No. 14-___

IN THE

Supreme Court of the United States

CHRISTOPHER ERWIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Jeffrey M. Brandt
ROBINSON &
BRANDT, P.S.C.
629 Main Street
Suite B
Covington, KY 41011

Kevin K. Russell
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
kr@goldsteinrussell.com

QUESTION PRESENTED

Approximately two-thirds of federal plea bargains contain provisions that waive the defendant's right to appeal his or her sentence. While the courts of appeals generally enforce those waivers, there are established exceptions for situations in which enforcing the waiver would, for example, result in a "manifest injustice." *See, e.g.*, *United States v. Grimes*, 739 F.3d 125, 128-29 (3d Cir. 2014).

This case raises the question of what a court of appeals should do when it decides that an appeal does not qualify for any exception and, therefore, is barred by the waiver agreement. The majority of circuits simply dismiss the appeal. In this case, the Third Circuit joined the Seventh in holding instead that a court may vacate the judgment and remand the case to allow the prosecutors to seek a higher sentence in light of the defendant's breach of the plea agreement. The question presented is:

Whether a court of appeals, having found an appeal barred by an appeal waiver in a plea agreement may vacate the judgment and remand to allow imposition of a higher sentence in the absence of a cross-appeal by the Government.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Erwin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-33a) is published at 765 F.3d 219. The district court issued no relevant opinion.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2014. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on December 31, 2014. Pet. App. 34a-35a. On March 23, 2015, Justice Alito extended the time to file this petition through April 30, 2015. No. 14A988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 3742 of Title 18 provides in relevant part:

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

* * * * *

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to

determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence. * * *

STATEMENT OF THE CASE

In negotiating plea bargains, the Government frequently requires defendants to waive any right to appeal their sentence. The agreements are generally entered into prior to sentencing, such that the defendant is forced to waive his right to challenge his sentence without knowing whether the sentence he will receive will be correctly calculated or even lawful. This Court has never decided whether such pre-sentence appeal waivers are enforceable, but the courts of appeals have uniformly held that they are, subject to certain requirements and exceptions. For example, the Third Circuit and several others refuse to enforce a waiver when doing so would result in a "miscarriage of justice." Pet. App. 9a (citation omitted).

This case presents the Court an opportunity to resolve a growing circuit conflict over what a court of appeals should do when it rejects a defendant's claim that his appeal falls within the "miscarriage of justice" or similar exception and holds, instead, that the appeal is barred by an appeal waiver. The majority of circuits simply enforce the waiver and dismiss the appeal. The Third and Seventh Circuits, however, allow the Government to request vacatur of the judgment and a remand to allow the prosecution to seek a higher sentence in response to the defendant's breach of his plea deal.

1. Petitioner pleaded guilty to drug conspiracy charges. The parties agreed that under the advisory Sentencing Guidelines, petitioner had an offense level of 39. Pet. App. 5a. But the Government promised to seek a downward departure for substantial assistance if petitioner cooperated with

government investigators and prosecutors. Petitioner, for his part, agreed to waive his right to appeal his sentence if the sentence was within or below the advisory Sentencing Guideline range resulting from an offense level of 39. *Id*. 5a-6a.

Petitioner subsequently submitted to extensive questioning by Government investigators and agreed to testify against certain other defendants. Pet. App. 6a-7a. In light of this "important and timely" assistance, the Government moved for a five-level downward departure from the applicable Guideline range. *Id*. 7a.

At sentencing, the Government acknowledged that there "may be some question as to where to start" in applying the five-level deduction. Pet. App. 8a. The question arose from the fact that the offense level of 39, combined with petitioner's criminal history category I, led to a Guideline range of 262 to 327 months, which was above the statutory maximum of 240 months. *Id*. 9a. Thus, simply applying the deduction to a Guideline range that could not lawfully be imposed would give petitioner less than the full benefit of the five-level reduction he had earned through his cooperation with the Government. The Government nonetheless requested that the five-level departure apply to the offense level of 39. *Id*. 8a. This resulted in a Guideline range of 151 to 188 months. *Id*. If the downward departure had been applied to a sentencing level commensurate with the statutory maximum, the sentencing range would have been 135 to 168 months. *Id*. 10a-11a. The district court accepted the Government's position and sentenced petitioner to 188 months. *Id*. 8a.

2. Petitioner appealed. The Third Circuit acknowledged that appeals are permitted, despite an appeal waiver in a plea agreement, if enforcing the waiver would "work a miscarriage of justice." Pet. App. 9a (quoting *United States v. Grimes*, 739 F.3d 125, 128-29 (3d Cir. 2014)) (internal quotation marks omitted). The panel did not dispute that the district court applied the five-level departure to a sentencing range that could not lawfully be applied because it exceeded the statutory maximum. Nor did it question that as a result, petitioner was denied the full benefit of the five-level departure. Pet. App. 10a, 13a-14a. But the Third Circuit decided that even if the district court had misapplied the Guidelines, it could not "conclude that, under these circumstances, enforcing Erwin's waiver would work a miscarriage of justice." *Id*. 14a.

The court then explained that "where a defendant's arguments on appeal are based on a valid appellate waiver, our ordinary procedure is to enforce the waiver by dismissing the defendant's appeal, thereby affirming the defendant's sentence." Pet. App. 14a. But in this case, at the Government's request, the panel went further, vacating the judgment and remanding the case in order to allow the Government to seek an even *higher* sentence by withdrawing its substantial assistance motion. *Id*. 23a. The panel reasoned that because petitioner was wrong in thinking his appeal waiver fell within the miscarriage of justice exception, he was in breach of his plea agreement. Because that breach caused the Government to expend some resources on the appeal, the panel believed that an order requiring "specific performance" was required. *Id*. 21a. And it concluded that specific performance meant not only

enforcing petitioner's obligations not to appeal by dismissing the appeal, but also vacating the judgment and remanding to allow the Government to withdraw its motion for a downward departure based on petitioner's uncontested substantial assistance. Pet. App. 22a-23a.

The panel recognized that the Government had not filed a cross-appeal seeking to expand the judgment in its favor. Pet. App. 23a. But it nonetheless concluded that granting the Government's request for a remand to seek an expansion of petitioner's sentence did not violate the cross-appeal requirement or this Court's decision in *Greenlaw v. United States*, 554 U.S. 237 (2008). The panel reasoned that the Government was excused from filing a cross-appeal because the "sole source of authority for a Government appeal in this case" would be 18 U.S.C. § 3742, which "permits the Government to appeal a defendant's sentence" in four situations, none of which applied in this case. Pet. App. 25a. "It would be nonsensical," the court reasoned, "to fault the Government for [failing to file] an appeal that we surely would have dismissed for lack of jurisdiction." *Id*. 25a-26a. Moreover, the panel believed, the remand did not "enlarge[] the Government's rights" because the court had ordered "de novo resentencing" in which petitioner was free to raise again the issue the district court had already resolved in the Government's favor and which the court of appeals had refused to consider. *Id*. 26a-27a. Finally, the court opined that petitioner "should have anticipated the possibility that he breached the agreement by appealing and thereby triggered the possibility of relief for his adversary." *Id*. 28a; *but see id*. 23a (noting that whether Government could seek

such relief was "a question of first impression" in the Third Circuit).

3. The full court denied rehearing en banc over the dissent of four judges. Pet. App. 34a-41a. The dissenters explained that the panel's decision "cuts counter to how we have acted, and it goes against the majority of cases in other circuits." *Id*. 40a; *see also id*. 40a-41a (collecting cases). They also pointed out that even if the contract law remedy of specific performance were the appropriate source for guidance on enforcing criminal appeal waivers, to "restore the parties to their pre-breach positions, we need only nullify Erwin's appeal, . . . no matter how meritorious." *Id*. 38a. Any remedy "beyond enforcing the waiver gives the Government more than it bargained for," given that it obtained petitioner's cooperation and that dismissing the appeal would preserve the sentence the Government had asked for. *Id*. The dissenters saw "no sound reason" for the panel's broader, novel remedy and therefore "join[ed] the growing chorus of commentators who have lamented this decision." *Id*. 39a-40a (collecting sources).

REASONS FOR GRANTING THE WRIT

In every circuit except the Third and Seventh, when a court concludes that an appeal falls within the scope of an appeal waiver, and outside the scope of the "miscarriage of justice" or other exception to the enforceability of such waivers, the court simply dismisses the appeal. Believing that dismissal is insufficient to punish and deter waived appeals, the Third and Seventh Circuits have taken it upon themselves to develop a new regime under which a defendant who is mistaken about his right to appeal is subject to a heightened sentence.

The Third and Seventh Circuits do not claim that Congress has directly authorized what amounts to a prison sentence for breach of contract. In fact, Congress has strictly limited the occasions on which the Government may ask an appellate court to vacate a criminal judgment and remand for increased punishment. Breach of an appeal waiver is not among them. At the same time, Congress has provided that even when the Government *is* permitted to appeal or cross-appeal, prosecutors must obtain authorization from high level officials in the Department of Justice. The decision in this case allows local federal prosecutors seek enhancement of a criminal sentence without filing a cross-appeal, thereby bypassing that important restriction on their authority. The Court should grant this petition to reverse the court of appeals' disregard for the scheme Congress established.

I. The Circuits Are Divided Over The Appropriate Response To A Defendant Filing An Appeal The Court Later Decides Is Barred By An Appeal Waiver In A Plea Agreement.

Leaving significant and sometimes obvious sentencing error uncorrected can create substantial injustices and undermine "public confidence in the judicial system." *United States v. Teeter*, 257 F.3d 14, 23 (1st Cir. 2001). For that reason, the courts of appeals have accepted the general validity of appeal waivers as part of plea agreements, but only on the understanding that there are situations in which the waiver will not be enforced. Some courts, like the Third Circuit, apply a "manifest injustice" exception. *See* Pet. App. 9a; *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009); *United States v. Andis*, 333 F.3d 886, 894 (8th Cir. 2003) (en banc); *Teeter*, 257 F.3d at 25. Others have developed similar tests or ad hoc lists of exceptions.[1]

---

[1] *See, e.g.*, *United States v. Adams*, 780 F.3d 1182, 1183-84 (D.C. Cir. 2015) (waiver not enforceable if "the defendant makes a colorable claim he received ineffective assistance of counsel in agreeing to the waiver" or "the district court utterly fails to advert to the factors in 18 U.S.C. § 3553(a), the sentence exceeds the statutory maximum, or the sentence is colorably alleged to rest upon a constitutionally impermissible factor, such as the defendant's race or religion" (citations and internal quotation marks omitted)); *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011) ("A violation of a fundamental right warrants voiding an appeal waiver," including sentencing "based on unconstitutional factors" or when the sentencing court "abdicat[ed] [its] judicial responsibility" (alterations in original) (citation and internal quotation marks omitted)); *United States*

The courts of appeals are divided, however, over what to do when a defendant who agreed to an appeal waiver files an appeal that is later determined not to qualify under any of these exceptions.

