IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. NO. 04-10453
	)	
Plaintiff-Appellee,	)	D.C. NO. 03-00140- HG
	)	(District of Hawai'i)
	)	
vs.	)	DEFENDANT-APPELLANT'S
	)	REPLY BRIEF;
	)	CERTIFICATE OF COMPLIANCE;
	)	CERTIFICATE OF SERVICE.
ALPHONSO PALMER,	)	
	)	
Defendant-Appellant.	)	
	)	

DEFENDANT-APPELLANT'S REPLY BRIEF;
CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

The Honorable Helen Gillmor
United States District Judge

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ARGUMENT

A. The Government Has Forfeited its Right to Argue Plain Error.

On November 16, 2004, this Court granted the defendant appellant Alphonso Palmer's ("Palmer") Motion for an Extension of Time to Designate the Transcripts. [See, Ninth Circuit Order filed November 16, 2004].[1] The order stated in part: "[i]n view of the apparent brevity of Defendant's sentence, the Clerk sua sponte expedites this appeal." Id. The order directed that Palmer's Opening Brief was due on February 11, 2005; the Answering Brief of the plaintiff appellee the United States of America ("Government") was due on March 11, 2005. Id. Both have parties timely submitted their briefs. This optional Reply Brief is due seven days after service of the answering brief. Id. The Government served the Answering Brief on March 11, 2005.

In light of the expedited schedule, the order warned both the parties' counsel and the court reporters against seeking further extensions of time: "The provision of 9th Cir. R. 31-2.2(a) shall not be applicable to this appeal; any Rule

[1] The terms of the order filed on November 16, 2004 are set forth in Ninth Circuit Docket attached to Palmer's Excerpts of Record, which excerpts were previously filed with this Court, along with Palmer's Opening Brief, on February 14, 2005.

31-2.2(b) motion is disfavored." Id. The case is calendared for oral argument on May 13, 2005, at 9:00 a.m. in Honolulu.

The issue on appeal is: "Whether the district court violated the Sixth Amendment by imposing a sentence exceeding the maximum authorized by the facts established in the Plea Agreement and admitted by Palmer, and thus requiring that this Court of Appeals vacate the sentence and remand for resentencing under the United States Sentencing Guidelines as modified by the Supreme Court in United States v. Booker? 543 U.S. ___ , 125 S. Ct. 738 (2005)." (See, Palmer's Opening Brief ("OB"), at 3).

Rather than respond to this particular issue, in its Answering Brief the Government limits its response to the appeal waiver provision in the Memorandum Plea Agreement the parties entered on November 3, 2003. [Excerpts of Record filed with the Court on February 14, 2005 ("ER"), 16 - 25; the "Plea Agreement"]. The Government argues in the Answering Brief: "[T]his Court Should Decline Review of Palmer's Sentencing Claim Because Palmer Waived His Right to Appeal His Sentence in His Plea Agreement." [Answering Brief (AB) 8]. Palmer will address this issue below.

Otherwise, rather than responding to the issue presented for appellate review in the Opening Brief, the Government writes in the Answering Brief:

> "Should this court find that the appeal waiver provision does not preclude the instant appeal, United States v. Ameline, __ F.3d __, 2005 WL 350811(D. Mont. [sic] Feb. 10, 2005) ("Ameline II"), appears to require a remand for resentencing. Ameline II found that, where a defendant's sentence was based on judicial fact-finding, it was plain error for him to receive a sentence which exceeded the maximum sentence authorized by a jury's verdict or the defendant's admissions. This court stated that only a "truly exceptional case ... will not require remand for resentencing under the new advisory guideline regime." 2005 WL 350811 at *6. On February 17, 2005, the United States filed a petition for panel rehearing and petition for rehearing en banc in Ameline II. Although the instant case may not be a "truly exceptional case" escaping remand, ***the United States reserves its right to argue plain error should this court revisit the plain error test set forth in Ameline II."***

[AB 12, n 5][emphasis added].

Palmer submits that Government's "reserv[ation] [of] right to argue plain error" conflicts with, and is not permitted under, the order filed November 16, 2004, wherein the Court expedited the appeal and warned the parties from seeking extensions pursuant to 9th Circuit Rule 31-2.2(b), which extension the Court stated would be "disfavored". [Ninth Circuit Order, 11/16/04]. Ninth Circuit Rule 31-2.2(b) states in relevant part: "an extension of time may be granted only upon written motion supported by a showing of diligence and substantial need."[2] 9th

[2] Further, the 9th Circuit Rule 31-2.2(b) states:
"The motion shall be filed at least seven (7) calendar days before the expiration of the time prescribed for filing the brief, and shall be accompanied by a declaration stating: (1) when the brief is due; (2) when the brief was first due; (3) the length of the requested extension; (4) the reason an extension is necessary; (5) movant's representation that movant has exercised diligence and that the brief will be filed

Cir. R. 31-2.2(b).

