

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: September 5, 2007 Decided: December 11, 2007)

5
6 Docket No. 06-2919-cr

7 -----
8 UNITED STATES OF AMERICA,

9 Appellee,

10 - v -

11 ARIEL LIRIANO-BLANCO,

12 Defendant-Appellant.
13 -----

14 Before: WALKER, CALABRESI, and SACK, Circuit Judges.

15 Appeal by the defendant from a judgment of conviction
16 and sentence in the United States District Court for the Northern
17 District of New York (Thomas J. McAvoy, Judge). Upon the
18 defendant's plea of guilty pursuant to a plea agreement, which
19 included an appeal waiver by the defendant, to unlawfully
20 entering the United States in violation of 8 U.S.C. § 1326(a),
21 (b) (2), the district judge declined to impose a non-Guidelines
22 sentence because he thought that doing so was likely prohibited
23 by law. The court was, at the time of sentencing, under a
24 misimpression as to the defendant's ability to appeal his
25 sentence, which may have affected the severity of the sentence
26 that the court imposed.

1 Remanded in order to give the district court the
2 opportunity to reconsider the sentence.

3 CRAIG M. CRIST, Dreyer Boyajian LLP,
4 Albany, NY, for Defendant-Appellant.

5 BRENDA K. SANNES, Assistant United
6 States Attorney (Edward P. Grogan,
7 Assistant United States Attorney, of
8 counsel), for Glenn T. Suddaby, United
9 States Attorney for the Northern
10 District of New York, Syracuse, NY, for
11 Appellee.

12 SACK, Circuit Judge:

13 On its face, this appeal raises the question of the
14 authority of a district court to sentence a defendant below the
15 range provided by the United States Sentencing Guidelines (the
16 "Guidelines") when so-called "fast-track" downward departures are
17 not available in the district. We cannot, however, reach the
18 substance of this issue because, we conclude, the waiver of
19 appeal included in the plea agreement of the defendant, Ariel
20 Liriano-Blanco, is effective and bars us from doing so.
21 Nevertheless, because the district court appears to have
22 determined the sentence based, in part, on its misimpression,
23 uncorrected by the government, that he could appeal his sentence
24 to us, and because that misimpression may have affected the
25 severity of the sentence that the court imposed, we remand to the
26 district court to provide it with an opportunity to reconsider.

27 **BACKGROUND**

28 On December 16, 2005, Liriano-Blanco entered this
29 country illegally by walking from Canada to the United States at

1 an unauthorized border crossing at or near Champlain, New York.
2 His movements were detected by an intrusion device, which
3 notified the United States Border Patrol. A member of the Border
4 Patrol effected Liriano-Blanco's arrest.

5 On December 22, 2005, Liriano-Blanco was indicted in
6 the United States District Court for the Northern District of New
7 York on one count of unlawfully attempting to re-enter the United
8 States after being previously removed from the country following
9 his conviction of an aggravated felony, in violation of 8 U.S.C.
10 § 1326(a), (b) (2). On February 6, 2006, Liriano-Blanco entered
11 into a plea agreement with the government. In it, he agreed,
12 inter alia, to plead guilty to various charges against him and to
13 waive the right to appeal any sentence of sixty months or less.

14 On the same day, the district court (Thomas J. McAvoy,
15 Judge) held a video-conference plea hearing.¹ During the plea
16 colloquy, the court specifically addressed the appeal waiver
17 contained in the plea agreement, asking whether Liriano-Blanco
18 agreed to give up the right of appeal for any sentence of 60
19 months or less, whether he did so voluntarily, and whether he
20 understood the waiver when he agreed to it. Liriano-Blanco
21 answered "yes" to each of these questions. Tr. of Plea Hearing,
22 Feb. 6, 2006, at 15-17. The court then accepted Liriano-Blanco's
23 guilty plea.

¹ The district judge was in Binghamton, New York, while Liriano-Blanco and counsel for him and for the government were in Albany. Tr. of Plea Proceeding, Feb. 6, 2006.

