



# Federal Criminal Law News

## PRE & POST CONVICTION LAW PUBLICATION

Vol. 22 No. 6

◆ Federal Criminal Law Center ◆

June 2005

### WHITE COLLAR CRIME

*Keeping the Government  
To Its Promises Again*  
By Kathryn Keneally

The Second Circuit in *United States v. Vaval*<sup>1</sup> provides a reason to revisit a topic discussed in the most recent edition of this column and in several previous columns: the need for courts to keep the government to its promises. The court in *Vaval* took up the issue of determining when the government's actions at sentencing violates a plea agreement, and set out the factors to be considered in determining an appropriate remedy.

#### Allegations and the Deal

The facts in *Vaval* are not of the white-collar crime variety. The defendant was charged with carjacking, robbery of federal money using a dangerous weapon, and other firearm violations. In particular, the government alleged that the defendant promised to sell firearms to a confidential informant, but instead ambushed the informant and stole the money that the government had provided for the purchase, among other items. The court depicts other alleged crimes and the details of a high-speed chase and apprehension.

The defendant pled guilty to the charge of robbery of federal property with a dangerous weapon, and specifically allocated to planning the robbery.<sup>2</sup> The government reserved to itself the right to "advise the Court and the Probation Department of information relevant to sentencing, including criminal activity engaged in by the

defendant."<sup>3</sup> In key and not uncommon language, however, the government agreed to: (1) "take no position concerning where within the Guidelines range determined by the Court the sentence should fall," and (2) "make no motion for an upward departure."<sup>4</sup> These provisions were expressly "based upon information now known to the U.S. Attorney's Office," and the agreement included, again in not uncommon language, terms stating that the government would not be bound if it later learned "information relevant to sentencing" or if the defendant violated the agreement.<sup>5</sup>

#### Presentence Report and the Government's Conduct at Sentencing

The presentence report (PSR) varied in several ways from the plea agreement. First, the PSR stated a higher offense level, because it included a two-level increase for fleeing the police in a dangerous manner. The PSR also noted that the defendant had acknowledged a supervisory role and that there appeared to be more than five participants, but accepted the two-level adjustment set out in the plea agreement for this factor rather than the three-level adjustment called for by these facts. Most significantly, the PSR found that the criminal history category set out in the plea agreement was in error because it included outdated crimes, and determined that a criminal history category of II rather than III should apply.<sup>6</sup>

At sentencing, the prosecutor argued for the three-level adjustment for a supervisory role, rather than a two-level adjustment. Defense counsel objected to the argument as a breach of the plea

<sup>1</sup> 2005 U.S. App. LEXIS 5946 (2d Cir. April 12, 2005).

<sup>2</sup> 18 U.S.C. § 2114(a).

<sup>3</sup> 2005 U.S. App. LEXIS 5946, at \*4.

<sup>4</sup> *Id.* at \*4-5.

<sup>5</sup> *Id.* at \*5.

<sup>6</sup> *Id.* at \*5-6.

agreement. The court relied on the two-level adjustment, stating a belief that the one-level difference would not affect the sentence.<sup>7</sup>

Defense counsel then argued for a sentence at the low end of the guideline range, and the defendant apologized and asked for leniency. In response, the prosecutor began by acknowledging that the government had waived its right to ask for an upward departure or to argue for a particular sentence within the applicable guideline range.<sup>8</sup> The prosecutor continued nonetheless.

The prosecutor brought to the sentencing court's attention that the government had been mistaken in its calculation of the criminal history category, stating: "I find the defendant's criminal history appalling."<sup>9</sup> The prosecutor then depicted the defendant's apology as "disingenuous," emphasizing the violence of the defendant's past crimes. Finally the prosecutor detailed the offense of conviction, describing the defendant as a "ring leader" who "punched the victim in the face," "orchestrated three people who were armed with guns...[including] an Intratek AB-10 semi automatic assault weapon," to have been "lying in wait for a victim," and to have intended that the victim "was going to be killed."<sup>10</sup> In conclusion, the prosecutor stated: "I just ask the Court to consider all of that when making the Court's decision about where to sentence this defendant."<sup>11</sup>

The defense objected that the government was violating the plea agreement. In response, the prosecutor stated: "we don't make a promise that we will be silent at sentencing."<sup>12</sup> The prosecutor also asserted that while the government was not making the argument for an upward departure as a result of its error in calculating the criminal history category at the time of sentencing, it believed that it could do so.<sup>13</sup>

