

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: January 13, 2011 Decided: August 10, 2011)

Docket No. 09-4391-cr

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UNITED STATES OF AMERICA,

Appellee,

- v. -

GIOVANNI RIGGI, also known as John Riggi, also known as Uncle John, GIROLAMO PALERMO, also known as Jimmy Palermo, CHARLES MAJURI, STEFANO VITABILE, also known as Steve Vitabile, FRANCESCO POLIZZI, also known as johndoe6, also known as Frank Polizzi, also known as Francesco Polizzi, ANTHONY MANNARINO, also known as Anthony Marshmallow, also known as Anthony Marshmallo, LOUIS CONSALVO, also known as johndoe8, also known as Louie Eggs, also known as Frank Scarabino, GREGORY RAGO, FRANK D'AMATO, BERNARD NICASTRO, FRANK SCARABINO, also known as Franky the Beast, GIUSEPPE SCHIFILLITI, also known as Pino Schifilliti, CHARLES STANGO, also known as Charlie the Hat, also known as The Mad Hetter, also known as Goombs, also known as Goombsie, JOSEPH COLLINA SR., SIMONE PALERMO, also known as Daddy, SALVATORE TIMPANI, also known as Sal the Barber, also known as Little Sal, JOSEPH BRIDESON, also known as Big Joey, AMERICO MASSA, also known as Mike Massa, MARTIN LEWIS, RUBEN MALAVE, MICHAEL SILVESTRI,

Defendants,

PHILIP ABRAMO,

Defendant-Appellant.

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Before: JACOBS, Chief Judge, WESLEY and CHIN,
Circuit Judges.

Defendant-Appellant Philip Abramo appeals from a judgment of conviction and sentence of the United States District Court for the Southern District of New York (Rakoff, J.), arguing that his rights under the Ex Post Facto Clause were violated by the application of the 2008 Sentencing Manual to a murder conspiracy that concluded in 1989. He contends that this alleged violation and his ignorance of his ex post facto rights render the appeal-waiver provision in his plea agreement unenforceable.

We enforce the appeal-waiver provision and dismiss the appeal.

INGA L. PARSONS, Marblehead, MA,
for Defendant-Appellant.

STEVE C. LEE, Assistant United States Attorney (Andrew L. Fish, Assistant United States Attorney, on the brief), for Preet Bharara, United States Attorney for the Southern District of New York, New York, NY, for Appellee.

DENNIS JACOBS, Chief Judge:

Defendant-Appellant Philip Abramo appeals from a judgment of conviction and sentence of the United States District Court for the Southern District of New York

1 (Rakoff, J.), arguing that his rights under the Ex
2 Post Facto Clause were violated by the application of the
3 2008 Sentencing Manual to a murder conspiracy that concluded
4 in 1989. He contends that this alleged violation and his
5 ignorance of his ex post facto rights render the appeal-
6 waiver provision in his plea agreement unenforceable.

7 Abramo returns to this Court several years after we
8 vacated his conviction and life sentence, holding that the
9 admission of eight plea allocutions of non-testifying co-
10 conspirators was plain error under the intervening Crawford
11 v. Washington decision. 541 U.S. 36 (2004); see United
12 States v. Riggi, 541 F.3d 94 (2d Cir. 2008). On remand,
13 Abramo pled guilty pursuant to a plea agreement to charges
14 that carried a greatly reduced maximum aggregate sentence of
15 eighteen years: conspiracy to commit murder, conspiracy to
16 commit loansharking, and receiving the proceeds of
17 extortion, in violation of 18 U.S.C. §§ 1959(a)(5), 371, and
18 880, respectively.

19 The plea agreement contained a broad appeal-waiver
20 provision by which Abramo agreed to forgo appealing any
21 sentence of eighteen years or less.¹ The parties also

¹ The full waiver reads:

It is agreed (i) that the defendant will not file
a direct appeal, nor litigate under Title 28,

1 stipulated to several Guidelines particulars: first, that
2 "[t]he Guidelines provisions in effect as of November 1,
3 2008, apply to this case"; second, that the appeal waiver
4 was binding "even if the Court employ[ed] a Guidelines
5 analysis different from that stipulated to [t]herein";
6 third, that the Guidelines sentence was the statutory
7 maximum of 216 months. Joint Appendix at 59, 61, 63.

8 The plea was accepted by the district court at a July
9 9, 2009 plea colloquy. Abramo confirmed he was knowingly
10 relinquishing the right to appeal.