1 The Fast-Track Program

2 Underlying the sentencing issues the district court
3 then faced was the existence of the "early disposition," or
4 "fast-track," federal sentencing program. The program has
5 existed since 2003 when Congress "instructed the United States
6 Sentencing Commission to issue a policy statement authorizing a
7 downward departure pursuant to an early disposition program
8 authorized by the Attorney General." United States v. Mejia, 461
9 F.3d 158, 160 (2d Cir. 2006) (citations and internal quotation
10 marks omitted).

11 As directed by Congress, the Sentencing
12 Commission adopted U.S.S.G. § 5K3.1 . . .
13 which provides that, "[u]pon motion of the
14 Government, the court may depart downward not
15 more than 4 levels pursuant to an early
16 disposition program authorized by the
17 Attorney General of the United States and the
18 United States Attorney for the district in
19 which the court resides.

20 Id. at 161 (emphasis added). At last count, the fast-track
21 program was in force in thirteen of the ninety-four federal
22 districts: Arizona; California (Central, Southern, Eastern, and
23 Northern districts); Idaho; Nebraska; New Mexico; North Dakota;
24 Oregon; Texas (Southern and Western districts); and the Western
25 District of Washington. Id. The fast-track program is not in
26 effect in the Northern District of New York.

27 Sentencing of Liriano-Blanco

28 The parties and the probation office made written
29 submissions to the district court with regard to Liriano-Blanco's
30 sentencing. The Probation Office calculated the Guidelines range

1 to be 57 to 71 months, based upon an offense level of 8, under
2 U.S.S.G. § 2L1.2(a), a 16 level enhancement under § U.S.S.G. §
3 2L1.2(b) (1) (A) (I) based upon Liriano-Blanco's prior felony
4 conviction, and a criminal history category of IV. Liriano-
5 Blanco argued, however, that a non-Guidelines sentence was
6 available and should be imposed "to avoid the disparity caused by
7 the existence of fast-track programs in other districts." Def.'s
8 Sentencing Mem., dated April 26, 2005 [sic], at Point II.A.

9 On May 8, 2006, some three months after Liriano-
10 Blanco's plea hearing, the district court conducted a brief
11 sentencing hearing. The court commented generally on non-
12 Guidelines sentencing in the district courts in illegal-reentry
13 cases. The court concluded:

14 [I]nstead of sentencing you today, we're
15 gonna look into those things, we're gonna
16 examine the new case law, I'm gonna take
17 under advisement the things I'm telling you
18 about today and then, fairly quickly,
19 hopefully within a couple weeks, we'll bring
20 you back and I'll hear arguments and I'll
21 sentence [you].

22 Tr. of Sentencing Hearing, May 8, 2006, at 6. The court made no
23 mention of the possibility of an appeal or of the appeal waiver
24 that was in force.

25 The sentencing hearing was reconvened on June 13, 2006.

26 At the outset, the district court said:

27 No matter which way I go in this case, . . . I am
28 gonna offer the other side a certificate of
29 appealability, so I will immediately sign

1 it. . . .² I would like to see what the Second
2 Circuit says about it. I know what other courts
3 and other Circuits say, but I would like guidance
4 from a non-Fast Track circuit.

5 Tr. of Sentencing Hearing, June 13, 2006, at 9.

6 The court then entertained argument from both sides.
7 Most of the discussion was about the disparity between the
8 Guidelines sentence for Liriano-Blanco and the lower Guidelines
9 sentence that would have been available to him had he crossed the
10 border into one of the fast-track jurisdictions instead of the
11 Northern District of New York.

12 Toward the end of the proceeding, the court expanded on
13 its introductory remarks about sentencing disparities and the
14 fast-track program.

15 Now, if I thought I could follow my own
16 individual predilections, if I could follow
17 my emotions and my heart, I would go down
18 four levels and say I'm gonna sentence him
19 there. But I don't think I can do
20 that. . . . That's what I did [when I sat by
21 designation] in Laredo, [Texas,] on two
22 separate occasions, and in Midland, [Texas,]
23 because they have the Fast Track Program.