In the vast majority of circuits, if a defendant's appeal is barred by his plea agreement and does not fall within any exception, the court will simply enforce the waiver and dismiss the appeal. *See, e.g.*, *United States v. Acosta-Roman*, 549 F.3d 1, 4 (1st Cir. 2009); *United States v. Riggi*, 649 F.3d 143, 150 (2d Cir. 2011) ; *United States v. Blick*, 408 F.3d 162, 173 (4th Cir. 2005); *United States v. Purser*, 747 F.3d 284, 294-95 (5th Cir. 2014); *United States v. Toth*, 668 F.3d 374, 379 (6th Cir. 2012); *United States v. Andis*, 333 F.3d 886, 894 (8th Cir. 2003) (en banc); *United States v. Mendez-Gonzalez*, 697 F.3d 1101, 1105 (9th Cir. 2012) (per curiam); *United States v. Hahn*, 359 F.3d 1315, 1329-30 (10th Cir. 2004) (en banc) (per curiam); *United States v. Buchanan*, 131 F.3d 1005, 1008 (11th Cir. 1997) (per curiam); *United States v. Adams*, 780 F.3d 1182, 1183-84 (D.C. Cir. 2015) .

In contrast, the Third and Seventh Circuits have held that if a panel determines that a defendant's appeal is barred by an appeal waiver, the Government may seek to have the judgment vacated and the case remanded to allow the prosecution to seek enhanced punishment. *See* Pet. App. 15a-33a; *United States v. Whitlow*, 287 F.3d 638, 640-41 (7th

---

v. Bibler, 495 F.3d 621, 624 (9th Cir. 2007) (waiver unenforceable if "the sentence does not comport with the terms of the plea agreement" or "violates the law").

Cir. 2002); *United States v. Hare*, 269 F.3d 859, 862-63 (7th Cir. 2001).

In *Hare*, for example, federal prosecutors promised that in exchange for the defendant's cooperation and waiver of appeal, they would dismiss some of the charges and recommend a reduction in his sentence. However, after the district court spoke disparagingly of the defendant at sentencing, the Government withdrew its support for a downward departure, thereby breaching the agreement. The defendant appealed, arguing that the Government's breach vitiated his appeal waiver. *See* 269 F.3d at 860-62. The court of appeals, however, refused to consider that argument because the defendant failed to ask the district court to set aside the plea or to order specific performance. *Id*. at 861.[2] The court then concluded that "[d]ismissing the appeal is an essential but incomplete response, because the prosecutorial resources are down the drain, and dismissal does nothing to make defendants' promises credible in future cases." *Id*. at 862. Instead, the court held that the defendant's attempt to appeal entitled the United States to "reinstate dismissed charges and continue the prosecution." *Id*.

In *Whitlow*, 287 F.3d 638, the Seventh Circuit applied the same principles to allow prosecutors to seek a higher sentence on remand. The court acknowledged that when the Government breaches a plea deal – say, by refusing to make a promised

---

[2] *But see United States v. Bowe*, 257 F.3d 336, 342 (4th Cir. 2001) (appeal waiver not enforceable when Government breaches plea deal); *Purser*, 747 F.3d at 289 (same).

recommendation for a reduction in sentence – the ordinary remedy is to order specific performance of the promise, not to relieve the defendant of all his obligations. *Id*. at 640. But it held that a different rule should apply when a defendant breaches a plea deal by filing a waived appeal. "Specific performance is a poor remedy for this kind of breach by the defendant." *Id*. Instead, the court held, breach of an appeal waiver agreement affords the Government the opportunity "to withdraw some concessions," including promises to dismiss charges or support a reduced sentence. *Id*. at 640-41.

Judge Wood wrote separately in *Whitlow* because she did "not subscribe to some of the majority's comments about waivers of the right to appeal in plea bargains." 287 F.3d at 641 (Wood, J., concurring). Given that there are exceptions to appeal waivers, she observed, attorneys who refuse to file an appeal because of a waiver in a plea agreement may end up "forfeiting or waiving . . . their clients' rights." *Id*. Consequently, Judge Wood believed, if a court determines that an appeal does not fall within one of the permitted exceptions, dismissal of the waived appeal "should be enough." *Id*. Nothing in contract law supported a broader remedy, she explained. The appeal waiver did not seem to be "among the essential terms of the overall agreement." *Id*. So if plea deals "are indeed to be interpreted as contracts," a violation of that term "ought not to constitute a basis for the government to recant on the entirety of

the agreement from which it too benefitted." *Id*. at 642-43.[3]

3. The circuit conflict is untenable. Federal law establishes the same appeal rights for all criminal defendants throughout the nation. Yet in two circuits, defendants who assert their statutory right to appeal face substantial adverse consequences should they fail to convince the particular panel that hears the appeal that their case satisfies the circuit's often vague criteria for refusing to enforce an appeal waiver.

---

[3] Disagreement about the consequences of filing an appeal in violation of an appeal waiver has contributed to a further conflict over whether refusing a client's request to file an appeal constitutes ineffective assistance of counsel if the defendant has agreed to an appeal waiver in a plea bargain. Most courts hold that it is. *See, e.g.*, *Campusano v. United States*, 442 F.3d 770, 772-77 (2d Cir. 2006); *United States v. Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007); *Campbell v. United States*, 686 F.3d 353, 358 (6th Cir. 2012); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262, 1267 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 793 (11th Cir. 2005). But the Seventh Circuit has held that it generally is *not* ineffective assistance to refuse to file such an appeal, in part because under the law of that circuit, taking the appeal risks "allowing the prosecutor to reinstate the . . . dismissed charges or ask the district court to increase the sentence on the existing conviction." *Nunez v. United States*, 546 F.3d 450, 455 (7th Cir. 2008).

II. The Question Presented Is Recurring And Important.

Whether the Government may seek further criminal punishment of a defendant who violates an appeal waiver is a question of surpassing importance both because of the significance of the rights at stake and because appeal waivers (and appeals despite them) are common.

The proper response to appeals taken despite an appeal waiver is a question that will affect hundreds, if not thousands, of cases nationwide each year. *See* Pet. App. 26a n.10 (noting that the Third Circuit alone entertains nearly 50 motions to enforce appellate waivers every year); *United States v. Whitlow*, 287 F.3d 638, 639 (7th Cir. 2002) (decrying "what has become a common" practice of a defendant "who waived his appellate rights as part of a plea bargain . . . fail[ing] to keep his promise").

At the same time, there should be no dispute over the importance of the rights at issue. Congress gave criminal defendants a statutory right to appeal their sentences. 18 U.S.C. § 3742. Although federal criminal appeals are relatively rare, nearly a quarter result in some relief for the defendant, either by reversal or remand. *See* Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQ. L. REV. 825, 829 tbl. 1 (2009). Left uncorrected, errors in criminal cases can affect the liberty of individuals and the public's perception of the federal judicial system's integrity. *See, e.g.*, *United States v. Teeter*, 257 F.3d 14, 23 (1st Cir. 2001).

Despite its critical role in ensuring the correct application of criminal law in our courts, appellate

review in criminal cases is increasingly unavailable. Almost all criminal cases end in plea deals. *See, e.g.*, Pet. App. 19a n.7 (noting that in the Third Circuit more than 95% of convictions were by guilty plea). And increasingly, the Government has insisted that appeal waivers be included in those agreements. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 224 n.69 (2005). One study found that such waivers are a part of nearly two-thirds of all federal plea agreements. *Id*. at 231. In some circuits, including some of the largest, the number is much higher. *See id*. at 232 fig. 7 (showing 90% of plea agreements in the Ninth Circuit include appeal waivers).[4]

In this context, the recognized exceptions to the enforceability of appeal waivers are essential to ensuring appellate courts retain their important role in the criminal justice system. Yet the rules adopted by the Third and Seventh Circuits were avowedly created to deter large numbers of criminal defendants from making the argument that their appeals fell within the permitted exceptions to the enforceability of appeal waivers. *See* Pet. App. 26a n.10. If such a dramatic alteration in the criminal justice system is to be ordered by a court rather than

---

[4] The study further found that waivers are distinctly one-sided: nearly ninety percent waived only the defendant's right to appeal. *Id*. at 256 tbl.12; *see also United States v. Raynor*, 989 F. Supp. 43, 45 (D.D.C. 1997) (quoting 1997 memorandum from Department of Justice to federal prosecutors urging that plea agreement include appeal waivers by defendants, but not the Government).

legislated by Congress, it at least should be ordered by *this* Court.

III. The Decision Below Is Wrong.

Certiorari is also warranted because the decision below is incorrect in two related respects. First, it allows the Government to seek an enlargement of a criminal sentence without taking a cross-appeal. Second, the court of appeals' attempt to fashion a severe criminal penalty for breach of appeal waiver agreements is an unnecessary and harmful invasion of Congress's authority.

A. In The Absence Of A Government Cross-Appeal, Courts Of Appeals May Not Vacate A Sentence To Allow Its Enlargement On Remand.

The Third Circuit recognized that the "Government neither appealed nor cross-appealed in this case." Pet. App. 23a. That fact alone should have precluded the court from considering the Government's request that the judgment be vacated and the case remanded to allow the prosecution to seek a higher sentence.

1. This Court has admonished that under the "cross-appeal rule," "an appellate court may not alter a judgment to benefit a nonappealing party." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). In the criminal context, this is not simply a matter of "inveterate and certain" tradition. *Id*. at 245 (quoting *Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937)) (internal quotation marks omitted). It is compelled by statutory limitations on the Government's right to appeal. *Greenlaw*, 554 U.S. at 245-46. Specifically, Congress has forbidden the

Government to appeal a criminal sentence except in certain defined circumstances. *See* 18 U.S.C. § 3742. And even if an appeal is permitted by statute, federal prosecutors must obtain the "personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." *Id.* § 3742(b). Congress has thus "entrusted to named high-ranking officials within the Department of Justice responsibility for determining whether the Government, on behalf of the public, should seek a sentence higher than the one imposed." *Greenlaw*, 554 U.S. at 246.

The Third Circuit acknowledged that in this case "the Government could not have filed a cross-appeal even if it wanted to do so," Pet. App. 24a, because it cannot satisfy any of the statutory criteria for taking an appeal, *id*. 25a-26a. Remarkably, rather than concluding from this that the Government was therefore forbidden from seeking alteration of the judgment in its favor, the Third Circuit thought that "[i]t would be nonsensical to fault the Government" for failing to file an appeal "that we surely would have dismissed for lack of jurisdiction." *Id*. 25a-26a. That misses the point, which is not to fault the Government for failing to file a piece of paper, but instead to enforce the statutory limits on, and procedures for, Government attempts to expand a criminal sentence.

In disregarding those limits, the Third Circuit's new rule invades Congress's prerogative to decide for itself whether additional criminal punishment is warranted for those who violate appeal waivers in plea agreements. There is no reason to think Congress is inattentive to such questions. Congress

has, for example, directly addressed the appeal rights of defendants and the Government when a plea bargain includes a specific sentence. *See* 18 U.S.C. § 3742(c).

At the same time, because the United States Attorney's Office did not file a cross-appeal, it was not compelled to seek the Solicitor General's approval of its novel position that breach of an appeal waiver subjects a defendant to a new sentencing with likely harsher punishment. This petition may, in fact, be the first occasion for anyone in the Solicitor General's office to consider the question. Requiring high-level deliberation about the Government's position on such issues is designed in part to help avoid the inconsistency and circuit conflict that has developed in this context.