The fact that this Circuit has granted a petition for rehearing en banc in United States v. Ameline (see, C.A. No. 02-30326, Order filed March 11, 2005) hardly prevented the Government from responding to the issue presented in the Opening Brief and quoted above. The issue for appellate review is based ***not*** upon Ameline, but upon Supreme Court precedent in United States v. Booker, as set forth in the issue quoted above from the Opening Brief. Future pertinent law stemming from this Court's en banc review of United States v. Ameline may be referenced by Palmer to the Court in the form of a Rule 28(j) letter, pursuant to the Federal Rules of Appellate Procedure. Fed. R. App. P. 28(j). It may be referenced by the Government only to the extent it is "pertinent" to the limited arguments set forth in the Answering Brief. See, id.

The Government had an opportunity to respond, but did not. Therefore, Palmer submits that the Government has forfeited that right. Had the Government needed more time, it should have sought the same pursuant to Ninth Circuit Rule 31-2.2(b), as set forth in the order of November 16, 2004, and argued "diligence

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within the time requested; and (6) whether any other party separately represented objects to the request, or why the moving party has been unable to determine any such party's position. A conclusory statement as to the press of business does not constitute a showing of diligence and substantial need."

and substantial need." 9th Cir. R. 31-2.2(b). It did not. "An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission." Fed. R. App. P. 31(c).

B. The Government Fails to Demonstrate That Palmer Knowingly and Voluntarily Entered the Plea Agreement and Waived His Right to Appeal the Sentence.

The Government argues that the Plea Agreement's appeal waiver precludes appellate review of Palmer's sentence because Palmer knowingly and voluntarily waived his right to appeal his sentence, relying on this Court's holding in United States v. Navarro-Botello, 912 F.2d 318 (9th Cir. 1990). (AB, 8 - 9). In Navarro-Botello, this Court held in part that: "if the waiver is made voluntarily and knowingly, it is enforceable and does not violate due process or public policy." Id. at 320.

Application of this holding here highlights the deficiencies inherent in the Palmer's sentence as discussed in the Opening Brief. Moreover, it demonstrates that Palmer did not knowingly enter the Plea Agreement and waive his right to appeal. In the Plea Agreement, Palmer agreed to plead guilty to Count One of the Indictment, in exchange for the Government's agreement to move to dismiss Count Two after sentencing. Id. His agreement to plead guilty to Count One was

based upon the following admitted facts set forth in paragraph number eight of the Plea Agreement:

> "8. Defendant admits the following facts and agrees that they are not a detailed recitation, but merely an outline of what happened in relation to the change to which Defendant is pleading guilty:
>
> a. On or about April 15, 1997 in the District of Hawaii, the Defendant who was then a resident of Honolulu subscribed to an IRS Form 1040, Personal Income Tax Return for the Calendar Year 1996.
>
> b. At the time that a return was signed, the Defendant affixed his signature below the jurat which stated that he was signing under the penalty of perjury.
>
> c. The Defendant willfully reported that he had a taxable income of approximately $6,976.00 whereas as [sic] he then and there well knew and believed his true income for that calendar year was approximately $470,556.00."

[ER 18 - 19]. Given this language, clearly the intent of the parties was to focus upon facts relevant to Count One and tax losses relating to the calendar year 1996.

The change-of-plea-hearing transcript from November 3, 2003, confirms that this understanding was not only Palmer's, but the Government's as well. When the district court asked to summarize the major terms of the Plea Agreement [ER 33], the Government stated:

> "The defendant is charged for filing false income tax returns for the years 1996 and 1997. The United States has agreed to accept the plea of guilty to Count I, the 1996 year as a complete resolution. There is some conflict between the parties to the actual tax loss which will determine the sentence. The parties have agreed to meet and attempt to resolve the figure as to the actual tax loss.... "

[ER 34]. When the district court asked Palmer if the Government's description "accurately state[d] [his] agreement with the Government" [ER 34], Palmer stated that it did. [ER 34].