The sentencing judge acknowledged the defense concerns, but stated that there was no resulting prejudice. Noting that the court was familiar with the

evidence from the trial of the co-defendants, the judge sentenced to the top of the guideline range.<sup>14</sup>

### Finding of a Breach of the Plea Agreement

The Second Circuit began its analysis by noting that interpretations of plea agreements are reviewed *de novo*, based on principles of contract law. As the court stated, "because plea bargains require defendants to waive fundamental constitutional rights, prosecutors are held to meticulous standards of performance."<sup>15</sup>

The Court took into account the prosecutor's statements at sentencing that the government was cognizant that it could not seek an upward departure or argue for a position within the applicable guideline range. The court determined that the actual arguments made by the government must nonetheless be reviewed to determine whether they had the effect of doing what was prohibited.

The government argued, as could be expected, that it was permitted under the plea agreement to advise the court of information relevant to sentencing. The Second Circuit, however, found that the prosecutor's depiction of the defendant's criminal history as "appalling" and the assertion by the prosecutor that the defendant's apology was "disingenuous" fell outside the realm of bringing information to the sentencing court's attention. The Second Circuit also noted that at sentencing, the prosecutor acknowledged that the Guidelines precluded consideration of certain older offenses, but then argued directly that those offenses be taken into account by the Court.<sup>16</sup>

The Second Circuit did not hold the government to an obligation to stand silent. Notably, the court made a careful distinction between the statements by the prosecutor that it found impermissible and the statements at sentencing concerning whether a two-point or three-point role adjustment should apply. As to the latter, the Second Circuit noted that the prosecutor merely provided information relevant to sentencing and did not argue for any impact on the sentencing decision, and thus the court concluded

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<sup>7</sup> *Id.* at \*6-7.

<sup>8</sup> *Id.* at \*7.

<sup>9</sup> *Id.* at \*8.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at \*9.

<sup>13</sup> *Id.*

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<sup>14</sup> *Id.* at 9-10.

<sup>15</sup> *Id.* at 15.

<sup>16</sup> *Id.* at 16.

that these statements were not a breach of the agreement.<sup>17</sup>

The court took particular issue with the prosecutor's statements concerning the criminal history category. The court summarized that the prosecutor had stated: "I think, technically, I could make an upward departure" argument, and then went on to discuss the details of the criminal history calculation.<sup>18</sup> As the Second Circuit summarized: "It is difficult to draw a principled distinction between the government actually moving for an upward departure and stating that it 'technically' could move for such a departure and then adding arguments that would support such a departure."<sup>19</sup>

The Second Circuit observed that the sentencing court had all of the relevant factual and legal information available to it before the prosecutor's comments were made at sentencing. Concluding that the prosecutor's statements could have served no purpose other than advocating an upward departure or a high sentence within the applicable guidelines range, the Second Circuit held that the plea agreement had been breached.

### Range of Remedies

The Second Circuit in *Vaval* next turned to the issue of remedy for breach of a plea agreement. The court candidly acknowledged a lack of clarity in at least its prior decisions in this area, and set out a summary of the alternatives and applicable principles for deciding which to apply. The court recognized three alternatives: breaches that do not require a remedy, breaches that may be remedied by resentencing, and breaches that permit withdrawal of a plea.

Foremost, the Second Circuit held that it was not relevant whether a breach by the government not to advocate a position at sentencing did or did not result in prejudice. In *Vaval*, the sentencing judge specifically stated that the prosecutor's arguments did not affect the sentencing decision, and thereby sidestepped the defendant's assertion of a breach of the plea agreement. The Second Circuit rejected this position. Rather, the Second Circuit held that "to

preserve the integrity of plea bargaining procedures and public confidence in the criminal justice system, a defendant is generally entitled to the enforcement of a plea agreement without showing a tangible harm resulting from a breach."<sup>20</sup>

The court noted two limited exceptions to this principal, however. The first it depicted as the specific performance exception. The court defined this exception as met when the government, through subsequent conduct, performs as promised and thereby remedies its breach. The Second Circuit offered as an example a promise, unmet at sentencing, by the government to bring the defendant's cooperation to the sentencing court's attention. The government, the Second Circuit noted, may remedy this breach by meeting its obligation on a Rule 35 post-sentencing motion. The defendant, placed in the same position as if the government had kept its promise initially, has no need for a remedy on appeal.<sup>21</sup>