2. The court of appeals also attempted a back-up justification, claiming that "the remedy of de novo resentencing neither enlarges the Government's rights nor lessens Erwins." Pet. App. 26a. Not so. The fact that the court of appeals did not directly order an increase in petitioner's sentence is legally irrelevant and only trivially true. The court of appeals cited no decision from any court holding that an appellee may seek vacatur of a judgment and remand for reconsideration, without filing a cross-appeal, so long as the outcome on remand is not foreordained. And for good reason: that would vitiate the cross-appeal rule. There should be little doubt, for example, that this Court would have decided *Greenlaw* the same way if the court of appeals, instead of vacating the sentence and instructing the district court to correct its sentencing error, had

simply vacated and remanded for de novo sentencing, having made its views about the error plain.

In fact, the cross-appeal rule is not limited to cases in which the appellee asks the court of appeals to definitively enlarge the judgment in its favor. It applies whenever an appellate court is asked to "alter a judgment to benefit a nonappealing party." *Greenlaw*, 554 U.S. at 244. And that, of course, is exactly what the Government asked the court to do in this case. Absent the Government's requested relief, the appeal would have been dismissed and petitioner's sentence left at its current level. The vacatur of the judgment served only one purpose, which was to allow the Government to seek an even higher sentence on remand.

The Third Circuit noted that petitioner himself had asked for resentencing. Pet. App. 26a. But the remand was not entered to satisfy that request. While the court claimed that the sentencing would be de novo, and thereby could theoretically result in a lower sentence, the court of appeals was equally emphatic that it was not entertaining petitioner's claim of procedural error in the calculation of his sentence. *Id*. 13a-14a. For that reason, the district court would have no reason to change its prior ruling. Accordingly, the nominally de novo resentencing has no prospect of doing anything but increasing petitioner's sentence.

More importantly, the Third Circuit's pretense that it was only giving petitioner what he asked for and was not enlarging the Government's rights provides a roadmap for evasion of the cross-appeal rule in criminal cases generally. Again, that rule would have permitted the Government in *Greenlaw*

to seek resentencing for the purpose of imposing a longer sentence so long as the Government did not ask the court of appeals to *order* the district court to correct its error. And it would allow local federal prosecutors to avoid the scrutiny of the Solicitor General so long as they end their briefs asking for a remand for de novo resentencing rather than resentencing with specific instructions.

3. Finally, requiring the Government to file a cross-appeal when it intends to seek resentencing to punish an alleged violation of an appeal waiver would also serve the salutary purpose of giving the defendant "fair warning, well in advance of briefing and argument, that pursuit of his appeal exposes him to the risk of a higher sentence." *Greenlaw*, 554 U.S. at 252-53. If given this warning, "he can seek the Government's agreement to voluntary dismissal of the competing appeals," *id*. at 253, thereby advancing one of the principal justifications the Third Circuit gave for its rule – minimizing the Government's cost of litigating waived appeals. *See* Pet. App. 21a.

B. Even If The Government Cross-Appeals, Courts Of Appeals May Not Vacate A Criminal Judgment To Allow Enhanced Punishment For Violating An Appeal Waiver.

Even setting aside the Government's failure to cross-appeal, the Third Circuit erred in holding that a criminal judgment may be vacated in order to allow the Government to seek further punishment in light of a defendant's breach of an agreement to waive his right to appeal. That remedy is unauthorized by statute, unsupported by contract law principles, and

unjustified by any need to deter inappropriate appeals.

1. That Congress has not provided the Government any way take a cross-appeal to seek enhanced punishment for violating an appeal waiver is reason enough to conclude that Congress has not authorized the enhanced punishment the Government seeks in this case. But there are other statutory indications as well.

After circumscribing the Government's right to initiate an appeal or cross-appeal, the statute then limits the scope of appellate review. It directs that "the court of appeals shall determine whether the sentence" was "imposed in violation of law" or "as a result of an incorrect application of the sentencing guidelines," or suffers any of a number of other flaws, none of which has anything to do with violation of appeal waivers. *See* 18 U.S.C. § 3742(e). The statute then directs the outcome of the appeal in terms that belie any additional discretion to vacate and remand for resentencing to remedy the defendant's perceived violation of an agreement not to appeal. *See id.* § 3742(f).

The sentencing appeal statute thus simply does not contemplate courts taking jurisdiction over an appeal to decide whether an appeal waiver was violated and remand for further punishment if a breach is found. Nor, contrary to the Third Circuit's suggestion, does 28 U.S.C. § 2106 fill that void. *See* Pet. App. 30a-31a. While that general provision allows appellate courts to "remand [a] cause and . . . require such further proceedings to be had as may be just under the circumstances," 28 U.S.C. § 2106, this Court explained in *Greenlaw* that the provision's

broad language "does not override the cross-appeal requirement." 554 U.S. at 249. Nor does it override the specific statute Congress enacted to govern the disposition of sentencing appeals. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general." (alteration in original) (citation and internal quotation marks omitted)). That is why, for example, Section 2106 does not provide a means for reversing a criminal sentence on grounds other than those enumerated in 18 U.S.C. § 3742(f).

2. Even setting aside lack of statutory authority, the Third Circuit's reliance on contract principles to justify its actions is inapt.

In *Santobello v. New York*, 404 U.S. 257 (1971), this Court held, as a matter of Due Process, that a prosecutor's breach of a plea agreement must be cured either by requiring "specific performance of the agreement on the plea" or by providing the defendant "the opportunity to withdraw his plea of guilty." *Id*. at 263. Consistent with that approach, the majority of courts remedy breach of an agreement not to appeal through the specific-performance-type remedy of dismissing the appeal. By allowing the Government to move to dismiss the appeal at the outset, this remedy minimizes any burden on the Government and ensures that the defendant enjoys no benefit from his breach.

The remedy imposed in this case bears no relation to those the Court recognized in *Santobello*. The remand does not amount to setting aside the entire plea agreement, for if it did, the Government would be forced to prove the defendant's guilt beyond

a reasonable doubt before having an opportunity to seek a greater sentence. Nor, the Seventh Circuit has acknowledged, is the remedy a species of specific performance. Instead, that court has concluded that "[s]pecific performance is a poor remedy for this kind of breach" because by the time the Government responds to the appeal "the resources sought to be conserved by the waiver have been squandered." *United States v. Whitlow*, 287 F.3d 638, 640 (7th Cir. 2002). Acknowledging that "[m]oney damages are unavailable," the court then proceeded to invent a new remedy designed to punish and deter appeals in the face of appeal waivers. *Id*.

That remedy has no foundation in contract law. The rule picks and chooses from among the agreement's terms, enforcing some (*e.g.*, the guilty plea) while ignoring others (*e.g.*, the Government's promises to dismiss charges or make sentence reduction recommendations) in order to remedy a breach of yet a different contractual provision (the promise not to appeal). Moreover, as Judge Wood observed, this dramatic judicial revision of the agreement arises solely because of the violation of a term of the contract that is not "among the essential terms of the overall agreement." *Whitlow*, 287 F.3d at 641 (Wood, concurring).

The Third Circuit claimed that in this case it was ordering specific performance of a term of petitioner's plea agreement, under which any violation of the agreement by petitioner "released [the Government] from its obligations under this agreement . . . including any obligation to file a motion under U.S.S.G. § 5K1.1." Pet. App. 22a. But that provision says nothing about vacating an already entered

criminal judgment and remanding for a de novo resentencing. That remedy is entirely the Third Circuit's invention.

3. Even if the courts of appeals had free range to develop remedies for breaches of plea agreements, enforcing an appeal waiver by dismissing the appeal is all that is necessary.

Some appeals in the teeth of an appeal waiver are appropriate and even socially desirable; that is why courts have developed exceptions to waiver enforcement. *See, e.g.*, *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001); *United States v. Hahn*, 359 F.3d 1315, 1318 (10th Cir. 2004) (en banc) (per curiam). But the Third and Seventh Circuits' rules make such appeals incredibly risky. To start, there is the risk of miscalculating whether an appeal is permitted under the "miscarriage of justice" exception. The First Circuit has acknowledged, for example, that the "circumstances potentially justifying a refusal to enforce a waiver on this ground are infinitely variable." *United States v. Nguyen*, 618 F.3d 72, 75 (1st Cir. 2010) (citation and internal quotation marks omitted). Other circuits apply equally open-ended exceptions. *See, e.g.*, *United States v. Buissereth*, 638 F.3d 114, 118 (2d Cir. 2011) (exception permitted when, among other reasons, sentencing court engaged in an "arbitrary practice" that "amount[s] to an abdication of judicial responsibility" (quoting *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995))).

At the same time, the cost of miscalculation is exceedingly high. In this case, for example, re-sentencing without any downward departure for substantial assistance would add more than four

years to petitioner's sentence. *See supra* p. 7. That is more than the Guideline range would have been for breaking into a federal building to steal the money the Government paid to litigate this appeal, obstructing a federal official, or bribing a witness. *See* U.S.S.G. § 2B2.1 (Burglary); *id*. § 2A2.4 (Obstructing or Impeding Officers); *id*. § 2J1.3 (Bribery of Witness).[5] Indeed, petitioner could have *killed* someone and gotten less than four years for it. *See id*. § 2A1.4 (Involuntary Manslaughter).

This kind of punishment bears no resemblance to the ordinary sanctions for filing frivolous appeals. *Compare, e.g.*, 28 U.S.C. § 1915(e)(2)(B)(i) (sanction for filing frivolous *in forma pauperis* appeal is dismissal); *id*. § 1915(g) (sanction for prisoner bringing three or more frivolous appeals is loss of right to file *in forma pauperis*). And it certainly far outstrips any traditional remedy for breach of a contract (for which there is no criminal punishment at all).

Faced with such daunting risks and penalties, it is easy to predict that many defendants with valid grounds for avoiding an appeal waiver will be deterred from seeking correction of seriously unfair or illegal sentences. The Third Circuit all but admitted as much, stating that "any such defendant must accept the risk that, if he does not succeed, enforcing the waiver may not be the only consequence." Pet. App. 32a.

---

[5] Given petitioner's criminal history category of I, a sentence of four years would require an offense level of 22 or higher. *See* U.S.S.G. Sentencing Table.

At the same time, the harsh penalty imposed by the Third and Seventh Circuits for a *defendant's* disregard of his plea agreement is distinctly asymmetrical to the one imposed for *Government* breaches. As the Seventh Circuit has acknowledged, when prosecutors breach a plea agreement, the ordinary remedy is to simply require resentencing with prosecutors required to do what they promised. *Whitlow*, 287 F.3d at 640. Even if the defendant has been forced to expend substantial resources in response to the breach, the Government is no worse off and the defendant is simply put back in the position he would have been if the Government had kept its promises. (No one has ever suggested that the Government's breach entitles the defendant to a sentence even *lower* than the one agreed to, much less that the prosecutors should be sent to jail for violating the plea agreement.) Yet in the Third and Seventh Circuits, if the *defendant* breaches an agreement, the defendant is made much worse off, and the Government substantially better off, than if the agreement had been adhered to – the defendant suffers additional criminal punishment and the Government gets to keep the benefit of its plea deal along with the higher sentence.