The court asked Palmer if he fully understood "the charges covered by the plea agreement", and Palmer said he did. [ER 35]. Notwithstanding the parties' in-court recognition and that the amount of tax loss which would determine the sentence was in "conflict" [see, ER 34], the court asked the Government, "What are the maximum possibly penalties, Mr Osborne with regards to Count I?". [ER 35]. The Government told the court it included up to three years custody, one year supervised release, a fine of up to $100,000.00 and a special assessment of $100.00. [ER 35].

In summarizing for the district court and Palmer the "essential elements which the Government would be required to prove if there were a trial on the charge" the Government stated:

> "That for the calendar year 1996, the defendant willfully made and subscribed an IRS form 1040, personal income tax return, which was materially false. In addition, it must be shown that the form was signed under penalty of perjury the jurat (inaudible)."

[ER 39].

As to the Plea Agreement's written summary of facts in paragraph eight, the

district court confirmed that Palmer had read the same, and that the facts were "true in every respect". [ER 40].

In determining whether a defendant's plea agreement waiver of his right to appeal was knowingly and voluntarily made, the court considers the express language of the waiver and the facts and circumstances surrounding the signing and entry of the plea agreement. United States v. Anglin, 215 F.3d 1064, 1066 (9th Cir. 2000). Nowhere in the record of the change-of-plea hearing on November 3, 2004 is there an indication by either party that in pleading guilty to Count One, Palmer would also be held responsible for the alleged tax loss under Count Two for the calendar year 1997, and for the alleged tax losses to the State of Hawai'i for 1996 and 1997. All factual references at the November 3, 2003, hearing focus on Count One, and the yet-to-be-determined tax loss for the calendar year 1996.

The pre-Booker Sentencing Guidelines mandated enhancements for the alleged tax loss under Count Two, and for the ***uncharged*** offenses relating to Hawai'i State income taxes. [See, OB, 38 - 46]. Eight months after the change-of-plea hearing, the Government clearly expressed at the sentencing hearing on June 24, 2004, that losses under Count Two and for Hawai'i State taxes must be used to determine the sentence under the Guidelines and related case law. [ER 57].

Yet it is Palmer's understanding that is at issue. The Plea Agreement specifies that the sentence will be governed by the Guidelines, and that the Guidelines -- as written at the time -- were mandatory: "The Defendant understands that the District Court in imposing sentence will be bound by the provisions of the Sentencing Guidelines." [ER 22, ¶ 14]. Notwithstanding, it cannot be said that Palmer knowingly pled guilty and waived his right to appeal pursuant to Navarro-Botello and Anglin when the change-of-plea hearing is silent as to the actual sentencing ramifications of the guilty plea: that Palmer will be sentenced for the yet-to-be-determined losses not only for Count One, but as well for losses under the eventually dismissed Count Two; and for losses pertaining to State of Hawai'i taxes for 1996 and 1997, which losses were not even charged in the Indictment.

The government has the burden "at the plea colloquy to seek an explicit admission of any unlawful conduct which it seeks to attribute to the defendant." United States v. Cazares, 121 F.3d 1241, 1248 (9th Cir. 1997). Moreover, "[i]n assessing the scope of the facts established beyond a reasonable doubt by a guilty plea, we must look at what the defendant actually agreed to-that is, what was actually established beyond a reasonable doubt." United States v. Banuelos, 322 F.3d 700, 707 (9th Cir. 2003). Based the review of the record presented above it

cannot be concluded that Palmer admitted tax losses for the calendar year 1997 and for State of Hawai'i taxes for 1996 and 1997. *See*, United States v. Thomas, 355 F.3d 1191 (9th Cir. 2004)(held that under Cazares, the district court erred in ruling that defendant's guilty plea necessarily admitted the drug quantity allegation in the indictment).

Rule 11 of the Federal Rules of Criminal Procedure requires that the district court advise and question the defendant to determine that he understands, "(I) any mandatory minimum penalty". Fed. R. Crim. P. 11(b)(1). The pre-Booker mandatory Guidelines under which the district court sentenced Palmer required that the court enhance his sentence based upon U.S.S.G. § 1B1.3(a)(2) and § 2T1.1, for all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. [See, OB 38 - 46]. Such enhancements are a part of Rule 11's "mandatory minimum penalty" notice, for which the district court was required to inform Palmer. Fed. R. Crim. P. 11(b)(1)(I).