24 Here, we don't have it. It does cause
25 disparity, but I think it is important that
26 Congress did incorporate that into The
27 [PROTECT] Act, and I think the First Circuit
28 made that call and was persuaded by that

² We are not quite certain what the district court meant by "a certificate of appealability." Ordinarily, we use the term to refer to the certificate granted by a district court, circuit judge, or a justice that permits a person whose petition or application for habeas corpus relief has been denied by the district court to appeal it to the court of appeals. See, e.g., 28 U.S.C. § 2253(c); Lozada v. United States, 107 F.3d 1011, 1015-16 (2d Cir. 1997), abrogated on other grounds by United States v. Perez, 129 F.3d 255, 260 (2d Cir. 1997).

1 precedent. I am persuaded by the way they
2 arrived at that.

3 Id. at 22-23. The district court then found Liriano-Blanco's
4 offense level to be 21, and granted a departure from the
5 recommended criminal history level of IV to a category III. The
6 court calculated the resulting range to be 46 to 57 months and
7 sentenced Liriano-Blanco to a term of 46 months.

8 Shortly thereafter, the district court returned to the
9 issue of a possible appeal. "Hopefully, maybe, the Second
10 Circuit may disagree with me and be able to give a lesser
11 sentence when they send it back, but I don't know." Id. at 26-
12 27. "Both you [referring to Liriano-Blanco] and the Government
13 have the right to appeal this sentence under certain
14 circumstances. And the Court has already indicated it would
15 issue, if applied for, a certificate of appealability." Id. at
16 28. The court told Liriano-Blanco, finally, that he was required
17 "to file any appeal [he] . . . plan[ned] to take within 10 days
18 of the date of th[e] sentence." Id.

19 In fact, of course, Liriano-Blanco had consented to an
20 appeal waiver as part of his plea agreement. No one present
21 corrected the district court's misimpression, despite the fact
22 that the court referred to its expectation of an appeal
23 repeatedly, and the possibility of an appeal appeared to be an
24 integral part of the judge's reasoning in arriving at a
25 sentencing decision.

26 Liriano-Blanco's Appeal

1 On June 20, 2006, Liriano-Blanco filed a notice of
2 appeal. On October 6, 2006, after his efforts to consolidate the
3 appeal with that of one José Duran-Ferreira -- who had traveled
4 into the United States, and was arrested, with Liriano-Blanco --
5 had failed, he filed his brief.

6 In the interim, on August 22, 2006, we decided Mejia.
7 We concluded: "We join other circuits in holding that a district
8 court's refusal to adjust a sentence to compensate for the
9 absence of a fast-track program does not make a sentence
10 unreasonable." Mejia, 461 F.3d at 164. We did not have before
11 us in Mejia, and did not address, the question presented in
12 Liriano-Blanco's case: whether the district court has the
13 authority to impose a non-Guidelines sentence in response to the
14 fast-track sentencing disparity if it deems such a reduced
15 sentence to be warranted.

16 On October 13, 2006, the government moved to dismiss
17 Liriano-Blanco's appeal on the ground that he had waived his
18 right to appeal in the plea agreement. On December 22, 2006, a
19 panel of this Court denied the motion. Our order reads:

20 The Government moves to dismiss defendant-
21 appellant's case on the ground that Liriano-
22 Blanco entered into a clear and enforceable
23 appellate waiver, and that he knowingly and
24 voluntarily acknowledged his waiver of his
25 right to appeal. Upon due consideration, the
26 Government's motion is DENIED. Liriano-
27 Blanco argues that the district court's
28 comments during sentencing regarding the
29 availability of appeal amounted to a de facto
30 striking and/or rejection of the appeal
31 waiver as contained in the plea agreement.

1 We have not addressed precisely this issue.
2 Cf. United States v. Fisher, 232 F.3d 301,
3 304 (2d Cir. 2000).

4 United States v. Liriano-Blanco, 2d Cir., No. 06-2919-cr, Order
5 dated Dec. 22, 2006.³

6 DISCUSSION

7 We note at the outset that if Liriano-Blanco were able
8 to lodge an appeal challenging the district court's perception of
9 its power to issue downward departures without fast-track
10 authorization, such an appeal would not be frivolous. Although
11 we concluded in United States v. Mejia that a sentencing court is
12 not required to account for the fast-track disparity by imposing
13 a non-Guidelines sentence, Mejia, 461 F.3d at 164, we did not
14 foreclose the possibility that a court has the legal authority to
15 impose, in its discretion, a non-Guidelines sentence on that
16 basis. Perhaps it does not, under an extension of the Mejia
17 rationale or otherwise, see, e.g., United States v. Castillo, 460
18 F.3d 337, 361 (2d Cir. 2006) (district court may not impose a
19 non-Guidelines sentence "based on policy disagreements with [a]
20 disparity that the Guidelines" call for). But the answer to that
21 question is not a foregone conclusion. The issue for us now,
22 therefore, is whether we can reach this question despite the