The cost and unfairness of this novel regime is not justified by any sufficient corresponding benefit. To be sure, appeals taken in violation of an appeal waiver impose costs on the Government and on the courts. But there are ample measures in place to minimize those costs. Appointed counsel who believe that there is no non-frivolous argument for avoiding the appeal waiver can be required to file an *Anders* brief. *See Whitlow*, 287 F.3d at 642 (Wood, J., concurring); *United States v. Gomez-Perez*, 215 F.3d

315, 320 (2d Cir. 2000). The Government may also file an early motion to dismiss a waived appeal with minimal investment of resources. *See* Pet. App. 26a n.10; *Hahn*, 359 F.3d at 1328 (providing that briefing on merits is postponed until resolution of Government's motion to dismiss appeal based on appeal waiver); *United States v. Buchanan*, 131 F.3d 1005, 1008 (11th Cir. 1997) (per curiam) (same). While these measures do not eliminate all costs, the courts and the Government are constantly called upon to bear the costs of meritless criminal appeals in order to ensure the public perception and reality that appeals that *do* have merits can be heard.

If more than that is needed to respond to some special problem of defendants' taking frivolous appeals in violation of appeal waivers, the solution should come from Congress, not the courts acting on their own sense of what best promotes the competing policy goals of efficiency and a fair criminal justice system.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey M. Brandt
ROBINSON & BRANDT, P.S.C.
629 Main Street
Suite B
Covington, KY 41011

Kevin K. Russell
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
kr@goldsteinrussell.com

April 30, 2015

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-3407

UNITED STATES OF AMERICA,

v.

CHRISTOPHER ERWIN,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(No. 3-12-cr-00364-001)
District Judge: Hon. Freda L. Wolfson

Argued: May 20, 2014

Before: McKEE, *Chief Judge*, CHAGARES, and
NYGAARD, *Circuit Judges*.

(Filed: August 26, 2014)

OPINION

Jeffrey M. Brandt, Esq. [ARGUED]
Robinson & Brandt
629 Main Street, Suite B
Covington, KY 41011
Attorney for Appellant

Mark E. Coyne, Esq.
Office of United States Attorney
970 Broad Street, Room 700
Newark, NJ 07102

Norman Gross, Esq. [ARGUED]
Office of United States Attorney
Camden Federal Building & Courthouse
401 Market Street
Camden, NJ 08101
Attorneys for Appellee

CHAGARES, *Circuit Judge*.

This case presents the novel question of what remedy is available to the Government when a criminal defendant who knowingly and voluntarily executed a waiver of right to appeal — and received valuable promises from the Government in return — violates his plea agreement by filing an appeal. Christopher Erwin pleaded guilty to conspiracy to distribute and possess with intent to distribute oxycodone, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 21 U.S.C. § 846. His agreement included

a waiver of right to appeal his sentence if it was within or below the advisory Sentencing Guidelines range that results from a total advisory United States Sentencing Guidelines ("U.S.S.G.") offense level of 39. The Government agreed not to bring further criminal charges against Erwin in connection with the conspiracy, and it also agreed to seek a downward departure under U.S.S.G. § 5K1.1. The Government fulfilled its part of the bargain; Erwin, who challenges his within-Guidelines sentence on appeal, did not.

For the following reasons, we conclude that Erwin's appeal is within the scope of his appellate waiver, to which he knowingly and voluntarily agreed, and that he has failed to raise any meritorious grounds for circumventing the waiver. We further conclude that Erwin breached the plea agreement by appealing, and that the appropriate remedy for his breach is specific performance of the agreement's terms: that is, the Government will be excused from its obligation to move for a downward departure. We will therefore vacate Erwin's judgment of sentence and remand for de novo resentencing in accordance with this opinion.

I.

From approximately January 2009 through December 2010, Erwin managed a large-scale oxycodone distribution ring (the "Erwin Organization") that operated throughout the State of New Jersey and elsewhere. The Erwin Organization's modus operandi was to obtain medically unnecessary prescriptions for oxycodone from licensed physicians Hassan Lahham and Jacqueline Lopresti, in Erwin's name and others' names, in exchange for cash.

Erwin's customers, posing as patients, filled the prescriptions at various pharmacies in New Jersey and New York. The conspiracy yielded hundreds of thousands of oxycodone tablets, which were illegally sold on the black market.

On May 9, 2011, the Government filed a sealed criminal complaint against Erwin, Lahham, Lopresti, and nineteen others in the United States District Court for the District of New Jersey. The complaint charged each defendant with conspiracy to distribute and possess with intent to distribute oxycodone, a Schedule II controlled substance. On May 8, 2012, Erwin executed a written plea agreement with the Government in which he agreed to plead guilty to a one-count information charging him with the above-referenced conspiracy that would later be filed in the District Court.[1] The Government, in turn, agreed not to bring further criminal charges against Erwin in connection with the conspiracy.

Schedule A of the plea agreement set forth, *inter alia*, several stipulations addressing Erwin's offense level under the advisory Sentencing Guidelines: (1) based on the quantity of oxycodone for which Erwin was responsible (6,912 grams), his base offense level was 38, *see* U.S.S.G. § 2D1.1(c)(1); (2) Erwin was subject to a four-level enhancement for his leadership role in the conspiracy, *see id.* § 3B1.1(a); and (3) Erwin qualified for a three-level downward

[1] The information was filed on May 24, 2012. Erwin waived his right to indictment and entered his guilty plea that day. The information was later superseded to add a forfeiture count; Erwin consented in writing to being sentenced thereon.

adjustment for acceptance of responsibility, *see id.* § 3E1.1. In accordance with the above, the parties agreed that the total Guidelines offense level applicable to Erwin was 39. The parties further agreed that "a sentence within the Guidelines range that results from the agreed total Guidelines offense level is reasonable." Appendix ("App.") 15 ¶ 7.

Paragraph 8 of Schedule A contained the following waiver of right to appeal:

> Christopher Erwin knows that he has and, except as noted below in this paragraph, voluntarily waives, the right to file any appeal, . . . including but not limited to an appeal under 18 U.S.C. § 3742 . . . , which challenges the sentence imposed by the sentencing court if that sentence falls within or below the Guidelines range that results from a total Guidelines offense level of 39. This Office [the United States Attorney for the District of New Jersey] will not file any appeal, motion[,] or writ which challenges the sentence imposed by the sentencing court if that sentence falls within or above the Guidelines range that results from a total Guidelines offense level of 39. The parties reserve any right they may have under 18 U.S.C. § 3742 to appeal the sentencing court's determination of the criminal history category. The provisions of this paragraph are binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, if the sentencing court accepts a stipulation, both parties waive the right to file an appeal . . .

> claiming that the sentencing court erred in doing so.

Id. ¶ 8. Both parties reserved the right to "oppose or move to dismiss" any appeal barred by the above paragraph. *Id.* ¶ 9.

Erwin also entered into a written cooperation agreement with the Government. The agreement provided that, if the Government determined "in its sole discretion" that Erwin substantially assisted in the investigation or criminal prosecution of others, it would ask the court to depart downward from the Guidelines range pursuant to U.S.S.G. § 5K1.1. Supplemental Appendix ("Supp. App.") 47. However, "[s]hould Christopher Erwin . . . violate any provision of this cooperation agreement *or the plea agreement*, . . . this Office will be released from its obligations under this agreement and the plea agreement, including any obligation to file [the] motion . . . ." Supp. App. 48 (emphasis added). "In addition, Christopher Erwin shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge . . . ." *Id.* The plea and cooperation agreements "together constitute[d] the full and complete agreement between the parties." Supp. App. 46. For the sake of brevity, we will refer to them collectively as the plea agreement.

During the next several months, Erwin attended debriefing sessions at which he was "questioned extensively." Supp. App. 53. In particular, he reviewed and explained documents critical to the Government investigation of the Erwin Organization, including his records, coconspirators' medical files, and prescriptions. *Id.* Erwin also agreed to testify against Lopresti and Lahham, influencing their

decisions to plead guilty. *Id.* In light of Erwin's "important and timely" assistance, the Government wrote a letter to the court on July 12, 2013, asking it to depart downward "from the otherwise applicable" Guidelines range and to consider Erwin's cooperation "in mitigation of [his] sentence." Supp. App. 54.

The United States Probation Office's Presentence Investigation Report ("PSR"), as revised on July 15, 2013, mirrored the parties' stipulations as to Erwin's offense level and determined that Erwin's criminal history category was I. The PSR noted, however, that Erwin's advisory Guidelines "range" was 240 months (20 years) "due to the statutory maximum."[2] PSR ¶ 187. A sentence of 240 months, for an offender in criminal history category I, falls within the low end of the range resulting from offense level 38 and the middle of the range resulting from offense level 37. *See* U.S.S.G. ch. 5, pt. A (Sentencing Table).

Erwin's sentencing hearing was held on July 25, 2013. The District Court agreed with the parties and the PSR that: (1) Erwin's base offense level based on the quantity of oxycodone attributable to him was 38; (2) Erwin was subject to a four-level enhancement for his leadership role in the conspiracy; and (3) Erwin qualified for a three-level downward adjustment for his acceptance of responsibility. Erwin's total offense level of 39 and criminal history category of I yielded an initial Guidelines range of 262 to 327 months of

---

[2] Pursuant to U.S.S.G. § 5G1.1(a), "[w]here the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."

imprisonment. The court noted that Erwin's sentence was "capped at" 240 months "because of the statutory maximum." App. 22. Citing its July letter to the court, the Government then moved for a five-level downward departure pursuant to U.S.S.G. § 5K1.1. The Government clarified that, to the extent there "may be some question as to where to start," it was requesting a departure from offense level 39 to offense level 34, as opposed to from the statutory maximum of 240 months. App. 24. Erwin did not object, and the court granted the Government's motion. Erwin's final Guidelines range was 151 to 188 months of imprisonment. After considering the factors under 18 U.S.C. § 3553, the court imposed a within-Guidelines sentence of 188 months, three years of supervised release, and a $100 special assessment.

Erwin timely appealed, arguing that the District Court's use of offense level 39 as its starting point for the downward departure was error because, when combined with criminal history category I, offense level 39 yields an advisory Guidelines range above the statutory maximum. The Government did not cross-appeal. It counters, however, that this Court should vacate and remand for de novo resentencing where it will seek a "modest increase" in Erwin's sentence in light of his breach of the appellate waiver. Gov't Br. 34.

II.

The District Court had jurisdiction over the prosecution of this criminal action pursuant to 18 U.S.C. § 3231. We have jurisdiction over Erwin's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Because the Government has invoked the

appellate waiver in Erwin's plea agreement, however, we will "decline to review the merits of [his] appeal" if we conclude that: (1) the issues raised fall within the scope of the appellate waiver; and (2) he knowingly and voluntarily agreed to the appellate waiver; unless (3) enforcing the waiver would "work a miscarriage of justice." *United States v. Grimes*, 739 F.3d 125, 128–29 (3d Cir. 2014) (quotation marks omitted). "The validity and scope of an appellate waiver involves a question of law and is, therefore, reviewed de novo." *United States v. Wilson*, 707 F.3d 412, 414 (3d Cir. 2013).