The Plea Agreement and the change-of-plea hearing fail to deliver this import safeguard designed to secure a knowing and voluntary guilty plea and appeal waiver. The record from the November 3, 2003 plea hearing does not support the conclusion that Palmer knowingly entered the Plea Agreement, and,

accordingly, knowingly waived his right to appeal. As fully discussed below in Argument C, a waiver of appeal will not bar an appeal where the defendant's guilty plea was not taken in compliance with Rule 11. United States v. Portillo-Cano, 192 F.3d 1246, 1252 (9th Cir. 1999) (holding that waiver of right to appeal will not preclude an appeal where defendant's plea allocution did not conform to the requirements of Rule 11).

The Government's reliance upon United States v. Nunez, 223 F.3d 956 (9th Cir. 2000), is unavailing. There, the Court dismissed the appeal because the defendant waived the issue of whether the plea agreement was knowingly and voluntarily made. Id., at 956. Here, since the Government has argued that Palmer's appeal waiver and Plea Agreement were knowingly and voluntary made, Palmer is entitled to respond in the optional Reply Brief.

C. Palmer's Right to Appeal an Illegal Sentence Survives the Waiver of Appeal Provision.

The Government argues that Palmer waived his right to appeal his sentence under the appeal waiver provisions in the Plea Agreement. (AB 21 - 22). In this regard, Palmer relies upon all the arguments set forth in the Opening Brief. (OB, 27 - 30). Otherwise, Palmer rebuts the Government's argument as follows.

As to the appeal waiver set forth in the Plea Agreement, the terms state in relevant part:

> "Defendant knowingly waives the right to appeal the sentence imposed under Title 18, United States Code, Section 3742(a). Defendant knowingly waives the right to appeal, except as indicated in subparagraph "b" below, any sentence within the maximum provided in the statute(s) of conviction or the manner in which that sentence was determined on any of the grounds set forth in Section 3742, or on any ground whatever, in exchange for the concessions made by the prosecution in this plea agreement."

[ER 21].

Generally, defendants may agree to waive the right to appeal the sentence. United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996), *cert. denied* 117 S.Ct. 1282, 137 L.Ed.2d 357 (1997). There are, however, a few well-established exceptions to appeal waivers under our case law. For example, a waiver of appeal will not bar an appeal where the defendant's guilty plea was not taken in compliance with Fed. R. Crim. P. 11. Portillo-Cano, 192 F.3d at 1252. Our Circuit has also held that where a judge advises a defendant, without qualification, that he or she has a right to appeal, the defendant will be deemed to have such a right even though it was waived in the plea bargain. United States v. Buchanan, 59 F.3d 914, 917-18 (9th Cir. 1995). Additionally, a defendant can appeal his or her sentence notwithstanding a waiver of the right to appeal where the sentence imposed violates the law, United States v. Littlefield, 105 F.3d 527, 528 (9th Cir. 1996), or

is not in accordance with the negotiated agreement. United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991). Further, defendant can appeal a sentence despite having waived the right to appeal for, "claims involving a breach of the plea agreement, racial disparity in sentencing among co-defendants ***or an illegal sentence imposed in excess of a maximum statutory penalty***." Baramdyka, 95 F.3d at 843 (emphasis added).

In Booker, the Court reaffirmed its recent holding in Blakely, "'that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant.'" Booker, 125 S. Ct. at 749 (*quoting* Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531, 2537 (2004)). Applying this rule here, the maximum statutory penalty the court could have imposed under the Sixth Amendment was restricted to the Guideline range supported by the facts Palmer admitted in the Plea Agreement. Palmer submits that that range, and only that range, constitutes the "maximum statutory penalty." Baramdyka, 95 F.3d at 843.

The Government's reliance on the Eleventh Circuit case United States v. Rubbo, ___ F.3d ___, 2005 WL 120507 (11th Cir. Jan. 21, 2005)(AB 11 - 12), is mistaken. The Eleventh Circuit wrote in Rubbo:

