

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 15-14042

THE UNITED STATES OF AMERICA,

Appellee,

-versus-

NATHALIE ZUANETTI,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA (ORLANDO DIVISION)

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure, Appellant submits that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

- 1) Nathalie Zuannetti (Appellant)
- 2) Patrick Michael Megaro, Esq. (Attorney for Appellant)
- 3) Appeals Law Group (law firm representing Appellant)
- 4) Corey I. Cohen, Esq.. (former counsel for Appellant)
- 5) David Webster, Esq. (former counsel for Appellant)
- 6) Vincent Chieu, Esq. (counsel for Appellee)
- 7) United States of America (Appellee)
- 8) Hon. G. Kendall Sharp, (U.S. District Judge)

/s/ Patrick Michael Megaro, Esq.
Patrick Michael Megaro, Esq.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument on this matter, as the claims raised in this appeal are unique and implicate issues that could impact a large number of criminal cases. Accordingly, counsel believes that oral discussion of the facts and applicable precedent would assist the Court in determining a just resolution.

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Middle District of Florida, Orlando Division. A Notice of Appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

This appeal raises the following questions: (1) whether the District Court's denial of the Government's Rule 35(b) motion was an abuse of discretion where the court rewrote the plea agreement to include a condition that before Appellant could receive any consideration for her testimony against a co-defendant at trial, the co-defendant had to be convicted; and (2) whether the District Court's denial was an abuse of discretion where the District Court made a clearly erroneous factual determination, unsupported by the record, that because the jury acquitted the co-defendant, the jury necessarily found Appellant to be incredible.

STATEMENT OF THE CASE

Appellant appeals from an August 31, 2015 order of the United States District Court for the Middle District of Florida, Orlando Division, the Honorable G. Kendall Sharp, District Court Judge, denying the Government's Rule 35(b) motion to reduce her sentence. (Docket Entry # 210, PageID # 1144). Appellant timely filed a notice of appeal on September 10, 2015. (Docket Entry # 215, PageID # 1149).

Appellant is currently incarcerated pursuant to a judgment of conviction entered against her in the court below, serving a sentence of 57 months imprisonment followed by one year of Supervised Release.

STATEMENT OF FACTS

In the summer of 2013, agents from the Drug Enforcement Agency began investigating the importation of methylene from China to the United States. (Docket Entry # 131, PageID # 604). Appellant was recruited to receive packages containing drugs, which she then turned over to the co-defendants in exchange for financial compensation. (Docket Entry 131, PageID # 605). As a result of her participation in this drug distribution conspiracy, Appellant and six co-defendants were indicted in the Middle District of Florida on April 30, 2014, charging each with conspiracy to possess and distribute methylene, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (c). (Docket Entry # 1, PageID #1-7). She was arrested and arraigned on May 12, 2014. (Docket Entry # 47, PageID # 64).

On July 3, 2014, Appellant and her attorney entered into a written plea agreement with the Government. (Docket Entry # 97, PageID # 241-261). The plea agreement provided, inter alia, that Appellant would plead guilty to Count # 1 of the Indictment in full satisfaction of the charges against her (Docket Entry # 97, PageID # 241-242), and the Government would recommend a sentence at the low end of the applicable Guidelines (Docket Entry # 97, PageID # 243-244). The agreement further provided as follows, in pertinent part:

9. Cooperation - Substantial Assistance to be Considered
Defendant agrees to cooperate fully with the United States in the investigation and prosecution of other persons, and to testify, subject to a prosecution for perjury or making a false statement, fully and truthfully before any federal court proceeding or federal grand jury in connection with the charges in this case and other matters, such cooperation to further include a full and complete disclosure of all relevant information, including production of any and all books, papers, documents, and other objects in defendant's possession or control, and to be reasonably available for interviews which the United States may require....If the cooperation is completed subsequent to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" in accordance with the policy of the United States Attorney for the Middle District of Florida, warranting the filing of a motion for a reduction of sentence within one year of the imposition of sentence pursuant to Fed. R. Crim. P. 35(b). In any case, the defendant understands that **the determination as to whether "substantial assistance" has been provided** or what type of motion related thereto will be filed, if any, **rests solely with the United States Attorney for the Middle District of Florida...**

(Docket Entry # 97, PageID # 245-246) (emphasis added).

On July 7, 2014, Appellant entered a plea of guilty before the Honorable G. Kendall Sharp, District Court Judge, pursuant to the written plea agreement referenced above. (Docket Entry # 225, Page ID # 1183-1194). The plea proceeding actually encompassed three pleading defendants at the same time: Takaynuki Sakaira, Brian Marmorstone, and Appellant. During the plea allocution, Sakaira and Marmorstone both admitted that they received packages containing drugs and gave them to Sakaira's roommate, co-defendant Justin Keith Smith, for distribution. (Docket Entry # 225, PageID # 1192-1193). The court accepted the plea, and continued the matter for sentencing. (Docket Entry # 225, PageID # 1194)

On December 16, 2014, Appellant was sentenced to a term of imprisonment of 57 months, followed by one year of Supervised Release. (Docket Entry # 168, PageID # 981-984).