Erwin waived the right to file any appeal challenging his sentence, including but not limited to an appeal under 18 U.S.C. § 3742, "if that sentence falls within or below the Guidelines range that results from a total Guidelines offense level of 39," with the caveat that both parties reserved the right to appeal the court's determination of Erwin's criminal history category. App. 15 ¶ 8. Erwin was sentenced to 188 months of imprisonment, which is far below the 262- to 327-month Guidelines range that results from a total offense level of 39 and criminal history category of I. It is also below the 240-month statutory maximum. Erwin does not challenge his criminal history category. His appeal fits squarely within the scope of the waiver. Moreover, as Erwin acknowledges, *see* Erwin Br. 25, the District Court fulfilled its "critical" role of ensuring that his waiver of appeal was knowing and voluntary. *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001); *see* Fed. R. Crim. P. 11(b)(1)(N) (requiring that before accepting a defendant's guilty plea, the court must inform the defendant of, and

determine that he understands, "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence").

Erwin's appellate waiver must therefore be enforced unless we identify the "unusual circumstance" of "an error amounting to a miscarriage of justice" in his sentence. *Khattak*, 273 F.3d at 562. This determination depends on factors such as

> [T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

Id. at 563 (first alteration in original) (quotation marks omitted).

Erwin contends that enforcement of the waiver would be manifestly unjust because the District Court applied the Government's downward departure motion to an "inapplicable" Guidelines range, thereby depriving him of the "benefit of his plea bargain and the full five-level departure the [D]istrict [C]ourt agreed he deserved." Erwin Br. 25–26. Erwin specifically argues that, because the statutory maximum (240 months) is less than the minimum of the Guidelines range resulting from offense level 39 and criminal history category I (262 to 327 months), the court should have departed downward from 240 months — which, when combined with his criminal history category, roughly equates to offense level 38. If the court had departed from offense level 38 to

offense level 33, instead of from 39 to 34, Erwin's final Guidelines range would have been 135 to 168 months instead of 151 to 188 months.

Erwin raises two constitutional grounds for circumvention of the appellate waiver and a claim of procedural error, none of which have merit. Erwin first argues that the court violated the spirit of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the Supreme Court held that, under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, "[o]ther 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. 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." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted). Erwin pleaded guilty to conspiracy to distribute and possess with intent to distribute an unspecified amount of oxycodone, a Schedule II controlled substance. Erwin's admission that he violated § 841(b)(1)(C) subjected him to a statutory maximum sentence of 20 years. His 188-month sentence amounts to less than 16 years and thus did not violate *Apprendi*.[3]

---

[3] To the extent that Erwin challenges the court's findings relevant to his initial Guidelines range, we have held that the constitutional rights to a jury trial and proof beyond a reasonable doubt "attach[] only when the facts at issue have the

Erwin's second constitutional argument is that the District Court's failure to depart to offense level 33 deprived him of his due process right to receive the full benefit of his bargain with the Government. Under *Santobello v. New York*, 404 U.S. 257 (1971), "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. The Government in this case agreed to "move the sentencing judge," pursuant to U.S.S.G. § 5K1.1, to depart from the otherwise applicable Guideline range if it determined in its sole discretion that Erwin provided substantial assistance. Supp. App. 47. The agreement cautioned that, "[w]hether the sentencing judge does in fact impose a sentence below the otherwise applicable guideline range is a matter committed solely to the discretion of the sentencing judge." *Id.* Because the record is devoid of any indication that the Government promised it would specifically request a five-level downward departure, much less that the court would apply the departure

---

effect of increasing the maximum punishment to which the defendant is exposed." *United States v. Grier*, 475 F.3d 556, 565 (3d Cir. 2007) (en banc). Because the advisory Guidelines do not "alter[] the judge's final sentencing authority," they do not have this effect and an error in their application consequently does not trigger *Apprendi* or its progeny. *Id.*; *see also United States v. Smith*, 751 F.3d 107, 117 (3d Cir. 2014) (holding that the Supreme Court's decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), "did not curtail a sentencing court's ability to find facts relevant in selecting a sentence *within* the prescribed statutory range").

to the statutory maximum, Erwin's due process claim also fails.

Erwin's claim that the court committed procedural error fares no better.[4] "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007). Even assuming the District Court erred procedurally when it applied the downward departure to the 262- to 327-month range instead of to the statutory maximum, *see* U.S.S.G. § 5G1.1 & cmt., its arguably erroneous calculation would be "precisely the kind of 'garden variety' claim of error contemplated by [an] appellate waiver," *United States v. Castro*, 704 F.3d 125, 141–42 (3d Cir. 2013) (quotation marks omitted). *See United States v. Corso*, 549 F.3d 921, 931 (3d Cir. 2008) ("[A]llow[ing] alleged errors in computing a defendant's sentence to render a waiver unlawful would nullify the waiver based on the very sort of claim it was intended to waive." (second alteration in original) (quotation marks omitted)); *see also United States v. Price*, 558 F.3d 270, 283–84 (3d Cir. 2009) (holding that there was no miscarriage of justice where the defendant claimed that the Government abused its discretion by refusing to request a three-

---

[4] We lack jurisdiction to review the extent of a district court's downward departure. *United States v. Torres*, 251 F.3d 138, 151–52 (3d Cir. 2001). Erwin's claim is reviewable because it is "premised on the theory that the [D]istrict [C]ourt misapplied the Guidelines." *United States v. Shaw*, 313 F.3d 219, 222–23 (4th Cir. 2002); *see United States v. Langford*, 516 F.3d 205, 212 (3d Cir. 2008).

level downward adjustment for acceptance of responsibility); *United States v. Mabry*, 536 F.3d 231, 243 (3d Cir. 2008) (characterizing the defendant's challenges to district court's sentencing calculation as "insubstantial" because "[t]hey do not implicate fundamental rights or constitutional principles").

Erwin's sentence did not exceed the 240-month maximum sentence prescribed by statute, let alone the higher advisory Guidelines range of 262 to 327 months. Moreover, Erwin largely acquiesced in the claimed error by failing to lodge a contemporaneous objection. *Khattak*, 273 F.3d at 563. We cannot conclude that, under these circumstances, enforcing Erwin's waiver would work a miscarriage of justice. His appeal is therefore barred by the appellate waiver.

III.

In circumstances where a defendant's arguments on appeal are based on a valid appellate waiver, our ordinary procedure is to enforce the waiver by dismissing the defendant's appeal, thereby affirming the defendant's sentence. *E.g.*, *United States v. Stabile*, 633 F.3d 219, 248 (3d Cir. 2011). But the Government argues that merely dismissing Erwin's appeal and affirming his sentence "would neither make the Government whole for the costs it has incurred because of Erwin's breach nor adequately deter other cooperating defendants from similar breaches." Gov't Br. 16. Instead, the Government asks the Court to vacate Erwin's sentence so that it can pursue the remedies specified in the breach provision of the plea agreement — that is, the opportunity to bring additional criminal charges against Erwin or to withdraw its § 5K1.1 motion. The

Government indicates that, if granted that choice here, it would pursue the latter option. Gov't Br. 17, 34. Erwin objects that the Government's proposal "would, as a practical matter, end this Court's review for miscarriage of justice, as defendants would be wary to appeal even in the most egregious cases of error." Reply Br. 10.

To address the Government's argument, we examine three issues: (1) whether Erwin in fact breached his plea agreement; (2) if so, whether resentencing in accordance with the terms of the agreement is an appropriate remedy in this case; and (3) even if this relief is appropriate, whether the cross-appeal rule divests this Court of jurisdiction or authority to grant it.

A.

"[P]lea agreements, although arising in the criminal context, are analyzed under contract law standards." *United States v. Castro*, 704 F.3d 125, 135 (3d Cir. 2013) (quotation marks omitted). We have long exercised de novo review over the question of whether a Government breach has occurred. *United States v. Warren*, 642 F.3d 182, 187 n.6 (3d Cir. 2011) (citing *United States v. Rivera*, 357 F.3d 290, 293–94 (3d Cir. 2004)). Because "a plea agreement necessarily works both ways," *Castro*, 704 F.3d at 135 (quotation marks omitted), we more recently held that the same standards apply when analyzing a claim that a defendant has breached a plea agreement, *United States v. Williams*, 510 F.3d 416, 424 (3d Cir. 2007).

In *Williams*, the defendant pleaded guilty to a narcotics offense pursuant to a written plea

agreement. *Id.* at 418. In the agreement, the parties stipulated as to Williams's offense level and further agreed "not to seek or argue for any upward or downward departure or any upward or downward adjustment not set forth herein." *Id.* at 419 (quotation marks omitted). Despite this promise, Williams sought downward departures under U.S.S.G. § 4A1.3 and Chapter 5, as well as a downward variance. *Id.* at 419–20. Rejecting the Government's position that Williams's requests were foreclosed by the terms of the plea agreement, *id.* at 420, the district court reduced Williams's criminal history category and varied downward from the resulting range, *id.* at 420–21. The Government appealed, asking this Court to resolve "what standard should be applied when analyzing a claim that a *defendant* has breached a plea agreement." *Id.* at 417. Because "the government would have no meaningful recourse if it performed its end of the agreement but did not receive the benefit of its bargain in return," *id.* at 422–23, we held that the same standard of review applies in considering a defendant's breach of a plea agreement as in a Government breach case — that is, "[w]e will review the question whether a defendant breaches his plea agreement de novo, and will impose the burden on the government to prove the breach by a preponderance of the evidence," *id.* at 424. Further, "we will analyze the issue whether a defendant has breached a plea agreement according to the same contract principles that we would apply in analyzing a government breach . . . ." *Id.*

"In determining whether [Erwin] breached his plea agreement, we examine the plain meaning of the

agreement itself and construe any ambiguities in the agreement against the government as drafter." *Id.* at 424–25. We need not draw any inferences here, however, because the relevant language is unambiguous. Paragraph 1 of Schedule A of the plea agreement provided that the parties "agree[d] to the stipulations set forth herein," including those concerning Erwin's offense level. App. 14 ¶ 1. The stipulations included a waiver of Erwin's right to challenge his sentence, including via a direct appeal under 18 U.S.C. § 3742, "if that sentence falls within or below the Guidelines range that results from a total Guidelines offense level of 39." App. 15 ¶ 8. Erwin's 188-month sentence is below the Guidelines range that results from an offense level of 39 and his undisputed criminal history category. Despite promising not to appeal from such sentence, he did

precisely that.[5] Erwin's appeal therefore amounts to a breach[6] of the plea agreement.

---

[5] Erwin contended at oral argument that there was no breach because he merely waived the right to file an appeal as opposed to promised not to file an appeal. See, e.g., Oral Arg. Tr. 4:08–5:23, 7:46–8:25 (3d Cir. May 20, 2014); see also Erwin Supplemental Br. 1 n.1. Erwin has not proffered any principled basis for drawing this distinction, and common sense dictates that there is none. A "waiver" is defined as "the intentional relinquishment or abandonment of a known right." United States v. Olano, 507 U.S. 725, 733 (1993) (quotation marks omitted). A "promise" is similarly defined as "a person's assurance that the person will or will not do something." Black's Law Dictionary 1406 (10th ed. 2014). By waiving his right to appeal, Erwin relinquished that right; in so doing, he promised not to exercise it.

