

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Axel Irizarry-Rosario,
Petitioner

v.

United States,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the government avoid its obligation to scrupulously observe the terms of a plea agreement by including in its sentencing argument information not relevant to the crime for which the sentence is being imposed?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Axel Irizarry-Rosario respectfully petitions for a writ of certiorari to review the judgment of a panel of the United States Court of Appeals for the First Circuit which affirmed petitioner's conviction and sentence in the United States District Court for the District of Puerto Rico.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 903 F.3d. 151 (2018) and appears in Appendix A.

STATEMENT OF JURISDICTION

The final decision of the United States Court of Appeals was entered on September 10, 2018. A copy of the judgement appears in Appendix B.

The United States District Court for the District of Puerto Rico had jurisdiction over this matter under 18 U.S.C. §3231. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924(c)(1)(A)(i)

(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for

which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime- (i) be sentenced to a term of imprisonment of not less than 5 years;

STATEMENT OF THE CASE

1. Prior proceedings

The defendant was indicted for possession of firearms in furtherance of a drug trafficking offense (Count One) and possession of cocaine with intent to distribute (Count Two). Irizarry and the government entered into a plea agreement. Appendix C. Irizarry subsequently pleaded guilty to both counts. After a sentencing hearing, he was sentenced to 84 months imprisonment on Count One and to a consecutive sentence of 12 months imprisonment on Count Two, as well as terms of supervised release. A notice of appeal was timely filed on February 12, 2016.

Irizarry appealed his sentence on the ground that the government had breached the plea agreement, doing an “end run” around its promise in the plea agreement by technically complying with the terms of its agreement, while impliedly arguing for a different result and that such breach constituted plain error. The Court of Appeals affirmed the District Court’s judgement.

2. Sentencing

In the plea agreement the government promised “to recommend a specific term of **sixty (60) months** of imprisonment”, the mandatory minimum term, on Count One, possession of firearms in furtherance of a drug trafficking offense. Appendix C, p. 5. (Emphasis in original.) At the sentencing hearing, the government, while acknowledging that it was obligated to recommend the minimum mandatory sentence of five years under 18 U.S.C. 924(c)(1)(A)(i), accompanied such recommendation with repeated references to the quantity of firearms found in the defendant’s home. Transcript of January 11, 2017 sentencing hearing (“Tr.”) pp. 18 - 19. Though such references were purportedly for the purpose of arguing for a sentence at the high end of the guidelines on the drug charge, their obvious intent, and their result, was to convince the Court to exceed the recommended sentence on the firearms charge. Referring to the defendant’s possession of firearms, the district court sentenced Irizarry to 84 months imprisonment on the firearms charge. Tr. p. 10.

REASON FOR GRANTING THE WRIT

Plea agreements and the resulting guilty pleas are at the core of the federal criminal justice system. In 2014, for instance, 91% of federal criminal prosecutions in the district courts were terminated by guilty pleas. The U.S.

Department of Justice, Office of Justice Programs, Bureau of Justice Statistics,
Federal Justice Statistics, 2013-2014, NCJ 249149, March 2017, p. 26, table 14.

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Santobello v. New York, 404 U.S. 257, 260 (1971).

Fairness to criminal defendants and the ability of the federal courts to handle thousands of criminal prosecutions depends on the ability of defendants to rely on the promises made by the government to secure such pleas. “[W]hen 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.” *Santobello* at 262. “The societal benefit of plea agreements would be undermined if defendants did not get benefits that could reasonably be expected to flow from a plea agreement.” *United States v. Ykema*, 887 F.2d 697, 699 (6th Cir. 1989).

It is essential that plea agreements “be scrupulously honored.” *United States v. Young*, 62 F. App'x 640, 644 (7th Cir. 2003). “The government is expected to scrupulously abide a plea agreement.” *United States v. Nicholson*, 272 F. App'x

732, 737 (10th Cir. 2008). "When the government enters into a plea agreement with a criminal defendant, it acquires a duty to carry out the obligations it has undertaken in both letter and spirit." *United States v. Almonte-Nuñez*, 771 F.3d 84, 86 (1st Cir. 2014). To fulfill the legitimate expectations of a defendant, a plea agreement must be interpreted "according to the defendant's reasonable understanding of its terms" and in accordance with the expectations which the defendant would fairly imply from its terms. *United States v. Scott*, 469 F.3d 1335, 1338 (10th Cir. 2006). The government breached its duty to Irizarry by failing to observe the agreement as so interpreted.

The plea agreement was breached.

Though the government observed the literal terms of its plea agreement with Irizarry by recommending a sentence of 60 months on the firearm charge, it breached the spirit of the agreement by emphasizing the number of firearms found in the defendant's apartment in the course of its argument for a sentence at the top of the sentencing guidelines range on the drug charge, an emphasis which undercut its promise to recommend 60 months on the firearms charge.

MR. PEREZ-BOURET: Well, Judge, in this case the parties have entered into a plea agreement in which, for the 924(c), we are going to be requesting 60 months. However, for the cocaine count, the Defense can request 6 months and the Government can request up to 12 months. The Government encourages the Court to sentence the Defendant in the higher end of those 12 months based on

the sheer volume and quantity of firearms that were seized, and the ammunition that was seized.

We are not talking about self-defense --

THE COURT: The higher end of the drug charge because of the weapons?

MR. PEREZ-BOURET: The weapons is 60 months minimum statutory. That's what we stand by. But, however, for the cocaine count, in which there is a spread -- there is a range from 6 to 12 months -- we encourage the Court to sentence him to the higher end of those 12 months based on the amount of firearms that were seized, the amount of ammunition, and the magazines that were seized in his house, Your Honor.

Tr. pp. 4 - 5.

The government's breach of the plea agreement was plain error.