On July 27, 2015, the Government filed a motion pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. (Docket Entry # 203, PageID # 1111-1113). In that motion, the Government stated that since her sentencing, Appellant had continued to provide what it viewed as substantial assistance to law enforcement, and truthfully testified in the trial of co-defendant Justin Keith Smith. (Docket Entry # 203, PageID # 1111). The Government recommended a reduced sentence for Appellant based upon her cooperation. Id.

Appellant filed a response, joining in the motion, on August 3, 2015. (Docket Entry # 208, Page ID # 1135-1141). In that response, Appellant provided additional facts regarding her cooperation, including the fact that she cooperated with law enforcement prior to her indictment and arrest by providing information to DEA agents, and testifying truthfully against her co-defendant. (Docket Entry # 208, PageID # 1139-1140).

On August 31, 2015, the District Court denied the Rule 35(b) motion without a hearing in a written decision. (Docket Entry # 210, PageID # 1144). In the one-page decision, the District Court ruled that “[g]iven Justin Keith Smith’s acquittal, the jury did not find Zuanetti’s testimony convincing. As a result, Zuanetti’s sentence will not be reduced.” Id.

Appellant timely filed a notice of appeal on September 10, 2015. (Docket Entry # 215, PageID # 1149). This appeal follows.

SUMMARY OF THE ARGUMENT

The District Court deprived Appellant of the benefit of her plea bargain by rewriting the plea agreement to include additional requirements that were not contemplated by the parties, and then made a clearly erroneous factual determination that Appellant had failed to satisfy those additional requirements because the co-defendant, against whom she testified, was acquitted. By conditioning Appellant's reduced sentence upon the co-defendant's conviction, the District Court deprived Appellant of Due Process of Law and abused its discretion, particularly where the Government retained sole discretion to determine whether Appellant had, in fact, testified truthfully.

ARGUMENT AND CITATIONS OF AUTHORITY

THE DISTRICT COURT'S DENIAL OF THE GOVERNMENT'S RULE 35(b) MOTION WITHOUT AN EVIDENTIARY HEARING WAS AN ABUSE OF DISCRETION BECAUSE THE DISTRICT COURT CONDITIONED APPELLANT'S SUCCESSFUL COOPERATION UPON THE CONVICTION OF A CO-DEFENDANT WHOM SHE TESTIFIED AGAINST AND BECAUSE THE DISTRICT COURT MADE A FACTUAL DETERMINATION THAT BECAUSE THE CO-DEFENDANT'S JURY ACQUITTED HIM, THEY NECESSARILY DISCREDITED APPELLANT'S TESTIMONY, WITHOUT ANY FACTUAL BASIS FOR SO DETERMINING AND WHICH DETERMINATION WAS CONTRADICTED BY THE GOVERNMENT'S DETERMINATION THAT APPELLANT HAD IN FACT TESTIFIED TRUTHFULLY AND WAS ENTITLED TO CONSIDERATION FOR SATISFYING HER PLEA BARGAIN

The denial of a Rule 35(b) motion is reviewed for abuse of discretion. United States v. Campbell, 711 F.2d 159 (11th Cir. 1983). Generally, this Court reviews a District Court's decision on whether to hold an evidentiary hearing for abuse of discretion. United States v. Arbolaez, 450 F.3d 1283, 1293 (11th Cir. 2006).

A. In Denying the Government's Rule 35(b) Motion, the District Court Usurped the Plenary Authority of the United States Attorney and Violated a Key Element of the Plea Agreement Appellant Entered Into With the Government

It is axiomatic that a criminal defendant is entitled to the benefit of a plea bargain entered into with the prosecution; if the defendant is denied the benefit of the bargain, they are entitled to either specific performance or a withdrawal of the plea. See Santobello v. New York, 404 U.S. 257 (1971).

In United States v. Yesil, 991 F.2d 1527 (11th Cir.1992) the defendants entered into a plea agreement with the Government which provided for cooperation. That plea agreement was accepted by the court. The defendants were sentenced, and continued their cooperation with the Government after sentencing, providing substantial assistance to Federal authorities investigating drug trafficking. Several months after sentencing, the Government filed a Rule 35(b) motion, which the defendants joined, and sought an evidentiary hearing on the motion. The District Judge denied the request for an evidentiary hearing as to both defendants, and summarily denied the Rule 35(b) motion as to one defendant, and granted only a minor reduction of sentence as to the other defendant.

