guilty pursuant to those penalties. *See Confredo*, 528 F. 3d at 156. In short, the undisputed record leaves no “doubt that the grand jury would have found” that the defendant’s conduct involved more than the FSA threshold of 28 grams and, thus, any error was harmless. *See Id.*

## **II. The defendant knowingly and voluntarily waived his appellate rights**

In his reply, the defendant argues that the appellate waiver in the plea agreement negotiated and agreed upon by the parties should not be enforceable because of the “contract principles

applicable.” Reply Br. at 1. However, it is precisely contract principles that require the appellate waiver’s enforceability. This Court has indicated that plea agreements should be construed “according to contract law principles,” *United States v. Yemitan*, 70 F.3d 746, 747 (2d Cir. 1995). Further, “because plea agreements are unique contracts, we temper the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards.” *United States v. Woltmann*, 610 F.3d 37, 39-40 (2d Cir. 2010) (internal quotation marks and ellipsis omitted). As described in detail in the government’s initial brief, the required due process and procedural safeguards have been applied to the defendant and the appellate waiver he negotiated.

The defendant also argues that the appellate waiver should not be enforced because he “is entitled to the benefit of his bargain.” Reply Br. at 8. Specifically, he maintains that, because he argued at the sentencing hearing that the FSA should apply to him, the appellate waiver should not apply to that issue. *See id.* at 8-9. The defendant again focuses on the wrong time-frame. At the time the plea agreement was negotiated and entered into – and when the government made concessions in exchange for the appellate waiver – the defendant did not seek to carve out issues outside the waiver’s scope. Further, 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 United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2004) (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.”). The defendant’s legal arguments at sentencing do not void a previously agreed-upon waiver.

The defendant also suggests that the government should be estopped from relying on the appellate waiver because, prior to the Court’s August 17, 2012 Order, it sought a remand in this case. He does not provide any case on point to support this argument, and the government is not aware of any case that bars the enforcement of an appellate waiver in these circumstances. To the contrary, just weeks before the government filed its brief in response to the August 17, 2012 Order, this Court 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*. *See Harrison*, 699 F.3d at 159.

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.* (empha-

sis in original; internal quotation marks omitted). The defendant attempts to distinguish his case from *Harrison* by noting that he argued for the FSA's applicability at sentencing and challenged the waiver in his initial brief on appeal. Neither his legal arguments at sentencing, nor his attempt to void the waiver on appeal renders the waiver unenforceable. To hold otherwise would make it remarkably easy for a defendant to negotiate a waiver in a plea agreement and subsequently avoid its enforcement.

Indeed, *Harrison's* holding rests on the simple proposition that a knowing and voluntary appeal waiver should be enforced. Indeed, it follows a long line of holdings by this Court upholding waiver provisions entered into voluntarily and knowingly at the time of the guilty plea. See e.g. *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. 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); *Morgan*, 386 F.3d at 378-79 (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); *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.”).

### Conclusion

For the foregoing reasons, and the reasons set forth in the government’s initial brief, the defendant’s appeal should be dismissed, and his sentence should be affirmed.

Dated: March 8, 2013

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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