"Because the sentence the district court imposed on [defendant] goes

> beyond that permitted on the basis of the facts she admitted during her plea colloquy, [defendant] contends that it exceeds the statutory maximum sentence for Booker purposes. Given that, she says that her sentence "exceeds the maximum permitted by statute" for purposes of the exception to the appeal waiver contained in her plea agreement. ***The problem with [defendant's] contention is its invisible premise, which is that "statutory maximum" for Booker purposes is the same thing as "the maximum permitted by statute" for purposes of Rubbo's appeal waiver. The two are not the same. The context in which the terms are used and the meaning they convey are different . . .***
>
> In the Apprendi/Booker line of decisions, the Supreme Court used the term "statutory maximum" to describe the parameters of the rule announced in those decisions, a rule that had nothing to do with the scope of appeal waivers. [Citations omitted.] The term was defined in a specialized, which is to say a non-natural, sense. It was defined that way not only for semantic convenience but also in order to justify and explain the holdings the Court entered in those decisions. Everyone knows that a judge must not impose a sentence in excess of the maximum that is statutorily specified for the crime. [Citation omitted.] . . . ***[T]he definition of "statutory maximum" the Supreme Court used to describe and explain its holdings in those cases says nothing about what [defendant] and the government meant when they used the term "the maximum permitted by statute" in the appeal waiver. This is not a matter of legal research. It is a question of the parties' intent.***"

Rubbo, ___ F.3d ___, 2005 WL 120507(emphasis added).

The Eleventh Circuit's analysis does not withstand scrutiny. (See, AB 19 - 20). Its premise -- that Booker's use of the terms "the maximum permitted by statute" and the parties' use of the same terms in the appeal waiver are different because "[t]he context in which the terms are used and the meaning they convey are different" (id.) -- is only partially correct. Obviously the contexts differ. But

the rationale that the parties' intent in executing the plea agreement must govern the terms because, "the parties chose to define the maximum sentence in terms of what is "permitted by statute," not in terms of what is permitted by the Apprendi line of decisions that was evolving at the time" (id.), is not supported by the record in this case and Ninth Circuit case law.

Here, the Plea Agreement was executed in November 2003. [ER 16]. By that time the Supreme Court had held in Apprendi v. New Jersey, 530 U.S. 466 (2000), that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., at 490. In Ring v. Arizona, 536 U. S. 584 (2002), the Court affirmed its conclusion that the characterization of critical facts is constitutionally irrelevant, and held that it was impermissible for "the trial judge, sitting alone" to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty. Id., at 588-589.

Relying in part upon Apprendi, in United States v. Buckland, 289 F.3d 558, 568 (9th Cir.) (en banc), *cert. denied*, 535 U.S. 1105 (2002), the Ninth Circuit held that defendants have a due process right to be adequately informed of allegations that could increase their sentence beyond the statutory maximum and to have those

allegations submitted to a jury upon proof beyond a reasonable doubt. Buckland, 289 F.3d at 568.

By the time Palmer executed the Plea Agreement in November 2003, both Supreme Court and Ninth Circuit precedent had clearly established that the appeal waiver terms relating to the 'statutory maximum' were governed and restrained by Apprendi, and that the statutory maximum could only mean the maximum sentence the judge could impose based upon facts submitted to a jury and proved beyond a reasonable doubt, or admitted by the defendant.

Thus, the Eleventh Circuit's rationale that the parties' intent in executing the plea agreement could not be governed by "the Apprendi line of decisions that was evolving at the time" (Rubbo, 2005 WL 120507), doesn't apply here. Sufficient Supreme Court and Ninth Circuit precedent had been published by the time parties executed the November 3, 2003 Plea Agreement to provide firm guidance to our Circuit and the District of Hawai'i concerning the application of the Sentencing Guidelines, and the meaning that must be given to the appeal waiver terms. As Justice Stevens wrote in Booker's Sixth Amendment opinion, "Our precedents, we explained, make clear 'that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'"

Booker, 125 S.Ct. 738, *quoting* Blakely, 124 S. Ct. 2531. At the time of the Plea Agreement it is reasonable to assume that the parties understood statutory maximum to mean 'statutory maximum for Apprendi purposes'. For this reason, the Government's reliance on Rubbo -- and the Eleventh Circuit's application of Rubbo in United States v. Grinard-Henry, 2005 WL 327265 (11th Cir. Feb. 11, 2005)(AB 12), and reliance on United States v. West, 392 F.3d 450 (D.C. Cir. 2004)(AB 10) -- do not help its cause.[3]

Otherwise, the focus on the parties' intent in executing the Plea Agreement strengthens Palmer's position. Inasmuch as the parties' intent in executing the Plea Agreement was to secure a knowingly and voluntary plea of guilty to Count One of the Indictment pursuant to Fed. R. Crim. P. 11, examination of both the Plea Agreement and the change-of-plea hearing reveal that the Government never sought an admission from Palmer concerning alleged unlawful conduct under