The Second Circuit noted as a second exception the case of a *de minimis* breach. The court noted that this is a "very limited exception...where the violation is so minor that it does not cause the defendant to suffer any meaningful detriment."<sup>22</sup> The court provided this standard: "In assessing whether a defendant suffered a meaningful detriment, the critical question is what the defendant reasonably understood to be the terms of the plea agreement, and whether his or her reasonable expectations have been fulfilled."<sup>23</sup>

Finally, the Second Circuit turned to the issue of the particular remedy: resentencing or withdrawal of the plea. The Second Circuit found this choice to be one of discretion, based on the circumstances of the particular case. In those circumstances where the taint of the government's breach is such that resentencing before a different judge cannot offer a cure, then the defendant should be permitted to withdraw the plea. The court gave as an illustration a situation in which the government has introduced evidence that cannot be ignored on remand. In those circumstances in which resentencing before a different judge can cure the breach, the court found

<sup>17</sup> *Id.* at 16 n.4.

<sup>18</sup> *Id.* at \*18.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*21.

<sup>21</sup> *Id.* at \*21-22.

<sup>22</sup> *Id.* at \*23.

<sup>23</sup> *Id.* at \*23.

this to be the appropriate remedy. On the record in *Vaval*, the court found that remand and resentencing was the appropriate remedy.<sup>24</sup>

### Considerations Following *Vaval*

Obviously the line must be carefully drawn between an assertion that a breach is *de minimis* and the court's previously stated holding that there is no place for consideration of whether prejudice resulted from the breach. It is perhaps too easy to see the Second Circuit's attempt at drawing a distinction between a breach as to which no prejudice is shown, which will still entitle the defendant to relief, and a *de minimis* breach, requiring no remedy, as an effort to reconcile its holding in *Vaval* with its earlier decisions.

In the context of the *Vaval* decision, the sentencing judge expressly stated that the prosecutor's arguments had no bearing on the sentencing decision, and nonetheless the Second Circuit found that the plea agreement had been breached and the defendant was entitled to a remedy for that breach. It may fairly be asserted that the reasonable understanding of the defendant was that the government would not seek to influence the sentencing decision by making arguments in breach of its promises, and that the defendant was entitled to relief regardless of the effectiveness of those arguments.

After *Vaval*, the analysis as to whether there is a remedial breach should consider the terms of the plea agreement and the subsequent words and acts of the government. The analysis should stop there. The analysis should not consider whether the defendant received the same sentence as would have been imposed but for the breach, or whether the defendant received a sentence that he or she reasonably understood could or would have been imposed under the terms of the agreement. The issue should be whether the government's conduct met the reasonable understanding of the parties to the plea agreement. To go further is to undermine the goals of ensuring "the integrity of plea bargaining procedures and public confidence in the criminal justice system" stated by the court in *Vaval*, as well

<sup>24</sup> *Id.* at \*25-26.

as to put back into the analysis the very issue of prejudice that the Second Circuit rejected.<sup>25</sup>

The issue of what is to be done in response to a breach of a plea agreement implicates strategic as well as legal concerns. In particular, the available remedy will in many instances be a significant factor in determining whether to pursue a claim that the government breached a plea agreement. In many instances, despite even the real impact of a breach, the defendant may nonetheless, conclude that the remaining benefits of a plea agreement outweigh the consequences of withdrawing the plea. In other instances, the consequences of the post-plea events may so alter the landscape that vitiating the plea agreement is the best choice for the defense. By contrast, when it is an available remedy, a remand for resentencing may be the defendant's best option. Consider, for example, that in *Vaval*, the impact of the remand was that sentencing would occur not only before a judge who had not heard the government's arguments, but also before a judge who not presided over the co-defendants' trial.

The factors that weigh in the balance of which remedy a defendant may prefer speak to the difficulty, implicitly recognized by the Second Circuit, in assessing whether any prejudice resulted from the government's breach. In other words, the defense will likely make this very assessment in deciding whether to raise the argument of breach in the first instance, by considering the consequences that may flow from a withdrawal of a plea or from resentencing.

*From: The Champion, July 2005.*

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<sup>25</sup> *See Id.* at \*21.