[6] Erwin does not dispute that, if he breached the agreement by filing an appeal, such breach was material. Nor could he: the breach defeated the parties' bargained-for objective and deprived the Government of a substantial part of its benefit. *See Pittsburgh Nat'l Bank v. Abdnor*, 898 F.2d 334, 338 (3d Cir. 1990); *see also Total Containment, Inc. v. Environ Prods.*, Inc., 921 F. Supp. 1355, 1416–17 (E.D. Pa. 1995) (holding that the plaintiff's lawsuit, which was filed despite a general release in the parties' settlement agreement, "constituted a material breach of the Settlement Agreement"), *aff'd in part, vacated in part on other grounds*, 106 F.3d 427 (Table) (Fed. Cir. 1997); *Maslow v. Vanguri*, 896 A.2d 408, 423 (Md. Ct. Spec. App. 2006) (holding that the appellant's appeal of the jury's verdict was a material breach of the "no appeals" provision in the parties' settlement agreement).

B.

"[A] classic rule of contract law[] is that a party should be prevented from benefitting from its own breach." *Assaf v. Trinity Med. Ctr.*, 696 F.3d 681, 686 (7th Cir. 2012); *see also United States v. Bernard*, 373 F.3d 339, 345 (3d Cir. 2004) (contract law prohibits a defendant from "get[ting] the benefits of [his] plea bargain, while evading the costs"). This rule carries particular importance in the criminal context, as a court's failure to enforce a plea agreement against a breaching defendant "would have a corrosive effect on the plea agreement process" by "render[ing] the concept of a binding agreement a legal fiction." *Williams*, 510 F.3d at 422, 423. Given that our criminal justice system depends upon the plea agreement process, that result cannot be countenanced. *Id.* at 423.[7] As the Supreme Court explained in *Blackledge v. Allison*,

> the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors

---

[7] Of the 2,920 convictions in the district courts within our circuit in 2013, 2,780 (more than 95%) were by guilty plea.

> conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

431 U.S. 63, 71 (1977). "These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality." *Id.* Appellate waivers exist precisely because they preserve the finality of judgments and sentences imposed pursuant to valid guilty pleas. *United States v. Wiggins*, 905 F.2d 51, 54 (4th Cir. 1990).

Erwin's plea agreement constituted a classic bargained-for exchange. Erwin agreed to plead guilty and to assist the Government in obtaining guilty pleas from his codefendants, conserving Government resources that would otherwise have been expended on his prosecution and those of his coconspirators. To ensure that prosecutorial resources would not be expended on him in the future, Erwin relinquished his right to appeal most aspects of his sentence. In return, the Government promised not to initiate additional criminal charges against Erwin for his role in the conspiracy, and it agreed to seek a § 5K1.1 departure if Erwin cooperated. Erwin received the full benefit of his bargain because the court accepted his guilty plea (resulting in the speedy disposition of his case) and granted the Government's request for a downward departure (yielding a sentence more than four years below the statutory maximum). That Erwin received a shorter sentence than he would have in the absence of the bargain is evidenced by the court's telling statement at sentencing that "but for"

the Government's motion, it "would have been happy" to impose a longer term. App. 49.

In contrast to Erwin, who fully benefited from the plea agreement, the Government devoted valuable resources to litigating an appeal that should never have been filed in the first place. "Empty promises are worthless promises; if defendants could retract their waivers . . . then they could not obtain concessions by promising not to appeal. Although any given defendant would like to obtain the concession and exercise the right as well, prosecutors cannot be fooled in the long run." *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995). Erwin is no exception. He purposely exchanged the right to appeal for items that were, to him, of equal or greater value. Having reaped the benefits of his plea agreement, he cannot avoid its principal detriment — to put it colloquially, he cannot "have his cake and eat it too." *Id.* at 282. Under basic principles of contract law, "[d]efendants must take the bitter with the sweet." *Id.* at 283; *see also United States v. Cianci*, 154 F.3d 106, 110 (3d Cir. 1998) ("Under the law of this circuit, [a defendant] cannot renege on his agreement.").

"When the government breaches a plea agreement, the general rule is to remand the case to the district court for a determination whether to grant specific performance or to allow withdrawal of the plea." *United States v. Nolan-Cooper*, 155 F.3d 221, 241 (3d Cir. 1998). However, "we have allowed for an exception when the circumstances dictate that there is only one appropriate remedy for the defendant." *Williams*, 510 F.3d at 427; *see, e.g.*, *United States v. Badaracco*, 954 F.2d 928, 941 (3d Cir. 1992) (holding that permitting withdrawal of the

defendant's plea would "be an empty remedy," as he had already served much of his sentence); *see also Nolan-Cooper*, 155 F.3d at 241 (noting that a court should not impose a remedy against a non-breaching party's will). Similarly, we have observed that "when the government requests specific performance at the hands of a defendant's breach [of the plea agreement], . . . resentencing under the terms of the executed plea agreement might be the only appropriate remedy." *Williams*, 510 F.3d at 427–28; *see Nolan-Cooper*, 155 F.3d at 241 (agreeing with the parties that "if we found a breach of the plea bargain, the case should be remanded for a full resentencing").

We agree with the Government that specific performance is warranted here, and, as in *Williams*, specific performance means de novo resentencing. As a general matter, "[s]pecific performance is feasible and is a lesser burden on the government and defendant." *United States v. Kurkculer*, 918 F.2d 295, 302 (1st Cir. 1990), *quoted in Nolan-Cooper*, 155 F.3d at 241. Specific performance certainly is feasible where, as in this case, the plea agreement contained a detailed breach provision:

> Should Christopher Erwin . . . violate any provision of . . . the plea agreement . . . [the United States Attorney's] Office will be *released* from its obligations under this agreement and the plea agreement, *including any obligation to file a motion under U.S.S.G. § 5K1.1* . . . .

Supp. App. 48 (emphases added). We previously held that a defendant's breach of his plea agreement in advance of sentencing excused the Government from its obligation to move for a downward departure.

United States v. Swint, 223 F.3d 249, 254 (3d Cir. 2000).[8]

In summary, because Erwin's breach of the plea agreement occurred post-sentencing, we will vacate his sentence and remand for resentencing where, in light of his breach, the Government will be relieved of its obligation to seek a downward departure.

C.

Unlike in *Williams*, where the Government appealed the judgment of sentence, the Government neither appealed nor cross-appealed in this case. We are therefore confronted by, and heard oral argument on, a question of first impression: whether the possibility of de novo resentencing is barred by application of the cross-appeal rule, which provides that "a party aggrieved by a decision of the district court must file an appeal in order to receive relief from the decision." *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342 (3d Cir. 1991); *see also United States v. Am. Ry. Express*, 265 U.S. 425, 435 (1924) ("[A] party who does not appeal from a final decree of the trial court . . . may not attack the decree with a view either to enlarging his own rights

---

[8] Erwin insists that the Government has "lost its discretion" not to request a downward departure, because it has already requested one. Reply Br. 11–12. While inventive, this argument is unpersuasive. The only reason the Government is seeking to withdraw a motion that it has already filed is because Erwin elected to breach his agreement after benefiting from the motion. Erwin's interpretation would "eviscerate one purpose of the plea agreement," namely, "to make him earn the downward departure motion." *Swint*, 223 F.3d at 255.

thereunder or of lessening the rights of his adversary . . ."). We conclude that the cross-appeal rule does not apply and consequently does not bar the Government from seeking de novo resentencing.[9]

First, the Government could not have filed a cross-appeal even if it wanted to do so. Congress has vested appellate jurisdiction in the Courts of Appeals for review of final decisions of the district courts. "It is axiomatic that only a party aggrieved by a final judgment may appeal." *Rhoads v. Ford Motor Co.*, 514 F.2d 931, 934 (3d Cir. 1975). The same is true of cross-appellants. *See, e.g.*, *Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC*, 555 F.3d 1331, 1343 (11th Cir. 2009) ("[A]n appellee is not entitled to cross-appeal a judgment in his favor."); *Great Am. Audio Corp. v. Metacom, Inc.*, 938 F.2d 16, 19 (2d Cir. 1991) (dismissing cross-appeal for lack of jurisdiction); *see also United States v. Atiyeh*, 402 F.3d 354, 358 (3d Cir. 2005) (articulating bases of jurisdiction over the Government's cross-appeal). "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). This requirement does not derive from the jurisdictional limitations of Article III, but rather "from the statutes granting appellate jurisdiction and the historic practices of the appellate courts." *Id.*

---

[9] In light of this conclusion, we do not resolve whether the cross-appeal rule is jurisdictional or a matter of practice and, if the latter, whether this case warrants drawing an exception to the rule.

"The Federal Government enjoys no inherent right to appeal a criminal judgment . . . ." Arizona v. Manypenny, 451 U.S. 232, 246 (1981). The grant of general appellate jurisdiction in 28 U.S.C. § 1291 does not authorize such an appeal, *id.*, and 18 U.S.C. § 3731 (establishing, *inter alia*, appellate jurisdiction over a Government appeal from a district court's order dismissing an indictment or granting a new trial), has no relevance here. *See* United States v. Ferri, 686 F.2d 147, 151 (3d Cir. 1982). The sole source of authority for a Government appeal in this case would lie, if anywhere, in 18 U.S.C. § 3742. That statute permits the Government to appeal a defendant's sentence where the sentence: (1) was imposed in violation of law; (2) resulted from an incorrect application of the Sentencing Guidelines; (3) departed from the applicable Guideline range; or (4) was plainly unreasonable, if imposed for an offense where there is no applicable Guideline. 18 U.S.C. § 3742(b).

The Government's argument does not fall into any of these categories, as Erwin's breach of the plea agreement occurred post-sentencing and was in no way sanctioned by the District Court. The District Court gave the Government everything it wanted with respect to Erwin's sentence — that is, it imposed a judgment of sentence that resulted from offense level 39 and criminal history category I and further incorporated the Government's § 5K1.1 motion. There was (and remains) no "sentencing error" for the Government to challenge for purposes of § 3742(b). It would be nonsensical to fault the Government for

filing an appeal that we surely would have dismissed for lack of jurisdiction.[10]

Moreover, the remedy of de novo resentencing neither enlarges the Government's rights nor lessens Erwin's. A cross-appeal must be filed to secure a favorable modification of the judgment. *See Am. Ry. Express*, 265 U.S. at 435. As discussed *supra*, Erwin contends that the District Court erred in its initial Guidelines calculation. To remedy the error, he asks this Court to vacate his sentence and remand for a new sentencing hearing. Our decision to vacate Erwin's sentence and remand for de novo resentencing does not lessen his rights, as we are

---

[10] The Government could have moved to enforce the waiver and summarily affirm Erwin's appeal pursuant to Third Circuit L.A.R. 27.4 rather than waiting to raise the issue in the ordinary briefing schedule. *See United States v. Goodson*, 544 F.3d 529, 534 n.2 (3d Cir. 2008). The Government notes that it did not file such a motion in this case because it was engaged in negotiations with defense counsel regarding the decision to proceed with Erwin's appeal in light of the waiver. Gov't Br. 19 n.3. We encourage the Government to seek summary action under Rule 27.4 where possible and as early as possible, as doing so minimizes the amount of Government (and judicial) resources spent on appeals barred by appellate waivers. However, that the Government could have expended fewer resources is of no legal moment in this case: what matters is that Erwin breached the agreement, not how costly the breach was. In any event, the costs are not trivial when considered in the aggregate — in 2013 alone, nearly 50 motions to enforce an appellate waiver were filed within our circuit, the vast majority of which were granted. We are not confronted by, and therefore need not resolve, whether the Government may seek remedies other than summary affirmance of an appeal in a Rule 27.4 motion.

giving him exactly what he asked for. Neither does our decision enlarge the Government's rights: as the Government acknowledges, Erwin is free to argue not only that he is entitled to a variance, but also that the variance should be applied to the statutory maximum instead of to the initial Guidelines calculation. *See* U.S.S.G. § 5G1.1(a). Of course, the District Court may exercise its discretion to accept or reject any such argument pursuant to § 3553(a).