11 However, Abramo's sentencing memorandum raised an
12 interesting ex post facto issue. The charged murder
13 conspiracy ended in 1989 upon the death of the targeted
14 victim. The Guidelines for murder conspiracy were raised
15 significantly in 1990: Conspiracies that "result[ed] in the
16 death of a victim" were linked to the first-degree murder

United States Code, Section 2255 and/or Section
2241, any sentence of 18 years (i.e., the
Stipulated Guidelines Sentence) or less, and (ii)
that the Government will not appeal any sentence
of 18 years. This provision is binding on the
parties even if the Court employs a Guidelines
analysis different from that stipulated to herein.
Furthermore, it is agreed that any appeal as 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) the above stipulation.

Joint Appendix at 63.

1 Guidelines. See U.S.S.G. §§ 2A1.1, 2A1.5(c)(1); id. App. C,
2 amend. 311 (1990). Abramo argued that applying the 2008
3 Guidelines--as stipulated--would violate his rights under
4 the Ex Post Facto Clause because this significant
5 enhancement was added after the charged murder conspiracy
6 had ended.² (Applying the 1989 Guidelines would have
7 resulted in a range of 78 to 97 months.)

8 But Abramo did not move to withdraw his plea; he raised
9 the issue only for the district "[c]ourt's attention as part

² The "one-book" rule raises a hurdle for Abramo. A "sentencing court must generally apply the version of the Guidelines that is in effect at the time of sentencing," United States v. Rodriguez, 989 F.2d 583, 587 (2d Cir. 1993); but if the court determines that the application would violate the Ex Post Facto Clause, it "shall use the Guidelines Manual in effect on the date that the offense of conviction was committed," U.S.S.G. § 1B1.11(b)(1). Where multiple offenses were committed (and the present Manual would trigger an ex post facto violation), the one-book rule dictates that the Guidelines Manual in effect for the most recent offense is applied to all offenses. See id. § 1B1.11(b)(2)-(3).

The superseding information alleges that the loansharking conspiracy ran from 1990 through October 2000. Under the one-book rule, the earliest Manual that could apply is the 1999 version, which contains the stricter murder-conspiracy provisions. Abramo counters that he technically allocuted only to conduct through October 1990, which he argues supersedes the date range from the information (thus making the 1989 Guidelines applicable and preserving the ex post facto issue).

Because we enforce the appeal waiver, we need not reach this issue.

1 of its review of [the 18 U.S.C.] § 3553(a) factors," as a
2 "relevant fact . . . in assessing a fair and just sentence."
3 Joint Appendix at 107-09. Nor did the issue factor into his
4 requested sentence, which sought a reduction in the 216-
5 month statutory maximum for the time he served on related
6 charges in Florida.³

7 When the issue was raised at sentencing, the district
8 court viewed the discrepancy between the 1989 and 2008
9 murder-conspiracy Guidelines as evidence "that the
10 guidelines are not operating in the manner in which they
11 were intended to operate." Joint Appendix at 157. The
12 court indicated that the discrepancy therefore would not
13 "make the slightest difference in [Abramo's] sentence," *id.*;
14 it instead referenced the nature of the offense itself:

15 [L]ooking at the conspiracy to murder, why is that
16 not an offense that calls for a[n] 18 year
17 penalty? . . . [W]hat crime more calls out for
18 deterrence, for punishment, for the most severe
19 penalties that the court allows than getting
20 together to murder a human being?

21 Joint Appendix at 172. But because the court had to select
22 a Guidelines range, Gall v. United States, 552 U.S. 38, 49

³ Abramo's primary concern was to seek a downward departure for the 70 months (61 months after good time) he served in Florida on related stock-fraud charges. Due to a long delay in the sentencing for the conviction that we later vacated, Abramo lost the opportunity for the Florida offense to run concurrently.

1 (2007), it chose to apply the 2008 Guidelines. Abramo was
2 sentenced to 186 months' imprisonment: the 216-month
3 statutory maximum with a partial offset for the 70-month
4 sentence he served in Florida.

5 This appeal followed. Abramo argues that the
6 application of the harsher murder-conspiracy provisions in
7 the 2008 Manual violated the Ex Post Facto Clause. He
8 offers two theories as to why the appeal-waiver provision is
9 unenforceable: first, his ex post facto rights were
10 unwaivable; second, any waiver was unknowing, due to his
11 ignorance of his ex post facto rights.