**CASES**  
***Booker and Beyond***

**1st Circuit remands where court stated that it would have departed if permitted by guidelines. (120)(855)**

Defendant argued that the amount of drugs involved in his offense was so trivial as to take his case out of the heartland of typical career-offender cases, and that he was entitled to a downward departure under U.S.S.G. § 5K2.0. The district court was sympathetic to defendant's plight, saying that it would depart downward if it could, but concluding that it lacked the authority to do so in defendant's case. After defendant was sentenced, the Supreme Court decided *U.S. v. Booker*, 125 S.Ct. 738 (2005). The First Circuit remanded for resentencing in light of *Booker*. The judge's comments indicated that but for the mandatory nature of the guidelines, he would have imposed a lesser sentence. The panel declined to answer the "smallness" question. Defendant could raise other arguments under advisory guidelines that were previously precluded, and the smallness question many not need to be addressed. *U.S. v. Morin*, \_\_F.3d\_\_(1st Cir. Apr. 8, 2005) No. 04-1277.

**10th Circuit holds that treating guidelines as mandatory rather than advisory constituted plain error. (120)(340)(855)**

Defendant argued for the first time on appeal that his sentence was unconstitutional in light of *Blakely v. Washington*, 124 S.Ct. 2531 (2004). The Tenth Circuit held that the district court's non-constitutional *Booker* error in treating the Sentencing Guidelines as mandatory rather than as advisory rose to the level of plain error. Defendant demonstrated a reasonable probability that had the district court applied the post-*Booker* sentencing framework, he would have received a lesser sentence. The relatively trivial nature of defendant's criminal history was at odds with the substantial 16-level enhancement he received under § 2L1.2(a)(1)(A)(ii) for a prior Oklahoma conviction for arson. The state court assessed restitution of a mere \$35 for defendant's third-degree arson, suggesting a quite minor offense. In addition, the district court's expression of sympathy for defendant and complaint about the minimum guideline sentence also implied the court was inclined to depart. Finally, given the mismatch between the sentence suggested by the post-*Booker* framework and the actual sentence given to defendant, the error affected the fairness, integrity, and inherent in less structured sentencing determinations. *U.S. v. Trujillo-Terrazas*, \_\_F.3d\_\_(10th Cir. Apr. 13, 2005) No. 04-2075.

**3rd Circuit, en banc, says court plainly erred in treating guidelines as mandatory. (120)** After the Third Circuit remanded in light of *U.S. v. Booker*, 125 S.Ct. 738 (2005), the government petitioned for a rehearing en banc. In denying the petition, the Third Circuit ruled that the district court plainly erred in treating the Sentencing Guidelines as mandatory in sentencing defendant. The court noted that while plain error jurisprudence generally places the burden on a defendant to demonstrate specific prejudice flowing from an error, "in this context where mandatory sentencing was governed by an erroneous scheme, prejudice can be presumed." Thus, "defendants sentenced under the previously mandatory regime whose sentences are being challenged on direct appeal may be able to demonstrate plain error and prejudice. We will remand such cases for resentencing." *U.S. v. Davis*, \_\_F.3d\_\_ (3rd Cir. Apr. 28, 2005) No. 02-4521 (denying rehearing)..

**4th Circuit holds that use of extraneous documents to make crime of violence finding violated *Booker* and *Shepard*. (120)(330)(520)**

The district court relied on a government memorandum, which attached a copy of the police report and the criminal investigation report, to find that defendant's prior conviction for breaking and entering was a "crime of violence" under §§ 2K2.1(a)(4) and 4B1.2(a)(2). At issue was whether the "fact of a prior conviction exception to the 6th Amendment protection applies to findings of fact regarding the circumstances of a prior conviction, when such findings are used to determine that the conviction is a crime of violence. In *Shepard v. U.S.*, 125 S.Ct. 1254 (2005), a Supreme Court plurality held that the consideration of materials outside the charging documents to rule that a prior offense was a violent felony "raised the concern underlying *Jones* and *Apprendi*." The Fourth Circuit found that the sentencing court's application of the §§ 2K2.1 and 4B1.2(a) crime of violence enhancement in defendant's sentencing proceeding was error under *Booker* and *Shepard*. Judge Luttig dissented. *U.S. v. Washington*, 404 F.3d 834 (4th Cir. 2005).