³ Meanwhile, this Court ordered counsel for Duran-Ferreira to respond to the government's similar motion to dismiss Duran-Ferreira's appeal. Our order in Liriano-Blanco was not brought to the attention of the panel to which the motion was assigned. The motion to dismiss was granted by another panel on February, 16, 2007. United States v. Duran-Ferreira, 2d Cir., No. 06-3003-cr, Order dated Feb. 16, 2007.

1 appeal waiver to which Liriano-Blanco consented as part of his
2 plea agreement.

3 "Plea agreements that include a waiver of a defendant's
4 right to appeal his conviction and sentence are a relatively
5 recent phenomenon. This Court has repeatedly upheld the validity
6 of such waivers, with the obvious caveat that such waivers must
7 always be knowingly, voluntarily, and competently provided by the
8 defendant." United States v. Gomez-Perez, 215 F.3d 315, 318 (2d
9 Cir. 2000) (citing cases). We have assumed that we have the
10 power to examine the circumstances surrounding the plea agreement
11 to assure ourselves that these conditions are met. See id.

12 Liriano-Blanco does not dispute, however, that he
13 entered his plea agreement knowingly, voluntarily, and
14 competently. What he does challenge is the validity of that
15 agreement in light of the district court's stated assumption that
16 he did have a right to appeal.

17 Under Federal Rule of Criminal Procedure 32(j)(1)(B),
18 "[a]fter sentencing--regardless of the defendant's plea--the
19 court must advise the defendant of any right to appeal the
20 sentence." But "'Congress seems to have understood'" -- indeed
21 it is difficult to believe it did not understand -- "'that advice
22 as to a right to appeal a sentence need be given only when such a
23 right exists. [And a] right might not exist either because it
24 was never created in the first place, or because it was created
25 and then waived.'" United States v. Fisher, 232 F.3d 301, 303
26 (2d Cir. 2000) (quoting United States v. Tang, 214 F.3d 365, 369

1 (2d Cir. 2000)). Indeed, Tang urged sentencing judges "not to
2 give 'unqualified advice concerning a right to appeal'" in "cases
3 where a waiver of appellate rights is of the type we have ruled
4 enforceable and [said waiver] has been fully explained to the
5 defendant at the time of the plea." Id. at 303 (quoting Tang,
6 214 F.3d at 370).

7 It is, nonetheless, not uncommon for a district judge
8 to notify a defendant at sentencing of his or her right to
9 appeal, momentarily unaware that that right has been waived.
10 This may result from Rule 32(j)(1)(B)'s requirement of notice
11 coupled with the fact that the waiver of appeal contained in a
12 plea agreement may be of little or no relevance to the sentencing
13 proceeding. And the time that usually elapses between a plea
14 hearing and sentencing -- in this case, more than three months --
15 makes such an error all the more likely. Cf. id. at 302
16 (observing that "[s]ome four months" elapsed between the district
17 court's taking of the guilty plea, at which it discussed the
18 appeal waiver, and the sentencing hearing, at which it mistakenly
19 advised the defendant of his right to appeal).

20 As a general matter, however, "a district judge's
21 post-sentencing advice suggesting, or even stating, that the
22 defendant may appeal" does not "render[] ineffective" an
23 "otherwise enforceable waiver of appellate rights." Id. at 304
24 (concurring with the conclusion of the Fifth, Seventh, Eighth,
25 and Tenth Circuits). "If enforceable when entered, the waiver
26 does not lose its effectiveness because the district judge gives

1 the defendant post-sentence advice inconsistent with the waiver."
2 Id. at 304-05 (footnote omitted). In Fisher, as in this case,
3 "[n]o justifiable reliance has been placed [by the defendant] on
4 such advice." Id. at 305.

