No. _____

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS GILBERT BEATTIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the prosecutor's conduct in speaking out of both sides of his mouth with respect to a sentencing recommendation they had agreed to make is a breach of plea agreement; or stated alternatively, whether furnishing argument in opposition to a sentencing recommendation on one hand, while stating on the other hand that they were nevertheless adhering to their recommendation was a breach of the plea agreement.

LIST OF PARTIES

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

RELATED PROCEEDINGS

United States District Court (S.D. Iowa.);

United States v. Beattie, No. 4:17-cr-0017-RGE-CFB-1 (Feb. 21, 2017)

United States Court of Appeals (8th Circ.):

United States v. Beattie, No. 18-2197 (June 4, 2018), petition for reh'g denied, (May 2, 2019)

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Petitioner prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Eighth Circuit for this case.

OPINION BELOW

For cases from federal courts the opinion of the United States Court of Appeals for the Eight Circuit in petitioner's case is attached to this petition as Appendix A. Court of appeals order denying rehearing is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court's jurisdiction was based upon 18 U.S.C § 3231. On October 20, 2017 Beattie pled guilty. Beattie was sentenced on May 16, 2018. The court of appeals entered its judgment on April 1, 2019. The petition for rehearing en banc, which was filed April 15, 2019, was denied on May 21, 2019. Beattie filed a timely notice of appeal. The jurisdiction of the court of appeals was based upon 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

18 U.S. Code § 3231 – District Courts
The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the severl States under the laws thereof.

28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S. Code § 1291 - Final decisions of district courts
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

USSG Section 3C1.1- Obstructing or Impeding the Administration of Justice
If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

USSG Section 3E1.1 -Acceptance of Responsibility
(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

STATEMENT OF THE CASE

Defendant, Nicholas Gilbert Beattie, pled guilty pursuant to the plea agreement in the Southern District of Iowa to one count of receipt of visual depictions of minors engaging in sexual conduct.

The government agreed to recommend a 3-level reduction of his offense level for acceptance of responsibility. This petition addresses the standard to apply when the government makes statements and takes positions contrary to a recommendation bargained for in a plea agreement. The Court should grant the petition for certiorari on the basis of answering a significant question one where there has been a clear conflict among the courts. Specifically, certiorari should be granted to make clear that end-runs, duplicity and undermining agreed upon recommendations are a breach of performance by the government in violation of the defendant's due process, even if the prosecutor still pays lip service to its recommendation.

In Santobello v. New York, 404 U.S. 257, 262, the Court held:

> ...that the judgement be vacated and that the case be remanded to the state courts for further consideration as to whether the circumstances require that there be specific performance of the agreement on the plea (in which case petition should be resentenced by a different judge), o petition should be afforded the relief he seeks of withdrawing his guilty plea. 404 U.S., at 498-499, 92 S.Ct.495

which sets out an automatic reversal rule.

In this case, the Government and Mr. Beattie had a plea agreement which stated that the government would recommend a 3-level decrease for acceptance of responsibility. The estimated guideline calculation resulted in a total

offense level of 34 and a range of 151-188 months. The government first breached the Plea Agreement on December 27, 2017 by suggesting to the United States Probation office3 that the court should decide whether the alleged obstruction was sufficient to deny acceptance. When the defendant filed a pleading alleging this was a breach, the government replied on May 1, 2018 with a lengthy factual recital with case citations explaining why the court would not be in error in denying acceptance. The government at the end stated it "notwithstanding the defendant's attempt to minimize his criminal culpability in this case, the government affords him the benefit of the doubt and adheres to its general obligation" (DCD Doc. 76) to recommend acceptance.

Here, the government's argument, especially on May 1 was pointedly against acceptance of responsibility and it's essence on December 27 and May 1 was also against that reduction as well. Nobody who bargained for the government's agreement to recommend acceptance would believe or accept that what they bargained for was what the government did here. The Government in this case alleges in the Presentencing Investigation Report that "upon further reflection, the total offense level should be 36." EFC No. 68 (Government Sentencing Brief) at 2. The Government then cites USSG § 3E1.1 comment (n.4) where the government then sets forth facts supporting the enhancement.

The Eighth Circuit panel "distinguishes" this authority by not addressing the totality of the government's conduct, suggesting that the government's duplicitous statements did not *ipso facto* urge denial of acceptance of responsibility and merely

"pointed out its right to argue against an acceptance of responsibility reduction for Beattie's post-plea conduct, but chose not to assert that right."[1] The question the panel majority cannot answer is how the government's December 27, 2017, statements and their May 1, 2018, statements were anything other than what defendant asserts they were- arguments and suggestions to deny acceptance. Both the December 27 and May 1 statements were gratuitous and duplicitous "end runs" around the plea agreement that obviously suggested denial of acceptance would be appropriate. The action in the May 1 filing essentially presented a full argument for denying acceptance, but the panel majority found this was not in breach because the government included language paying reluctant lip service to the agreement.