12 13 **DISCUSSION**

14 "Waivers of the right to appeal a sentence are
15 presumptively enforceable." United States v. Arevalo
16 (Vigil), 628 F.3d 93, 98 (2d Cir. 2010). We have
17 "repeatedly upheld the validity of [appeal] waivers" if they
18 are "knowingly, voluntarily, and competently provided by the
19 defendant." United States v. Gomez-Perez, 215 F.3d 315, 318
20 (2d Cir. 2000). The "exceptions to the presumption of the
21 enforceability of a waiver . . . occupy a very circumscribed
22 area of our jurisprudence." Id. at 319. We construe plea
23 agreements "according to contract law principles," United

1 States v. Yemitan, 70 F.3d 746, 747 (2d Cir. 1995), but
2 “because plea agreements are unique contracts, we temper the
3 application of ordinary contract principles with special due
4 process concerns for fairness and the adequacy of procedural
5 safeguards.” United States v. Woltmann, 610 F.3d 37, 39-40
6 (2d Cir. 2010) (internal quotation marks and ellipsis
7 omitted).

8
9 **I**

10 A violation of a fundamental right warrants voiding an
11 appeal waiver. For example, we have voided appeal waivers
12 where the sentence imposed was based on unconstitutional
13 factors--such as race, see Gomez-Perez, 215 F.3d at 319,
14 naturalized status, see, e.g., United States v. Jacobson, 15
15 F.3d 19, 23 (2d Cir. 1994), or the ability to pay
16 restitution, see, e.g., United States v. Johnson, 347 F.3d
17 412, 415, 419 (2d Cir. 2003). Similarly, we have voided
18 waivers where a sentencing court “failed to enunciate any
19 rationale for the defendant’s sentence,” and thus
20 “abdicat[ed] [its] judicial responsibility.” Woltmann, 610
21 F.3d at 40 (internal quotation marks omitted) (voiding
22 waiver because sentencing court relied on plea agreement “to
23 the exclusion of” the 18 U.S.C. § 3553(a) factors and a

1 U.S.S.G. § 5K1.1 letter urging a below-Guidelines sentence).

2 On the other hand, other meaningful errors are
3 insufficient to void an appeal waiver. We have enforced
4 waivers where a sentence was arguably imposed contrary to a
5 statutory requirement. See Yemitan, 70 F.3d at 748
6 (enforcing appeal waiver despite potential noncompliance
7 with statement-of-reason requirement in 18 U.S.C.
8 § 3553(c)(1), because the noncompliance--if any--did not
9 present the "extraordinary circumstances" of the
10 impermissible bias or abdication cases). We also enforced
11 an appeal waiver notwithstanding the defendant's claim that
12 the sentencing court failed to make certain downward
13 departures prior to sentencing. United States v. Rivera,
14 971 F.2d 876, 896 (2d Cir. 1992); see also United States v.
15 Buissereth, 638 F.3d 114, 115-16 (2d Cir. 2011) (enforcing
16 appeal waiver despite district court's failure to: rule on
17 [i] objections to the pre-sentence report (PSR) and [ii]
18 requests for downward departures; adopt findings of PSR;
19 discuss the § 3553(a) factors; and calculate applicable
20 sentencing range).

21 The decisive considerations dividing these cases appear
22 to be the nature of the right at issue and whether the
23 sentence "was reached in a manner that the plea agreement

1 did not anticipate." United States v. Liriano-Blanco, 510
2 F.3d 168, 174 (2d Cir. 2007). As to the nature of the
3 right, a defendant pleading guilty "can waive elemental
4 constitutional and statutory rights." United States v.
5 Braimah, 3 F.3d 609, 611 (2d Cir. 1993); see also McCarthy
6 v. United States, 394 U.S. 459, 466 (1969) ("A defendant who
7 enters [a guilty] plea simultaneously waives several
8 constitutional rights"); United States v. Waters, 23
9 F.3d 29, 36 (2d Cir. 1994) (holding that ex post facto
10 challenge to statute of conviction was waived by pleading
11 guilty without preserving the issue). However, "a defendant
12 may be deemed incapable of waiving a right that has an
13 overriding impact on public interests," United States v.
14 Ready, 82 F.3d 551, 555 (2d Cir. 1996), as such a waiver may
15 "irreparably discredit[] the federal courts," id. at 556
16 (quoting United States v. Mezzanatto, 513 U.S. 196, 204
17 (1995)). As to unanticipated matters at sentencing, "a
18 defendant who waives his right to appeal does not subject
19 himself to being sentenced entirely at the whim of the
20 district court." United States v. Marin, 961 F.2d 493, 496
21 (2d Cir. 1992).