**5th Circuit says *Booker* error was preserved even though defendant never mentioned 6th Amendment. (120)(855)(820)**

Defendant raised various challenges to his sentence under *U.S. v. Booker*, 125 S.Ct. 738 (2005). The Fifth Circuit found that defendant properly preserved his *Booker* challenge below. He repeatedly objected to the district court's determination of a range of financial loss between five and ten million dollars on the ground that the figure had not been proven at trial. He also consistently urged that the court confine its loss to the amount alleged in the indictment. Although he never explicitly mentioned the 6th Amendment, *Apprendi*, or

*Blakely*, his objections adequately apprised the district court that he was raising a 6th Amendment objection to the loss calculation. Where, as here, the defendant preserves his error, the court will ordinarily vacate the sentence and remand unless the error was harmless under Rule 52(a). The government could not show the error was harmless. It could not point to any record evidence that would prove beyond a reasonable doubt that the district court would not have sentenced defendant differently had it acted under an advisory guidelines regime. *U.S. v. Akpan*, \_\_\_F.3d\_\_\_ (5th Cir. Apr. 14, 2005) No. 03-20875.

**7th Circuit remands where court used facts not admitted by defendant or found by jury to determine drug quantity.** (120)(242)(251) Defendant argued that the court erred by enhancing his sentence based on a factual finding made solely by the sentencing judge with respect to the purity and quantity of methamphetamine involved in his offenses. The jury found defendant guilty of offenses involving 600 grams or more of plain old “methamphetamine” – not “methamphetamine (actual) or “Ice.” The district court found by a preponderance of the evidence that the actual weight of the charged mixtures was 878.8 grams (based on uncontested results of government lab analysis) and that 91 percent of those mixtures, or 799.7 grams, constituted “methamphetamine (actual).” The Seventh Circuit agreed that the court’s use of supplemental facts not admitted by defendant or proven to the jury beyond a reasonable doubt violated the 6th Amendment, as interpreted by *U.S. v. Booker*, 125 S.Ct. 738 (2005). *U.S. v. Macedo* \_\_\_F.3d\_\_\_ (7th Cir. Apr. 14, 2005) No. 02-3563.

**8th Circuit, en banc, says plain error requires reasonable probability that court would have imposed more lenient sentence under advisory guidelines.** (120)(855)(870) Following the decision of the First, Fifth, and Eleventh Circuits, the Eighth Circuit en banc held that where a defendant failed to preserve a claim under *U.S. v. Booker*, 128 S.Ct. 738 (2005), a remand for resentencing is not required unless the defendant meets his burden to demonstrate plain error prejudice, *i.e.* a reasonable probability that the district court would have imposed a more favorable sentence under the advisory sentencing guidelines regime. Defendant here did not establish a reasonable probability of prejudice. Although the sentence imposed was at the bottom of the guidelines range, this by itself was insufficient to demonstrate a reasonable probability that the court would have imposed a lesser sentence absent the Booker error. Judge Bye dissented. *U.S. v. Pirani*, 406 F.3d 543 (8th Cir. 2005)(en banc).

## OFFENSE CONDUCT GENERALLY

**6th Circuit holds that account holders who only temporarily lost funds because banks reimbursed them were not victims.** (220) Defendant participated in a scheme involving stolen checks drawn on about 13 accounts of over 50 individuals using their stolen bank information. After depositing the stolen checks, defendant withdrew portions of the deposited funds from 47 of those accounts, receiving over \$20,000 in cash. The district court applied a two-level increase under § 2B1.1(b)(2)(A) based on its finding that the offense involved more than 10 but less than 50 victims. The court found at least 11 victims – the five banks defrauded and the six account holders who had to open new accounts and buy new checks as a result of defendant’s actions. The Sixth Circuit held that those account holders who only temporarily lost funds because their banks reimbursed them for their losses were not victims because they were fully reimbursed for their temporary financial losses. Moreover, the court also erred in finding sufficient evidence that six account holders suffered pecuniary harm. While there was testimony that six account holders were required to open new accounts and obtain new checks, the witness later admitted that the account holders did not tell him whether they were reimbursed for their purchase of the new checks. *U.S. v. Yagar*, \_\_\_F.3d\_\_\_ (6th Cir. Apr. 18, 2005) No. 04-5151.