The Supreme Court's most recent decision dealing with the cross-appeal rule in the criminal context, *Greenlaw v. United States*, 554 U.S. 237 (2008), is not to the contrary. The defendant in *Greenlaw* appealed as too long a 442-month sentence. *Id.* at 240. The Government did not appeal or cross-appeal. *Id.* at 242. However, to counter the defendant's argument that his sentence was unreasonably long, the Government noted that the sentence should have been fifteen years longer because he was convicted of two violations of 18 U.S.C. § 924(c)(1)(A).[11] *Id.* Relying on the plain error rule, the Court of Appeals for the Eighth Circuit

---

[11] Under § 924(c)(1)(C)(i), "[i]n the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years." Any sentence for violating § 924(c) must run consecutively to "any other term of imprisonment," including any other conviction under § 924(c). § 924(c)(1)(D)(ii). For the first § 924(c) offense, the district court imposed a five-year sentence under § 924(c)(1)(A)(i). As to the second § 924(c) conviction, the district court erroneously imposed the ten-year term prescribed in § 924(c)(1)(A)(iii) for first-time offenses. 554 U.S. at 241–42.

vacated the sentence and instructed the district court to impose the statutorily mandated consecutive minimum sentence, which it did. *Id.* at 242–43. The defendant petitioned for certiorari as to the following issue: "When a defendant unsuccessfully challenges his sentence as too high, may a [C]ourt of [A]ppeals, on its own initiative, increase the sentence absent a cross-appeal by the Government?" *Id.* at 243.

The Supreme Court held that it could not. It reasoned that "[e]ven if there might be circumstances in which it would be proper for an appellate court to initiate plain-error review, sentencing errors that the Government refrained from pursuing would not fit the bill" in light of § 3742(b)'s "dispositive direction." *Id.* at 248. In so holding, the Court recognized the importance of providing notice to a criminal defendant that "on his own appeal, his sentence would be increased." *Id.* at 252–53. In this case, unlike in *Greenlaw*, the Government did not deliberately disregard a sentencing error, and Erwin — whose entire appeal rests on the terms of his plea agreement — should have anticipated the possibility that he breached the agreement by appealing and thereby triggered the possibility of relief for his adversary. *See United States v. Wells*, 262 F.3d 455, 467 (5th Cir. 2001) ("[A] reasonable defendant would understand that his breach of the plea agreement would motivate the government to [withdraw leniency].").[12]

---

[12] In *United States v. Harvey*, 2 F.3d 1318 (3d Cir. 1993), a pre-*Greenlaw* decision, the Government argued in response to the defendant's sentencing appeal that the district court

The Court of Appeals for the Seventh Circuit has held that a defendant's breach of his appellate waiver provision permits the Government to seek specific performance of the plea agreement, notwithstanding the absence of a Government cross-appeal. In *United States v. Hare*, 269 F.3d 859 (7th Cir. 2001), the defendant was charged with three federal crimes and pleaded guilty to one; the Government dismissed the other two and promised to recommend a reduction in offense level in exchange for his cooperation. *Id.* at 860. The defendant promised, among other things, not to appeal from the sentence — a promise that he subsequently breached. *Id.* The Court of Appeals held that dismissal of Hare's impermissible appeal would be an "incomplete response" because "the prosecutorial resources are down the drain." *Id.* at 862. But the court explained that there is another remedy: "[i]f the defendant does not keep his promises, the prosecutor is not bound either." *Id.* Namely, "the United States is free to reinstate dismissed charges and continue the prosecution." *Id.*; *see also United States v. Poindexter*, 492 F.3d 263, 271 (4th Cir. 2007) (determining that the

---

erroneously calculated the applicable base offense level as 22 instead of 25. *Id.* at 1326. The Government conceded, and we agreed, that its failure to file a cross-appeal precluded it from obtaining a sentence "more favorable" than that already imposed. *Id.* at 1326, 1330. Our decision in *Harvey* is consistent with *Greenlaw* — and does not guide our decision today — because the Government similarly declined to exercise its discretion to correct a sentencing error below that it easily could have challenged on appeal. Whereas "fundamental fairness" dictated an outcome favorable to the defendant in *Harvey* and *Greenlaw*, it dictates an opposite conclusion in this case.

Government may argue that "it is no longer bound by the plea agreement because the defendant's appeal amounts to a breach of that agreement").

The Supreme Court's decision in *Ricketts v. Adamson*, 483 U.S. 1 (1987) is also instructive. The defendant agreed to plead guilty to second degree murder and to testify against two alleged coconspirators. *Id.* at 3. While the defendant testified against the coconspirators in their initial trial, he refused to testify again when a retrial was ordered. *Id.* at 4. The State filed a new information charging the defendant with first degree murder, and the defendant's motion to quash the information on double jeopardy grounds was denied. *Id.* at 5. The Arizona Supreme Court rejected the defendant's double jeopardy claim, holding that the plea agreement "by its very terms waives the defense of double jeopardy if the agreement is violated." *Id.* at 6 (quotation marks omitted). On federal habeas review, the Supreme Court agreed that the defendant's breach of the plea agreement removed the double jeopardy bar to prosecution on the first degree murder charge. *Id.* at 8. In so holding, the Court emphasized that "[t]he State did not force the breach; [the defendant] chose, perhaps for strategic reasons or as a gamble, to advance an interpretation of the agreement that proved erroneous." *Id.* at 11. Here too, Erwin made a calculated decision to advance an interpretation of his appellate waiver that proved erroneous. It would be unjust to permit him to escape the consequences.

Having determined that the cross-appeal rule does not apply under these circumstances, we finally consider the source of our authority to grant de novo

resentencing. That authority can be found in 28 U.S.C. § 2106, which permits us to modify, vacate, set aside, or reverse any judgment "lawfully brought before [us]" for review. Section 2106 further provides that we may remand the cause and direct the entry of such appropriate judgment, or "require such further proceedings to be had," as may be just under the circumstances. "[I]n determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *In re Elmore*, 382 F.2d 125, 127 & n.12 (D.C. Cir. 1967) (per curiam) (quotation marks omitted) (citing § 2106); *see also Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a[n] . . . appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below.").

The validity of Erwin's sentence was lawfully brought before us via Erwin's direct appeal. *See* 18 U.S.C. § 3742(a). "When an appeal is taken from an order made appealable by statute, we have all the powers with respect to that order listed in 28 U.S.C. § 2106." United Parcel Serv., Inc. v. U.S. Postal Serv., 615 F.2d 102, 107 (3d Cir. 1980). Since the judgment was entered, there has been a significant change in fact (Erwin's breach of the plea agreement). As discussed at length above, de novo resentencing is not only just, but is also consistent with basic principles of contract law and the plain language of the plea agreement.

Contrary to Erwin's position, we do not believe that our holding will "end this Court's review for

miscarriage of justice." Reply Br. 10. We will continue to review conscientiously whether enforcing defendants' appellate waivers would yield a miscarriage of justice (as well as whether a waiver was knowingly and voluntarily entered into and whether the issues raised fall within the scope of the waiver) but, as discussed *supra*, any such defendant must accept the risk that, if he does not succeed, enforcing the waiver may not be the only consequence.

Accordingly, we will grant this relief pursuant to § 2106.

* * * * *

"[B]oth the government and the defendant must fulfill promises made to achieve a plea agreement." United States v. Forney, 9 F.3d 1492, 1500 n.2 (11th Cir. 1993). Yet, "[i]n what has become a common sequence, a defendant who waived his appellate rights as part of a plea bargain, and received a substantial benefit in exchange, has failed to keep his promise." United States v. Whitlow, 287 F.3d 638, 639 (7th Cir. 2002). We hold that, like any defendant who breaches a plea agreement in advance of sentencing, a defendant who breaches his plea agreement by appealing thereby subjects himself to the agreement's breach provision. The breach provision in this case permits the Government to withdraw its motion for a downward departure. To that end, we will vacate and remand Erwin's judgment of sentence. Consistent with our precedent, Erwin will be resentenced by a different district

judge than the one who presided over the now-vacated sentence. *See* Nolan-Cooper, 155 F.3d at 241; see also Williams, 510 F.3d at 428.[13]

IV.

For the foregoing reasons, we will vacate Erwin's judgment of sentence and remand to the District Court for resentencing before a different judge.

---

[13] Our precedent compels assigning the case to another judge for resentencing "irrespective of the fact that the need for resentencing . . . is not attributable to any error by the sentencing judge." *Nolan-Cooper*, 155 F.3d at 241. We emphasize that the reason for the reassignment in this case is not due to any error on the sentencing judge's part and that we have no doubt she could resentence Erwin fairly.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-3407

UNITED STATES OF AMERICA,

v.

CHRISTOPHER ERWIN,

Appellant

Present: McKEE, *Chief Judge*, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, VANASKIE, and KRAUSE, and NYGAARD[*], *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

---

[*] Pursuant to Third Circuit I.O.P. 9.5.3., Judge Nygaard's vote is limited to panel rehearing.

and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

Judges Rendell, Ambro, Greenaway, and Vanaskie would have granted the petition for rehearing en banc.

BY THE COURT,

s/ Michael A. Chagares
Circuit Judge

Dated: December 31, 2014

CJG/cc: David R. Fine, Esq.
Jeffrey M. Brandt, Esq.
Norman Gross, Esq.
Mark E. Coyne, Esq.

OPINION SUR REHEARING

AMBRO, *Circuit Judge*, with whom RENDELL, GREENAWAY, JR. and VANASKIE, Circuit Judges, join, dissenting from the denial of the petition for rehearing *en banc*.

Christopher Erwin pled guilty to conspiracy to distribute and to possess with intent to distribute oxycodone. As a part of his plea agreement, he waived most (but not all) of the arguments he otherwise could have raised on appeal. He filed an appeal containing only a waived argument. Because the argument was waived, the sentence should be affirmed. End of case. But the panel opinion is longer than the four sentences it took me to reach the correct result, as it did not affirm Erwin's sentence but vacated it to allow the Government to seek a longer prison term. Thus I explain my disagreement.