22 Neither consideration warrants voiding Abramo's appeal
23 waiver. There is no suggestion that the sentencing judge

1 was biased or that he abdicated his judicial responsibility;
2 to the contrary, the constitutional error during sentencing
3 arose following a careful consideration of a baffling legal
4 issue--if indeed there was any error.⁴ Any issue as to
5 Abramo's knowledge aside, the sentencing process was exactly
6 as anticipated: The district court applied the 2008
7 Guidelines, as contemplated by the following *three*
8 stipulations from the plea agreement: (1) that the 2008
9 Guidelines be used; (2) that the applicable Guidelines
10 sentence was eighteen years; and (3) that the agreement was
11 binding even if the court used a different Guidelines range.
12 Joint Appendix at 59-62. No public interest was impaired by
13 Abramo's waiver, and recognizing the waiver does not impugn
14 the integrity of the judiciary or the sentencing process.

⁴ Because the Guidelines are only advisory, applying a provision that was amended after the charged offense violates the Ex Post Facto Clause only where there was a "substantial risk" that the imposed sentence "was more severe" because of the amendment. United States v. Ortiz, 621 F.3d 82, 87 (2d Cir. 2010) (quoting United States v. Turner, 548 F.3d 1094, 1100 (D.C. Cir. 2008)), cert. denied, 131 S. Ct. 1813 (2011). Here, Judge Rakoff was aware of the discrepancy between the two Manuals, but concluded that it had no effect on the sentence he was imposing because the Guidelines were not "operating in a way that g[ave] the Court any meaningful guidance." Joint Appendix at 158. This explicit consideration of the phenomenon that arguably implicates the Ex Post Facto Clause, and the decision to discount or disregard the provision said to create the violation, may eliminate any "significant risk" of a more severe sentence.

1 Rather, by agreeing not to appeal, Abramo avoided another
2 life sentence and capped his sentencing exposure. (The
3 government presumably would not have offered the deal if the
4 lower Guidelines range were applicable.) If in such
5 circumstances a waiver were found unenforceable, then "the
6 covenant not to appeal becomes meaningless and would cease
7 to have value as a bargaining chip in the hands of
8 defendants." Yemitan, 70 F.3d at 746, 748.

9 United States v. Rosa, 123 F.3d 94 (2d Cir. 1997), is
10 not to the contrary. In Rosa, we noted in dicta that "[w]e
11 will certainly often be willing to set aside the waiver and
12 accept appeal when constitutional concerns are implicated,
13 whether those concerns be related to a particular
14 constitutional provision such as the *ex post facto clause*
15" Id. at 101 (emphasis added). This dicta should be
16 read in view of the "disturbing characteristic[s]," id. at
17 100, of the plea agreement in Rosa: The parties did not
18 stipulate to a sentence below which the defendant would not
19 appeal (in this case, eighteen years); rather, the defendant
20 agreed not to appeal a within-Guidelines sentence regardless
21 of the court's Guidelines calculation. The agreement thus
22 "may [have] subject[ed] a defendant to a sentence vastly
23 greater than he, or possibly even the Government, could have

1 anticipated." Id. In any event, the dicta dates from the
2 era of mandatory Guidelines, a variable with impact on ex
3 post facto issues. (Moreover, the Rosa court enforced the
4 waiver notwithstanding its "disturbing characteristic[s],"
5 id.)

6 II

7 Abramo argues that he did not knowingly or
8 intelligently agree to the appeal waiver because he was
9 ignorant of his existing ex post facto rights. He invokes
10 contract principles, classifying the Guidelines stipulations
11 as a mutual mistake of fact that voids the contract. Abramo
12 Br. at 26.

13 A mutual mistake concerning the proper Guidelines range
14 is an insufficient basis to void a plea agreement. In
15 United States v. Rosen, 409 F.3d 535 (2d Cir. 2005), the
16 parties overlooked an ex post facto issue (among others)
17 when calculating the stipulated Guidelines range in the plea
18 agreement, id. at 541-42; the district court applied the
19 otherwise proper calculation, which yielded a stricter
20 Guidelines range, id. at 544.⁵ We held that the defendant's

⁵ Resolving a potential ex post facto issue should yield a more lenient result, but other errors in the calculation led to the stricter range. (The enhancement that triggered the potential ex post facto issue had been erroneously omitted from the parties' calculation, so applying the earlier Guidelines Manual did lower the

1 request to withdraw his plea was properly denied. Because
2 the plea agreement contained "express provisions with
3 respect to the possibility of a mistaken prediction as to
4 sentencing calculations," the agreement was "not a proper
5 candidate for rescission on the ground of mutual mistake."
6 Id. at 548-49. (Rosen did not involve an appeal-waiver
7 provision, but we see no reason why Rosen's approach would
8 not be valid in this context as well. See United States v.
9 Castillo, 303 F. App'x 989 (2d Cir. 2008) (summary order).)