On December 19, 2017, the initial presentence investigation report was filed assessing a 2-level increase under USSG Section 3C1.1 for obstruction of justice and

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[1] In United States v. Gomez, 271 F.3d 779, 781 (8th Cir. 2001) the Eighth Circuit held that if a prosecutor believes a defendant breached an agreement first, the prosecutor must either move to withdraw from the agreement or abide by it. Here, the prosecutor chose to abide by the agreement in his response, making his arguments in opposition to acceptance a breach. The panel asserts what the prosecutor argued was their "right", but that is simply incorrect under Gomez. Moreover, one can not fairly read what the government did in it's filing as honestly recommending acceptance be granted. The filing gratuitously made a factual and legal argument against acceptance being granted in a filing where the precise issue had to do with whether the government had breached the agreement by arguing for obstruction, a separate guideline enhancement. There was no plausible explanation for the entire acceptance portion of the May 1 filing, except when it is read as providing ammunition to the court to deny acceptance. If the point of the acceptance portion was to state the government supported acceptance, then the 7 paragraphs after paragraph 6, where they reiterated they had recommended acceptance, had no purpose if not the purpose to suggest a basis for denial of their recommendation. Even if this was not the purpose, it was an argument made in breach of the agreement.

declining to provide for any reduction for acceptance of responsibility under USSG Section 3E1.1. (DCD Doc. 56, p. 9). The basis for the recommendation was Beattie's conduct in response to the illegal search warrant at the jail. (PSR ¶ 15).

On December 27, 2017, the government filed "objections" to the PSR stating:

> ...2. The government adheres to its agreement to recommend a 3-level reduction for acceptance of responsibility. *The court will have to determine whether the Defendant's refusal to comply with a state warrant to provide access to his phone is a sufficient obstruction of justice to merit denial of acceptance of responsibility under Application note 4 to USSG 3E1.1...*

(R. Doc. 57)(italics added). This second gratuitous[2] sentence of the government's "objection" was itself a violation of any reasonable interpretation of the government's agreement to recommend acceptance unless obstruction occurred *after* the plea proceeding. The language of the "objection" stating they were leaving to the court to determine whether the failure to provide the password was sufficient obstruction to warrant denial of acceptance is contrary to the government's obligation. The government agreed that whatever the circumstances were with the passcodes, (circumstances fully known to the government), they would recommend acceptance. Instead, they suggested it was up to the court to determine if acceptance should be denied based on alleged obstruction. The government's "objection" language suggested they believed the alleged pre-plea "obstruction"

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[2] It goes without saying that the court had to make this determination just like every other guideline determination. For the prosecutor to write that this is something the court will have to determine can only be read as an invitation to the court to make the determination that defendant did not accept responsibility.

could be determined by the court to be sufficient to warrant denial of acceptance, but they agreed to recommend against such a determination.

On May 1, 2018 the Government filed its Response to Motion for Specific Performance of Plea Agreement and went into undeniable full breach status. The government used that filing as an opportunity to make an apparently retaliatory claim that Beattie's offer of mitigation evidence through the reports of Dr. Rypma and Rosell, which they admitted to being aware of previously, amounted to post-plea conduct sufficient to deny him the acceptance of responsibility. Some of their egregious argument is referenced verbatim here:

> ...7. One of the exceptions to the government's duty to request the defendant receive credit for accepting responsibility is if he, post-plea, "otherwise engages in conduct not consistent with acceptance of responsibility." The government notes that some of the materials submitted to the court by the defense for sentencing, notably Defendant's Sentencing Exhibit S and Exhibit T, come dangerously close to triggering this exception.[3]
>
> 8. The government was aware of these reports prior to sentencing, but had no idea[4] the defense would tender them to the court in an effort to curry leniency.
>
> 9. In Defendant's Sentencing Exhibit S, the defense essentially minimizes his mental state at the time of the offense. ...
>
> As the PSR notes, his participation in the child pornography marketplace started before[5] his methamphetamine use, and before his

---

[3] Dr. Rypma's July 28, 2017, report, Exhibit S, was furnished to the government in plea discussions as mitigating evidence in *advance* of the plea and Dr. Rosell's December 2017 report was furnished to probation and the government *at the request of probation* who wished to use it in preparing their report. Both reports are materially the same and Rosell's report is not new information.

[4] This assertion is disingenuous.