This case involves three common concessions of a plea bargain, two by Erwin and one by the Government. Erwin waived his right to appeal his sentence if it fell within or below the United States Sentencing Guidelines' recommendation (240 months' incarceration), and he agreed to cooperate with the Government in its investigation of Erwin's criminal associates. For its part, the Government promised to seek a "downward departure" from the Guidelines' calculation to recognize Erwin's cooperation. *See* U.S.S.G. § 5K1.1. Before sentencing, Erwin complied with his promise to cooperate, and at his sentencing

the Government kept its promise and sought a five-level downward departure, resulting in a Guidelines sentence of 151–188 months' imprisonment. Erwin was sentenced to 188 months, and he appealed.

As 188 is less than 240, the only argument Erwin can raise on appeal is that affirming his sentence "would work a miscarriage of justice." *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001). Artfully cloaked in *Khattak*'s garb, Erwin raises the waived argument that the District Court erred by departing downward from offense level 39 rather than level 38 (which would have led to a sentencing range of 135–168 months). We must therefore ask what do we do with a waived argument.

The panel wrongly calls this a "novel question." *United States v. Erwin*, 765 F.3d 219, 223 (3d Cir. 2014). When a civil litigant, the Government as prosecutor, or a criminal defendant waives an argument, the remedy is to enforce the waiver by not considering the argument, even if it has merit. *Brenner v. Local 514, United Bhd. of Carpenters & Joiners*, 927 F.2d 1283, 1298–99 (3d Cir. 1991); *United States v. Weatherspoon*, 696 F.3d 416, 418 n.2 (3d Cir. 2012); *United States v. Hoffecker*, 530 F.3d 137, 163 (3d Cir. 2008).

From its premise that there is something unusual in a waived argument before the Court, the panel reaches the conclusion that it needs to do more than enforce the waiver and affirm the sentence. Here is the novelty: the District Court may now resentence Erwin without the Government reprising its downward-departure motion, potentially increasing his time in prison by over four years. The opinion relies on statements from contract law, but,

on closer examination, contract principles faithfully applied call for a different remedy from the one our Court orders.

The panel presents a false choice between "de novo resentencing" and "withdrawal of the plea" as the appropriate remedies for breach of a plea waiver. *Erwin*, 765 F.3d at 231. But the cases it relies on in presenting these unhappy alternatives all involved presentence breaches that relieved the nonbreaching party of as-yet unfulfilled promises in order to restore the parties to the *status quo* before the breach. Here the Government (the nonbreaching party) fulfilled its promise by seeking a downward departure from the Guidelines' sentencing range; *later*, Erwin breached by appealing. To restore the parties to their pre-breach positions, we need only nullify Erwin's appeal. To do this, we should not consider Erwin's arguments, no matter how meritorious.

Rejecting this approach, the panel created the new rule that a "defendant must accept the risk that . . . enforcing the waiver may not be the only consequence" of an appeal. *Id.* at 236. Unlike traditional contract remedies, any consequence that goes beyond enforcing the waiver gives the Government more than it bargained for. Specifically, it bargained for Erwin's cooperation (which it got) and his waiver of the argument that his sentence was calculated incorrectly. We have held that the Government receives "the full benefit of its bargain" when it files "a motion for summary action under Third Circuit L.A.R. 27.4 to enforce the waiver and to

dismiss the appeal." *United States v. Goodson*, 544 F.3d 529, 535 n.2 (3d Cir. 2008).[1] Now the Government gets more than the full benefit of its bargain, namely, an opportunity to sentence Erwin again without an obligation to compensate him for his cooperation.

The panel provides no sound reason for its new remedy, and I join the growing chorus of commentators who have lamented this decision. *See* Kevin Bennardo, *United States v. Erwin and the Folly of Intertwined Cooperation and Plea Agreements*, 71 Wash. & Lee L. Rev. Online 160 (2014); Alain Leibman, "Third Circuit Holds that Breach of Agreement not to Appeal Justifies Government's Withdrawal of 5K Motion," *White Collar Defense and Compliance* (Sept. 18, 2014), *available at* http://whitecollarcrime.foxrothschild.com/2014/09/articles/sentencing-1/third-circuit-holds-that-breach-of-agreement-not-to-appeal-justifies-governments-withdrawal-of-5k-motion/ ("Not only did the court get it wrong in terms of appreciating the true nature of the parties' exchange of commitments, but it did not even apply contracts law correctly."); Matthew Stiegler, "Divided Court Denies *En Banc* Rehearing in *Erwin* Appeal-Waiver

---

[1] For technical reasons not relevant to this case, *Goodson* should have said "affirm the judgment of the district court" instead of "dismiss the appeal." *United States v. Gwinnett*, 483 F.3d 200, 202 (3d Cir. 2007). Nonetheless the substance of *Goodson* remains true: the Government gets the benefit of its bargain when we dispose of appeals under L.A.R. 27.4 without briefing and argument before a merits panel.

Case," *CA3blog* (December 31, 2014), *available at* http://thirdcircuitblog.com/cases/divided-court-denies-en-banc-rehearing-in-erwin-appeal-waiver-case/ ("An ignominious ending to 2014."); Lathrop B. Nelson, III, "Third Circuit Issues Cautionary Tale for Appellate Waivers," *White Collar Alert* (Aug. 24, 2014), *available at* http://whitecollarblog.mmwr.com/2014/08/27/third-circuit-issues-cautionary-tale-for-appellate-waivers/ ("What about those defendants who have legitimate appellate issues that decline to appeal for fear of a harsher sentence if the court deems the appeal within the scope of their appellate waiver?"); Hon. Richard George Kopf, "Pigs Get Fed, Hogs Get Slaughtered," *Hercules and the Umpire* (Sept. 2, 2014), *available at* http://herculesandtheumpire.com/2014/09/ 02/pigs-get-fed-hogs-get-slaughered/ ("Contract principles are not intended to be punitive, and more than four years extra in prison appears to be punitive rather than restorative in nature."); Scott H. Greenfield, "Such a Deal (or Snitches Get Stiches)," *Simple Justice* (Sept. 8, 2014), *available at* http://blog.simplejustice.us/2014/09/08/such-a-deal/ ("Nobody would have seen this coming.").

In every one of the thousands of criminal appeals this Court has heard since the first appellate waiver in a plea bargain, we have *never* before held that an attempt to litigate a waived argument opens the door to a harsher sentence. Yet here we do. This cuts counter to how we have acted, and it goes against the majority of cases in other circuits. *E.g.*, *United States v. Blick*, 408 F.3d 162, 168 (4th Cir. 2005); *United States v. Hahn*, 359 F.3d 1315, 1329 (10th Cir. 2004) (*en banc*); *United States v. Andis*, 333 F.3d 886, 894

(8th Cir. 2003) (*en banc*); *but see United States v. Hare*, 269 F.3d 859, 861 (7th Cir. 2001).[2] We should remain faithful to our long-time practice of treating waived arguments in plea agreements the same as in other contexts.

* * * * *

For these reasons, I dissent from the denial of rehearing *en banc*.

---

[2] *Hare* assumes that resentencing those who raise waived arguments benefits defendants as a class because it makes "promises [not to appeal] credible," and it holds that dismissal of the appeal is an "incomplete [remedy] . . . because the prosecutorial resources are down the drain." 269 F.3d at 861. But *Hare* fails to consider that: appeals cannot be completely waived, *Khattak*, 273 F.3d at 563; ignoring a possibly meritorious argument is a significant sanction; and the Government can limit its outlay of resources "through a routine motion to strike," *United States v. Whitlow*, 287 F.3d 638, 642 (7th Cir. 2002) (Wood, J. concurring), or for summary affirmance. I therefore find *Hare* unpersuasive.

APPENDIX C

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

Christopher Erwin

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:12-CR-364-01(FLW)

The defendant, CHRISTOPHER ERWIN, was represented by James R. Murphy, Esq.

The defendant pled guilty to count(s) One of the SUPERSEDING INFORMATION on 5/24/12. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	**Nature of Offense**	**Date of Offense**	**Count Number(s)**
21:846	CONSPIRACY TO POSSESS/ DISTRIBTE CONTROLLED SUBSTANCE (Oxycodone)	1/2009 – 12/2010	One

As pronounced on July 25, 2013, the defendant is sentenced as provided in pages 2 through *5* of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count(s) One, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the *25th* day of July, 2013.

/s/ Freda L. Wolfson
Freda L. Wolfson
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 188 Months.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a facility located close to his family.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons when a date and facility is designated.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court as set forth below.

The defendant shall submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release and shall comply with the following special conditions:

ALCOHOL/DRUG TESTING AND TREATMENT

You shall refrain from the illegal possession and use of drugs, including prescription medication not prescribed in your name, and the use of alcohol, and shall submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that you shall submit to evaluation and treatment, on an outpatient or

inpatient basis, as approved by the U.S. Probation Office. You shall abide by the rules of any program and shall remain in treatment until satisfactorily discharged by the Court. You shall alert all medical professionals of any prior substance abuse history, including any prior history of prescription drug abuse. The Probation Officer shall supervise your compliance with this condition.

MENTAL HEALTH TREATMENT

You shall undergo treatment in a mental health program approved by the United States Probation Office until discharged by the Court. As necessary, said treatment may also encompass treatment for gambling, domestic violence and/or anger management, as approved by the United States Probation Office, until discharged by the Court. The Probation Officer shall supervise your compliance with this condition.

GAMBLING RESTRICTIONS AND REGISTRATION ON EXCLUSION LISTS

You shall refrain from all gambling activities, legal or otherwise, to include the purchase or receipt of lottery tickets. You shall register on the self-exclusion lists maintained by the New Jersey Casino Control Commission and Racetrack Commission within 60 days of the commencement of supervision and remain on these lists for the duration of supervision. The Probation Officer shall supervise your compliance with this condition.

RESTRICTIONS FROM ENTERING GAMBLING ESTABLISHMENTS

You shall not enter any gambling establishment without the permission of the U.S. Probation Office and/or the Court.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.
2) The defendant shall not illegally possess a controlled substance.
3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.
4) The defendant shall not leave the judicial district without the permission of the court or probation officer.
5) The defendant shall report to the probation officer in a manner and frequency directed by the Court or probation officer.
6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and

shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

17) You shall cooperate in the collection of DNA as directed by the Probation Officer.
(This standard condition would apply when the current offense or a prior federal offense is either a felony, any offense under Chapter 109A of Title 18 (i.e., §§ 2241-2248, any crime of violence [as defined in 18 U.S.C. § 16], any attempt or conspiracy to commit the above, an offense under the Uniform Code of Military Justice for which a sentence of confinement of more than one year may be imposed, or any other offense under the Uniform Code that is comparable to a qualifying federal offense);

18) Upon request, you shall provide the U.S. Probation Office with full disclosure of your financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, you are prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Office. You shall cooperate with the Probation Officer in the investigation of your financial dealings and shall provide truthful monthly statements of your income. You shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Office access to your financial information and records;

19) As directed by the U.S. Probation Office, you shall participate in and complete any educational, vocational, cognitive or any other enrichment program offered by the U.S. Probation Office or any outside agency or establishment while under supervision;

20) You shall not operate any motor vehicle without a valid driver's license issued by the State of New Jersey, or in the state in which you are supervised. You shall comply with all motor vehicle laws and ordinances and must report all motor vehicle infractions (including any court appearances) within 72 hours to the U.S. Probation Office;