10 But Rosen (and Castillo) involved Guidelines
11 calculation errors of the garden variety, not alleged
12 violations of constitutional rights.⁶ Abramo distinguishes
13 Rosen by claiming that the Guidelines error here arose from
14 his ignorance of existing⁷ constitutional rights. Abramo
15 Br. at 27. (The government does not argue that Rosen is

ultimate Guidelines range).

⁶ As noted, the Rosen court recognized the potential ex post facto issue that the parties overlooked, and applied the correct Manual; Rosen thus did not argue that his ex post facto (or other constitutional) rights were violated.

⁷ Our cases foreclose the possibility that a plea agreement can be nullified by a change in law *after* the agreement is executed: 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." United States v. Morgan, 406 F.3d 135, 137 (2d Cir. 2005) ("Morgan II"). "[T]he possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements." Id.

1 controlling; in fact, it does not even cite Rosen.)
2 Abramo's argument derives from our dicta: We have hinted
3 that "ignorance of existing rights may void a plea agreement
4 and a waiver of appellate rights," United States v. Roque,
5 421 F.3d 118, 122 (2d Cir. 2005). For example, in United
6 States v. Morgan ("Morgan I"), we did not foreclose the
7 possibility that an otherwise valid waiver could be
8 unenforceable "if a defendant can establish that he was
9 unaware of his Apprendi rights at the time he entered into
10 his plea agreement." 386 F.3d 376, 381 n.3 (2d Cir. 2004);
11 see also Morgan II, 406 F.3d at 137 n.2 (reiterating that
12 existing-rights argument is not reached); United States v.
13 Haynes, 412 F.3d 37, 39 (2d Cir. 2005) (per curiam) (citing
14 Morgan II).

15 It is unclear, however, why a hypothetical claim based
16 on "ignorance of existing rights" is not subsumed by a claim
17 based on ineffective assistance of counsel, which can
18 survive an appeal waiver "where the claim concerns 'the
19 advice [the defendant] received from counsel.'" Parisi v.
20 United States, 529 F.3d 134, 138 (2d Cir. 2008) (quoting
21 United States v. Torres, 129 F.3d 710, 715-16 (2d Cir.
22 1997)). A lawyer's obligations during plea negotiations
23 include informing the client of constitutional rights that

1 affect the plea. Thus, a defendant claiming ignorance of
2 existing constitutional rights during plea negotiations is
3 in effect arguing that the advice given by his counsel was
4 inadequate or incorrect. Such a deficient performance is
5 one element of an ineffective-assistance claim. Id. at 140
6 (referencing Strickland v. Washington, 466 U.S. 668, 688,
7 693 (1984)). Were a separate "ignorance of existing rights"
8 claim readily available, a defendant could litigate the same
9 issue twice.

10 That concern is particularly acute here. Abramo claims
11 "ignorance of existing rights" in this appeal, but he has
12 carefully reserved an ineffective-assistance claim for a
13 habeas petition. Abramo Br. at 28. (And he goes further,
14 arguing that the "specter" of the ineffective-assistance
15 claim "should give additional weight to finding the waiver
16 clause unenforceable" in this case. Id.) We cannot say
17 that a claim alleging ignorance of existing rights will
18 always be subsumed by a claim of ineffective assistance, but
19 on these facts Abramo's alleged ignorance of his ex post
20 facto rights is relevant only in an ineffective-assistance
21 claim (which is not raised here, and as to which we express
22 no view).

23 Moreover, even assuming that Abramo was not aware of

1 the ex post facto issue when he pled guilty, he was well
2 aware of it by the time of sentencing. Yet he made no
3 motion to withdraw his plea and took no step to preserve the
4 issue for appeal. Instead he elected to ask that this be
5 taken into account merely as a sentencing factor under
6 § 3553(a). And he made this election knowing that he had
7 waived his right to appeal any sentence of eighteen years or
8 less.

9 Under these circumstances, we hold that the plea waiver
10 is enforceable.

11

12

CONCLUSION

13 For the foregoing reasons, Abramo's appeal is
14 dismissed.