

NOT PRECEDENTIAL

IN THE UNITED STATES COURT  
OF APPEALS  
FOR THE THIRD CIRCUIT

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NO. 04-3492

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UNITED STATES OF AMERICA

v.

WILSON TORRES,  
Appellant

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On Appeal From the United States  
District Court  
For the District of New Jersey  
(D.C. Crim. Action No. 98-cr-00105-3)  
District Judge: Hon. Joseph H. Rodriguez

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Submitted Pursuant to Third Circuit LAR 34.1(a)  
December 13, 2005

BEFORE: SLOVITER, SMITH and STAPLETON,  
Circuit Judges

(Opinion Filed December 15, 2005)

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OPINION OF THE COURT

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STAPLETON, Circuit Judge:

I.

Appellant Wilson Torres pled guilty to conspiring to distribute cocaine in violation of 21 U.S.C. § 846, a crime which carries a 10 year mandatory minimum sentence and a maximum sentence of life imprisonment. His plea agreement provided in part as follows:

Further, if Wilson Torres fully complies with this agreement and, prior to his sentencing, provides substantial assistance in the investigation or prosecution of one or more persons who have committed offenses, this Office: (1) *will* move the sentencing judge, pursuant to Section 5K1.1 of the Sentencing Guidelines, to depart from the otherwise applicable guideline range; and (2) *may* move the sentencing judge, pursuant to 18 U.S.C. § 3553(e), to depart from any applicable statutory minimum sentence.

App. at 51 (emphasis supplied).

The government moved for a downward departure of 216 months pursuant to § 5K1.1. It did not make an application under 18 U.S.C. § 3553(e) so that less than the mandatory minimum sentence might be imposed. The District Court found that this was consistent with the plea agreement and granted a downward departure of 216 months under § 5K1.1. The resulting sentence was 144 months of imprisonment.

II.

Contrary to Torres' position on appeal, the government did not breach its plea agreement. It committed itself to move under § 5K1.1 if Torres provided substantial assistance. In contrast, it promised only that it "may" move under § 3553(e). Moreover, it reserved complete discretion to itself to evaluate Torres' assistance. The "will"/ "may" contrast and reservation of discretion clause here distinguishes this case from *United States v. Hernandez*, 17 F.3d 78 (5th Cir. 1993). Accordingly, the failure of the government to file an application under § 3553 entitles Torres to no relief.<sup>1</sup>

### III.

Torres is also not entitled to a remand for resentencing under *United States v. Booker*, 125 S. Ct. 738 (2005). His sentence was not enhanced based on any facts not stipulated to in the plea agreement<sup>2</sup> and the District Court, after reviewing *Blakely v. Washington*, 124 S. Ct. 2531 (2004), stated as follows:

I will say that even if the Guidelines were [not] to apply, that looking at them and taking guidance from the studies that support their structure, that I feel that in the exercise of my discretion under 5K1.1 that I feel that there would be no violence done to the concept of whether *Blakely* applies or does not apply. Looking at it as guidance, *I don't see that we have any conflict with respect to what my individual judgment would be in this case.*

S.App. at 43 (emphasis added).

Despite the general presumption of prejudice in cases where the District Court

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<sup>1</sup> Torres has tendered no evidence from which an inference of bad faith on the part of the government could be inferred.

<sup>2</sup> The fact that the District Court may have relied on its own fact finding in downwardly departing below the Guideline range is not material under *Booker*. See *Booker*, 125 S. Ct. at 756.

treated the Guidelines as mandatory, *United States v. Davis*, 407 F.3d 162 (3d Cir. 2005) (*en banc*), “this is an exceptional case where the record contains clear and specific evidence that the district court would not have sentenced [defendant] to a lower sentence under an advisory Guidelines regime.” *United States v. Webb*, 403 F.3d 373, 382-83 (6th Cir. 2005). *See also United States v. Hill*, 411 F.3d 425 (3d Cir. 2005) (where a district court “clearly indicates that an alternative sentence would be identical to the sentence imposed under the Guidelines, any error that may attach to a defendant’s sentence under *Booker* is harmless.”).

### III.

The judgment of the District Court will be affirmed.