**9th Circuit says that thief who sells goods he stole is not in stolen property business.** (220)(300) The guideline for fraud and theft offenses, § 2B1.1(b)(4), requires a two-level enhancement “if the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property.” Defendant engaged in a scheme to defraud computer suppliers by establishing lines of credit, then buying computer equipment without paying for it. The Ninth Circuit vacated defendant’s sentence enhancement under § 2B1.1(b)(4), holding that a thief who sells goods that he has stolen is not in the business of receiving and selling stolen property. *U.S. v. Kimbrew*, \_\_\_F.3d\_\_\_ (9th Cir. May 11, 2005) No. 04-10193.

**7th Circuit holds that court erred in evaluating the nature of prior conviction rather than relying on elements of offense.** (330)(520) Defendant was convicted of being a felon in possession of a firearm. The district court found that his prior robbery conviction was a crime of violence, and imposed an enhanced offense level under § 2K2.1(a)(4)(A). Instead of evaluating the elements of robbery under state law, or the risks posed by robberies as a class, the district court focused on defendant’s conduct, as outlined in the affidavits in the earlier prosecution. The

Seventh Circuit remanded for resentencing. A judge is “limited to examining the statutory definition, charging documents, written plea agreement, transcript of plea colloquy, and any explicit factual finding made by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005). Affidavits attached to information as part of Indiana practice are not part of the “charging document” for this purpose. the affidavit is just a police report under oath, and *Shepard* holds that police reports may not be considered. When resentencing defendant, the judge will treat the guidelines as advisory. *U.S. v. Lewis*, \_\_\_F.3d\_\_\_ (7th Cir. Apr. 19, 2005) No. 03-4100.

**2nd Circuit remands where court applied wrong standard for robbery conspiracy increase. (220)(380)**

Defendant acted as the “inside man” in a conspiracy to rob a federal credit union. The conspiracy guideline uses the base offense level from the substantive offense, plus any adjustments “that can be established with reasonable certainty.” U.S.S.G. § 2X1.1(a). The base offense level for robbery (20) is increased by five “if a firearm was brandished or possessed.” U.S.S.G. § 2B3.1(b)(2)(C). In applying this enhancement, the district court erroneously stated that the proper test was “whether it was reasonably foreseeable that a firearm would be brandished or possessed during the commission of the robbery.” The government offered no evidence that a firearm was actually possessed in connection with the conspiracy. A conspirator cannot be held liable for an action that was intended by a co-conspirator (reasonably foreseeable or not) if the action did not actually occur, unless it was within the specifically intended scope of the conspiracy. The district court’s misstatement of the law may not have affected defendant’s sentence, since the court made findings that could have supported the increase. It could have concluded that the use of firearms was a specifically intended element of the conspiracy. However, as the district court was proceeding under an inapplicable legal standard, it never made that finding. The Second Circuit remanded. *U.S. v. Savarese*, 404 F.3d 651 (2d Cir. 2005) No. 03-1376.

**8th Circuit says government breached agreement by arguing for use of guideline different from that stipulated in plea agreement. (330)(790)**

Defendant pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Defendant and the government stipulated that the applicable guideline was § 2K2.1(a), which would have resulted in an offense level of 14. However, the probation officer calculated his offense level under § 2K2.1(c), which applies if the defendant used or possessed the firearm in connection with the commission or attempted commission of another

offense. Defendant objected at sentencing, and the court asked the prosecutor for his comments. The prosecutor responded by arguing that the facts to which defendant had stipulated established that he had committed felony assault. The Eighth Circuit held that the government breached the plea agreement by arguing in support of a sentence exceeding that allowed under the stipulated guideline. The argument that defendant’s factual stipulations supported felonious assault was essentially an argument that § 2K2.1(c)(1), rather than § 2K2.1(a) should apply. *U.S. v. Thompson*, 403 F.3d 1037 (8th Cir. 2005).