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[3] The Government's reliance upon United States v. Killgo, 397 F.3d 628 (8th Cir. 2005)(AB 12), is unavailing. That case concerned only the issue of whether the district court erred in determining relevant conduct under the Guidelines thus rendering defendant's sentence unreasonable, and was irrelevant to the issue of the appeal waiver. Reliance on United States v. Yoon, 2005 WL 427883 (6th Cir Feb. 24, 2005)(AB 12 - 13), in also unavailing. There, the Sixth Circuit affirmed defendant's conviction and sentence because, among other reasons, there was no reason that defendant's knowledgeable and voluntary waiver of his right to appeal should not be enforced. Palmer has provided sound reason, under Argument B, to support the conclusion that his plea failed the Rule 11 safeguards because it was not made knowingly and voluntarily.

Count Two, or concerning the alleged Hawai'i State taxes. Cazares, 121 F.3d at 1248. "In assessing the scope of the facts established beyond a reasonable doubt by a guilty plea, we must look at what the defendant actually agreed to-that is, what was actually established beyond a reasonable doubt." Banuelos, 322 F.3d at 707. Here, Palmer only admitted those facts set forth in paragraph eight of the Plea Agreement. [ER 18 - 19]. Thus, it is reasonable to conclude that the parties intended the statutory maximum to be limited to those facts admitted by Palmer.

Otherwise, it should be noted that a policy of fair-play and protection of the defendant's rights at the time of the plea bargain underscores our Ninth Circuit's history of recognizing the need to make exceptions to appeal waivers, as seen in the opinion Baramdyka. Baramdyka, 95 F.3d at 843. In contrast to this policy, we find the Eleventh Circuit's opinion in Rubbo wherein the Court stated: "We have also held that '[a] waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues-indeed, ***it includes a waiver of the right to appeal blatant error***.'" United States v. Howle, 166 F.3d 1166, 1169 (11th Cir. 1999) (emphasis added).

While the Government would have this Court follow the Eleventh Circuit's severe policy in this regard, our Circuit's precedent has clearly demonstrated a willingness to acknowledge exceptions when warranted. *E.g.*, Portillo-Cano, 192

F.3d at 1252; Buchanan, 59 F.3d at 917-18; Littlefield, 105 F.3d at 528; Bolinger, 940 F.2d at 480; Baramdyka, 95 F.3d at 843. Palmer's appeal waiver falls within at least two of these exceptions because, as set forth under Argument B, his guilty plea and waiver of appeal was not taken in compliance with Fed. R. Crim. P. 11, Portillo-Cano, 192 F.3d at 1252, and otherwise was not made knowingly. Further, as set forth in the Opening Brief, his sentence is illegal in that it violates the Sixth Amendment because it exceeds the maximum possible sentence available under the facts he admitted in the Plea Agreement. Littlefield, 105 F.3d at 528. As well, Palmer submits, as set forth above, that the sentence is illegal because it was imposed in excess of a maximum statutory penalty. Baramdyka, 95 F.3d at 843.

CONCLUSION

For all the reasons set forth in this Reply Brief, Palmer submits: that the Government has forfeited its right to argue plain error; that the Government fails to demonstrate that Palmer knowingly and voluntarily entered the plea agreement and waived his right to appeal the sentence; and that Palmer's right to appeal an illegal sentence survives the waiver of appeal provision of the Plea Agreement.

For all the reasons set forth in the Opening Brief, Palmer respectfully requests that this Court vacate his sentence and remand the case for resentencing in a manner consistent with Booker.

DATED: Maui, Hawai'i, March 18, 2004

_____

GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. Appl. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply Brief is proportionately spaced, has a typeface of 14-points, Times New Roman, and contains approximately 4721 words, with an average of 214 words per page.

DATED: Maui, Hawai'i, March 18, 2005.

_____

GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Defendant Appellant Alphonso Palmer's Reply Brief were duly served on the following, by placing said copies in the U.S. mail, postage prepaid, addressed as set forth below:

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UNITED STATES OF AMERICA

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_____

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United States v. West, 392 F.3d 450 (D.C. Cir. 2004). 17

United States v. Yoon, 2005 WL 427883 (6th Cir Feb. 24, 2005). 17

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Fed. R. App. P. 28(j). 4

Fed. R. App. P. 31(c). 5

Fed. R. Crim. P. 11(b)(1). 10

Fed. R. Crim. P. 11(b)(1)(I). 10

U.S.S.G. § 1B1.3(a)(2). 10

U.S.S.G. § 2T1.1. 10