In reviewing those denials, this Court held that the District Court's discretion is "severely" curtailed once the court accepts a plea bargain, as "[o]nce the court unqualifiedly accepts [a plea] agreement it too is bound by the bargain." Id. at 1532 (internal citations omitted). This Court adopted the reasoning of the D.C. Circuit that

[t]he judge's faithful observance of the requirements of Rule 11 is just as vital to the fairness and efficiency of the process as the prosecutor's compliance. She has a primary duty under that rule to insure not only that the terms of the bargain are understood by the defendant but that they are adhered to by both sides, **as well as by the court itself.**

Id., quoting United States v. Blackwell, 694 F.2d 1325, 1339 (D.C.Cir.1982) (emphasis added).

This Court further held that once the District Judge accepted the plea bargain obligating the Government to make known to the court the nature and extent of a defendant's cooperation, the court was also obligated to accept the Government's proffered information. *Id.* at 1532.¹

Yesil is particularly instructive because Yesil involved the same District Judge below. In addition, in Yesil, this Court reversed and remanded for consideration of the Rule 35(b) motion before a different District Judge because this Court found that the court below abused its discretion. That is exactly what happened in the instant case.

Here, like in Yesil, Appellant entered into a plea agreement with the Government that provided for cooperation. The plea agreement specifically gave the Government the discretion to determine whether Appellant provided “substantial assistance” by testifying truthfully in the trial of a co-defendant:

In any case, the defendant understands that the determination as to whether “substantial assistance” has been provided or what type of motion related thereto will be filed, if any, **rests solely with the United States Attorney for the Middle District of Florida...**

¹ The Rule 35(b) motion in Yesil did not detail the full extent of the defendant's cooperation, but urged the court to hold an in camera hearing because of the confidentiality concerns of an ongoing investigation. *Id.* This Court held that by denying an evidentiary hearing on the motion, the District Court had “effectively prevented the government from presenting its Rule 35 motion.” *Id.*, quoting United States v. Hernandez, 34 F.3d 998, 1001 (11th Cir.1994).

(Docket Entry # 97, PageID # 245-246).

What the District Court did in the instant case was insert into the plea agreement two additional clauses and requirements, neither of which were contemplated by or agreed to between Appellant and the Government. The first additional requirement was that the District Court, not the Government, would conduct its own factual determination as to whether Appellant provided “substantial assistance” in the form of truthful and accurate testimony impose an additional condition of the plea agreement. This was directly in conflict with the written language of the plea agreement.

The second additional requirement that the District Court apparently imposed on its own initiative was to marry Appellant’s testimony (and any benefit she would receive as a result of her cooperation) to a particular verdict in the trial of the co-defendant – a verdict of guilty. Simply put, Appellant would only receive a benefit for testifying if, and only if, the co-defendant was found guilty. The District Court would only conclude that she testified “truthfully” if the co-defendant was convicted.

This was fundamentally wrong on many levels. First, the plea agreement between Appellant and the Government did not require any particular verdict in any trial in which Appellant was called as a witness. The agreement simply provided that Appellant provide truthful information and testify truthfully in any court proceeding in which she would be called as a witness.

Second, and most obvious, tying a cooperating witness' testimony to a particular result in a co-defendant's trial is to invite cooperators to commit perjury. If cooperating witnesses know that they will not receive a benefit unless they ensure those whom they are cooperating against are convicted, the natural inclination will be to embellish and fabricate. It is unimaginable that the United States Government would even desire such a policy where the Government would either knowingly suborn perjury or be willfully blind to it.

In this case, it is clear that the Government did **not** employ such a policy. Rather, the Government, pursuant to its agreement with Appellant, exercised its discretion and made a determination that Appellant had, in fact, testified truthfully against her co-defendant. Because she so testified, the Government filed a motion notifying the court below that Appellant had fulfilled her obligations, and asked for the court to give her due consideration for her cooperation pursuant to the bargain struck between the parties. It was the court below that usurped the judgment of the Government in denying the motion.

Here, the District Court endorsed and accepted the plea bargain between Appellant and the Government, which specifically provided for consideration upon Appellant's cooperation. Once the court below accepted the agreement, like in Yesil, it was bound to honor and enforce the terms. The record is clear that the District Court failed to do so, and as a result, essentially rewrote the contract between

Appellant and the Government, effectively depriving her of the benefit of the bargain. This was the type of “clear error in judgment” that constitutes an abuse of discretion. See United States v. Brown, 415 F.3d 1257, 1268 (11th Cir. 2005). Accordingly, reversal is required.

B. The District Court Abused Its Discretion in Summarily Denying the Government’s Motion to Reduce Appellant’s Sentence Based Upon Her Post-Sentencing Cooperation Because the District Court’s Justification For Denying the Motion Was Based Upon “Facts” That Are Not Within the Record, and Because the Factual Basis is Clearly Erroneous

“An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.” F.T.C. v. Washington Data Resources, Inc., 704 F.3d 1323, 1326 (11th Cir. 2013).