**ADJUSTMENTS, GENERALLY**

**1st Circuit says that counsel was ineffective in failing to attack official victim enhancement. (410)**

Defendant was convicted of aiding and abetting the murder of an on-duty policeman during the commission of a drug offense. The policeman was acting undercover as a drug customer of drug conspirators with whom defendant frequently associated, although there was no evidence that defendant actually sold drugs. The judge found that the officer’s killing was motivated by his status as a police officer, resulting in a three-level enhancement under § 3A1.2(a). Defendant’s trial counsel objected to the enhancement, arguing that the government had not shown that defendant knew that the victim was a police officer. The issue was not raised on appeal. The First Circuit ruled that defendant’s appellate counsel was ineffective in failing to attack the official victim enhancement. It was unclear why the judge thought defendant knew or believed the victim was a police officer and that his assistance in the murder was motivated by the victim’s official status. One of the dealers testified that he confronted the victim and called him a snitch, and told another conspirator to find out if the victim was an informant. Moreover, the judge stated that he was relying at least in part on the jury verdict; however, the jury never made a finding that defendant knew the victim was a police officer. *Munoz v. U.S.*, 404 F.3d 527 (1st Cir. 2005).

**DEPARTURES**

**8th Circuit holds that 75% of downward departure for substantial assistance was reasonable. (712)**

Defendant faced a 240-month mandatory minimum sentence based on her conspiracy for conspiracy to distribute 500 grams or more of methamphetamine. The government recommended a 10 percent departure, to 216 months. Defense counsel proposed a 40 percent departure, to 144 months. The district court sentenced defendant to 50 months in prison. Nonetheless, the Eighth Circuit affirmed the departure, finding the sentence was

reasonable. Defendant's sentence was distinguishable from the sentences reversed in *U.S. v. Dalton*, \_\_F.3d\_\_ (8th Cir. Apr. 13, 2005) No. 04-1361 and *U.S. v. Haack*, 403 F.3d 997 (8th Cir. 2005). Like defendant, Dalton debriefed and testified before a grand jury. However, Dalton's cooperation clearly ended when she absconded while on pretrial release. The district court also did not explain how it evaluated the § 5K1.1 factors. Unlike defendant, the *Haack* defendant did not attempt to work actively for a controlled drug buy, or give grand jury testimony. Also, the judge made comments indicating it was departing based on the improper factor of dissatisfaction with the sentencing guidelines. *U.S. v. Christensen*, \_\_F.3d\_\_ (8th Cir. Apr. 13, 2005) No. 04-2084.

### PLEA AGREEMENTS, GENERALLY

#### **7th Circuit says government breached plea agreement by commenting on "appalling" criminal history. (790)**

Defendant's plea agreement stated that the government would advise the court of information "relevant to sentencing, including criminal activity engaged in by the defendant...." However, the government also agreed not to take any position concerning where within the guidelines range defendant's sentence should fall, and agreed not to move for an upward departure. At sentencing, the government stated that defendant's criminal history was "appalling," that his purported contrition was "disingenuous," and then discussed in detail the violent nature of the current offense. The prosecutor also noted that at the time of the plea agreement the government believed defendant's criminal history was III rather than II, and stated that "technically, I could make an upward departure [argument.]" The Seventh Circuit held that the government breached the plea agreement through its arguments relating to the facts of defendant's crime and the seriousness of his criminal history. The government volunteered highly negative characterizations of defendant's criminal history and demeanor. Such characterizations were not "information" provided by the government. There is no principled distinction between the government actually moving for an upward departure and stating that it "technically" could move for such a departure and then adding arguments that would support such a departure. *U. S. v. Vaval*, \_\_F.3d\_\_ (2d Cir. Apr. 12, 2005) No. 04-0121-CR.

**5th Circuit holds that government breached plea agreement by supporting enhancement not discussed in it. (790)** Defendant signed a plea agreement, which contained a detailed calculation of defendant's sentencing range. The PSR, however, calculated defendant's

sentence differently, including a recommended enhancement for abuse of trust. The plea agreement did not include this enhancement. At sentencing, the prosecution acknowledged that the enhancement was not included in the agreement, but stated that it was free to take a position on the enhancement. The Fifth Circuit held that the government breached the plea agreement because it stipulated in the agreement to a guideline calculation that did not include the abuse of trust enhancement. The agreement states that the government and defendant "agree that the applicable sentencing guidelines should be calculated as follows." By not including an enhancement for an abuse of trust, the parties agreed that it was not an applicable guideline and that it should not be included in the sentence calculation. Urging an enhancement that was not part of the agreement constituted a breach. *U.S. v. Munoz*, \_\_F.3d\_\_ (5th Cir. Apr. 29, 2005) No. 04-40481.

#### **Sources:**

***Federal Sentencing Guide, Vol. 16, No. 10, May 16, 2005.***

***Federal Sentencing Guide, Vol. 16, No. 11, May 31, 2005.***

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