Because the defendant did not object to the government's breach of the plea agreement, the standard of review is for plain error. *Puckett v. United States*, 556 U.S. 129, 134 (2009).

'[P]lain-error review'[] involves four steps, or prongs. First, there must be an error or defect--some sort of "[d]eviation from a legal rule"--that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error--discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Puckett at 135 (internal citations and quotation marks omitted).

This standard was met in the instant case.

An error occurred.

For the reasons set out above, the government's end run around the plea agreement and its breach of the spirit of that agreement was error. *Supra*, pp. 4 - 6.

The error was clear.

There was nothing subtle about the government's contravention of the spirit of the plea agreement and the defendant's reasonable expectations. The agreement clearly laid out the government's obligation to recommend a sentence of 60 months on the firearms charge. The government's references to the number of firearms, the ammunition and the (firearm) magazines found in the defendant's home in the irrelevant context of the drug charge were well-calculated to lead the Court to exceed the recommended sentence on the firearms charge. “[W]hen a prosecutor . . . gratuitously offers added detail garbed in implicit advocacy, a court might well find that the prosecutor is actually seeking a result in a manner that breaches the agreement.” *United States v. Miranda-Martinez*, 790 F.3d 270, 275 (1st Cir. 2015). See *United States v. Whitney*, 673 F.3d 965, 972 (9th Cir. 2012) (Breach of plea agreement was plain error when “[a]lthough the prosecutor uttered the requisite words by recommending a sentence at the low-end of the guidelines,

her additional statements constituted an argument for a higher sentence . . .").

Significantly, the government's discussion of the firearms found in Irizarry's apartment did *not* come in response to any inquiry from the sentencing judge.¹

[A] plea agreement does not bar the government from honestly answering the district court's questions. To the contrary, honest response of the government to direct judicial inquiry is a prosecutor's professional obligation that cannot be barred, eroded or impaired by a plea agreement. On the other hand, **an attempt by the government to influence the district court to impose a harsher sentence than the one to which the government agreed in the plea agreement to recommend would violate the agreement.**

United States v. Allen, 434 F.3d 1166, 1175 (9th Cir. 2006) (internal citations and quotations omitted) (emphasis added).

In light of the government's references to the firearms and related items found in the defendant's house, its recommendation of the agreed 60-month sentence was no more than "grudging". *United States v. Canada*, 960 F.2d 263, 268 (1st Cir. 1992).

"No magic formula exists for a prosecutor to comply with the agreed-upon sentence recommendation, but the prosecutor's 'overall conduct must be

¹ The nature of the materials found in the defendant's home was known to the government when it entered into the plea agreement, being set forth in the indictment and referred to in the plea agreement. Appendix C, pp. 1 - 2.

reasonably consistent with making such a recommendation, rather than the reverse.”” *United States v. Gonczy*, 357 F.3d 50, 54 (1st Cir. 2004), quoting *United States v. Canada*, 960 F.2d at 268. The government’s remarks in this case were, plainly, not reasonably consistent with its obligations under the plea agreement.

The error affected the defendant’s substantial rights.

Although a defendant usually demonstrates prejudice by proving that the error affected the outcome of the proceedings, *see* [*United States v. Olano*, 507 U.S. 725, 734 (1993)], a defendant alleging a breached plea agreement on appeal need not go so far. *See* [*United States v. Clark*, 55 F.3d 9, 13 - 14 (1st Cir. 1995)] (stating that prosecutor’s failure to abide by plea agreement, even if did not affect the defendant’s sentence, is not harmless error); *Correale v. United States*, 479 F.2d 944, 949 (1st Cir. 1973) (finding that prosecutor’s breach of plea agreement “is not rendered harmless because of judicial refusal to follow the recommendation or judicial awareness of the impropriety”). In a plea agreement, the defendant is bargaining for “the prestige of the government and its potential to influence the district court.” [*United States v. Carrero*, 77 F.3d 11, 12 (1st Cir. 1996)]. When the prosecutor fails to fulfill the agreement, the defendant is prejudiced because his rights are violated. *See* [*Correale v. United States*, 479 F.2d at 949] (noting that waiver of rights, in exchange for prosecutor’s statements, is ineffective when agreement is violated).

United States v. Riggs, 287 F.3d 221, 225 (1st Cir. 2002).

If there can be any doubt as to the potential of the government’s argument to “influence the district court”, it is dispelled by the fact that the Court did, in fact, refer to the very facts argued by the government in sentencing Irizarry to a sentence on the gun charge substantially exceeding that which the government

promised to recommend and substantially exceeding the guidelines sentence.

Because of the significant number of weapons, some with obliterated serial number, and ammunition found, including assault rifles, large capacity magazines chocked full of ammunition, and additional ammunition in boxes, the Court finds that the sentence to which the parties agreed does not reflect the seriousness of the offense, does not promote respect for the law, does not protect the public from further crimes by Mr. Irizarry, and does not address the issues of deterrence and punishment.

Accordingly, it's the judgment of the Court that Axel Irizarry-Rosario is committed to the custody of the Bureau of Prisons to be imprisoned for a term of 84 months as to Count One . . .

Tr. p. 10.

The error seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

In addition to being prejudicial, the government's breach of the plea agreement meets the fourth prong of the Olano test: Because violations of plea agreements on the part of the government serve not only to violate the constitutional rights of the defendant, but directly involve the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government, we hold that the Government's breach constituted plain error.

United States v. Riggs, 287 F.3d at 226, quoting *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997).

If the federal courts are to continue to rely on plea bargains and pleas to resolve the overwhelming majority of criminal cases, this Court must reaffirm the

duty of prosecutors to observe both the letter and spirit of such agreements.

CONCLUSION

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

Respectfully submitted,

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