Here, as in all Federal criminal prosecutions, the Government did not simply throw Appellant onto the witness stand in a vacuum. Any lawyer who has practiced Federal criminal law knows that before the Government calls a cooperator to the stand as a Government witness, the assigned Assistant United States Attorney and the case agents will speak with the cooperating witness, evaluate their information, and compare and corroborate their information to information already known to the Government. Before that witness ever takes the stand, their information is checked and re-checked numerous times, and they are prepared as any other witness by the

attorney trying the case. Before that witness testifies at trial, the Government is confident that what that witness will testify to is the truth, and what comes out on the witness stand is the end product of many hours of fact-checking and preparation. This case was no different.

Appellant testified at a co-defendant's trial, which ended with an acquittal. The case was tried before the same District Judge who accepted Appellant's guilty plea and endorsed the plea bargain. However, while the details of the co-defendant's trial are not set forth within the record in this case, what is clear is that the Government believed that Appellant testified completely and truthfully in the co-defendant's trial, as evidenced by the Rule 35(b) motion it filed.

What is also clear is that the jury in that trial did not, and would never have, rendered a special verdict explaining why it acquitted the co-defendant, or a special verdict expressly finding any witness credible, incredible, or credible as to some matters and incredible as to others. As any reasonable and experienced jurist and trial lawyer is aware, there are many reasons as to why a jury would acquit a defendant; perhaps the jury decided to show lenity to the defendant; perhaps the jury believed that while the evidence was strong, it was simply not enough to convince them beyond a reasonable doubt; perhaps the jury found some of the Government's evidence credible and others incredible, and decided to apply the principle of falsus in uno, falsus in omnibus; perhaps the jurors rested their decision on other factors

such as the presentation of the lawyers, the appearance of the witnesses, or whatever personal prejudice jurors carried with them to the jury room. Because a jury is not required to explain its verdict and make special findings as to the credible, or lack thereof, of any witness, it is impossible to tell why a jury acquits a defendant.

In this case, there is absolutely no factual basis to determine that Appellant was anything other than complete and truthful in her testimony. The fact that the jury acquitted the co-defendant does not automatically render Appellant's testimony incredible as a matter of law; it is entirely possible that the jury found Appellant to be completely credible but felt that the remainder of the Government's evidence was lacking, or there existed some reasonable doubt which required the jury to acquit, or exercised its power using any of the myriad of reasons for a jury to acquit.

However, the court below made an unreasonable factual determination, unsupported by any evidence, that Appellant was the cause of the acquittal, and penalized her for it. This was a clear abuse of discretion that requires reversal and remand before a different judge.

C. Public Policy Considerations Require Reversal

There are also well-grounded policy considerations implicated in this case, and by the District Court's summary denial of the Rule 35(b) motion. As virtually every Federal court in the United States has observed, Federal criminal prosecutions are mainly based upon cooperation given from confidential witnesses and defendants

who have entered into cooperation agreements with the Government in exchange for leniency.

It is also generally understood that every bit of information known to the Government is not necessarily presented at trial for a multitude of reasons; the information may not be relevant to any issue in the case, or may not be otherwise admissible. The exact same holds true for the defense. Thus, a trial court almost always has less information about the case than the Government or the defense, because a trial court only hears the information presented to it by the parties. Thus, the Government is always in the best position to evaluate the truthfulness and accuracy of information provided by a cooperating witness. This is why the plea agreement in this case gave sole discretion of the determination of “substantial assistance” to the Government.

Judicial interference with plea bargaining within the framework of the Federal Sentencing Guidelines and the United States Code threatens to upend the entire system of cooperation that Congress wrote into the Sentencing Guidelines and into the United States Code. If Federal courts are permitted to interfere with contracts between defendants and the Government, and substitute their own judgment for that of the United States Attorney where the court is at an informational disadvantage, then there is absolutely no incentive for any defendant to plead guilty and cooperate. What would be the point of bargaining if a court can arbitrarily decide to deprive

one side of the benefit of the bargain? Such a scenario is “bad for business” not only for the cooperating defendant, but for the Government as well, which relies on cooperation to make criminal cases. For these reasons, this Court should reverse and remand.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing reasons, Appellant respectfully requests that this Court reverse the August 31, 2015 order of the District Court, and remand this matter for a de novo determination before a different District Court Judge, and grant Appellant such other and further relief as this Court may deem just, proper and equitable.

Dated: Orlando, Florida
November 11, 2015

/s/ Patrick Michael Megaro
Patrick Michael Megaro, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font. The word count of this brief is 4,219 words.

/s/ Patrick Michael Megaro
Patrick Michael Megaro, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties via CM/ECF on November 11, 2015

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