5 Liriano-Blanco's appeal waiver is therefore effective
6 to bar his appeal of the district court's conclusion that a non-
7 Guidelines sentence is unavailable despite the "fast track"
8 disparity.

9 That is not the end of the matter, however. Our
10 concern regarding mistaken statements by a sentencing judge about
11 the defendant's right to appeal has typically focused on the
12 possibility that such bad advice may "'precipitate some needless
13 appeals,'" id. at 303 (quoting Tang, 214 F.3d at 370). Perhaps
14 there has been concern, too, about false expectations of the
15 possibility of appeal engendered in those who are being
16 sentenced. In this case, however, there is more at stake than
17 unnecessary proceedings and false hope. The mistake as to
18 Liriano-Blanco's right to appeal may have directly affected the
19 length of the sentence imposed on him. The court explicitly
20 expressed its view that a more lenient sentence might be
21 appropriate but that it harbored doubts about whether under the
22 applicable law it could impose that sentence. The court then
23 chose to not depart from the Guidelines and imposed a sentence of
24 46 months. The district court relied on the possibility of
25 appeal in choosing the higher sentence, apparently unaware that
26 Liriano-Blanco had waived the ability to pursue such an appeal.

1 Heightening our concern in Liriano-Blanco's case is the
2 fact that, notwithstanding his awareness of this reliance, the
3 Assistant United States Attorney who appeared at Liriano-Blanco's
4 sentencing did nothing to disabuse the district court of its
5 misapprehension that an appeal by Liriano-Blanco remained
6 possible. In at least two of the cases in which we have
7 discussed the obligation of district courts to advise defendants
8 of their right to appeal, we have noted the prosecutors'
9 obligations at sentencing under a plea agreement containing an
10 appeal waiver. As we said in Fisher:

11 We will continue to expect prosecutors to
12 alert district judges at sentencing to the
13 existence of appellate waivers, see Tang, 214
14 F.3d at 370, both to provide an opportunity
15 to clarify any ambiguity as to the scope of
16 such waivers, and to afford district judges
17 an opportunity to fashion any advice
18 concerning possible appellate rights in light
19 of the terms of the waiver.

20 Fisher, 232 F.3d at 305. Our cases have not imposed the same
21 duty on defense counsel, and we have never suggested that the
22 silent presence of defense counsel excuses the government's
23 counsel's failure to speak up under these circumstances.⁴

⁴ That may reflect "the special role played by the American prosecutor" Strickler v. Greene, 527 U.S. 263, 281 (1999) ("[T]he United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" (quoting Berger v. United States, 295 U.S. 78, 88 (1935))). It may also be deemed preferable not to require defense counsel, who may one day challenge an appeal waiver, to acknowledge the waiver's effect in open court, but instead place responsibility for acknowledging the existence of

1 Plea agreements are generally treated as contracts.
2 Matters outside of the bargain between the parties are not
3 covered. In past cases we have thus held that despite a plea
4 agreement, a sentencing decision could be reviewed on appeal if
5 it was reached in a manner that the plea agreement did not
6 anticipate. In United States v. Yemitan, 70 F.3d 746 (2d Cir.
7 1995), for example, we held that "a sentence tainted by racial
8 bias could not be supported on contract principles, since neither
9 party can be deemed to have accepted such a risk or be entitled
10 to such a result as a benefit of the bargain." Id. at 748.
11 Along these lines, we think, Liriano-Blanco cannot be "deemed to
12 have accepted [the] risk" that the judge sentencing him would do
13 so based on the judge's mistaken impression that his sentencing
14 decision could be appealed. Although we cannot decide Liriano-
15 Blanco's appeal on the merits, then, we conclude that the waiver
16 does not explicitly or implicitly bar us from returning this
17 matter to the district court, so that, having been made aware
18 that Lirirano-Blanco cannot appeal its decision, it might
19 resentence him if it sees fit to do so.

20 We do not know what the district court might have done
21 had it been corrected at the time of sentencing as to its
22 mistaken view that Liriano-Blanco was entitled to appeal the
23 decision of law upon which the court based the sentence. While
24 we will not suggest in advance our views on a matter not before

an appeal waiver on the party that intends to enforce it.