[5] This was based on the government error in believing the offense started in 2013 rather than 2015. The whole minimization argument of the government was based on government counsel's mistaken belief that the offense started in 2013 before later events

> divorce. Therefore, it appears the defendant is attempting to use a factually inaccurate argument to try and misrepresent his history and characteristics and the circumstances of the offense...
>
> 11. By providing these documents to the court for consideration at sentencing, the defendant has come perilously near to engaging in conduct not consistent with acceptance of responsibility...
>
> 12. As far as acceptance of responsibility is concerned, "[t]o receive this reduction, a defendant cannot minimize his conduct or partially accept responsibility." *United States* v. *Daniels,* 625 F.3d 529, 534 (8th Cir. 2010). "Special emphasis is placed on the defendant's honesty about the factual basis for the offense, rather than an emphasis on whether the defendant pleaded guilty or took the matter to trial." *United States* v. *Erhart,* 415 F.3d 965, 971 (8th Cir. 2005). *See for example, United States v. Little Hawk,* 449 F.3d 837, 839-40 (8th Cir. 2006) ("Little Hawk's acceptance of responsibility was equivocal and hedged with excuses for his behavior. "); *United States v. Johnson,* 22 Fed. Appx. 646 (8th Cir. 2001) (affirming Judge Pratt's denial of acceptance in a child pornography case "because [the defendant] continued to minimize his acts and describe them in a way that was both unbelievable and very self-serving." and "people with Mr. Johnson's sexual tendencies typically minimize their behavior.")..."

(DCD 76). After clearly suggesting a basis for denial of acceptance of responsibility, the Government nevertheless paid lip service to the plea agreement, stating:

> ...13. Notwithstanding the defendant's attempt to minimize his criminal culpability in this case, the government affords him the benefit of the doubt and adheres to its general obligation in the Plea Agreement to ask the court to give him credit for accepting responsibility...

(DCD Doc. 76). If what the government did in their May 1 filing is not a breach of their obligation to recommend acceptance of responsibility, then it is hard to imagine what would be. If paragraph 13 saved the government from breach, then

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that defendant identified as contributing to his conduct. By the time government counsel realized the error at sentencing, it was too late to undo the damage.

that court is really saying the government need not honor its agreements in good faith.

REASONS FOR GRANTING THE PETITION

I. THIS WRIT SHOULD BE GRANTED TO ADDRESS THE STANDARD TO APPLY TO GOVERNMENT CONDUCT IN MAKING STATEMENTS AND TAKING POSITIONS CONTRARY TO A RECOMMENDATION BARGAINED FOR IN A PLEA AGREEMENT AND TO MAKE CLEAR THAT END RUNS, DUPLICITY AND UNDERMINING AGREED UPON RECOMMENDATIONS IS A BREACH OF PERFORMANCE BY THE GOVERNMENT IN VIOLATION OF DUE PROCESS.

Two of the judges on the panel found that the government's suggestions and arguments that the trial court could deny acceptance of responsibility were not a breach of the plea agreement' duty to recommend it because the government, speaking out of the other side of their mouth, also asserted they were "leaving it to the court to decide" and giving Beattie the "benefit of the doubt" and "adhering" to their "general obligation" to recommend acceptance of responsibility. The two judges in the majority flatly endorsed the government's duplicitous, cute arguments as compliance with the obligation to recommend acceptance of responsibility, setting a disturbingly low bar for the expectations placed upon government counsel under plea agreements that puts this Circuit out of step with its own precedent and that of other Circuits. Ultimately, the government actually argued against acceptance of responsibility, claiming Beattie's conduct of possessing a cell phone

days before sentencing, after the government's prior breaches, warranted them in being excused from their obligation.

In interpreting plea agreements, the court looks to basic principles of contract law. United States v Norris, 486 F 3d 1045, 1051 (8th Cir. 2007). Any ambiguities in a plea agreement are construed against the government. United States v Yah, 500 F 3d 689, 704 (8th Cir. 2007). In evaluating government performance, the court looks not just to "technical compliance" with the terms, but to

> ...the spirit of the promise and ultimately the plea agreement." *See* United States v. Clark, 55 F.3d 9, 10–13 (1st Cir.1995) (concluding government's submission prior to sentencing of memorandum discussing defendant's entitlement to adjustment "effectively opposed" adjustment and thus breached plea agreement's provision not to oppose adjustment); United States v. Canada, 960 F.2d 263, 269 (1st Cir.1992) (stating that although government "stopped short of explicitly repudiating the agreement," Santobello v. New York 's interest in fairness prohibited government's "end-runs" around promises contained therein)...

United States v. Mitchell, 136 F.3d 1192, 1194 (8th Cir. 1998). The government obligations and the Court's review of those are well described in a recent First Circuit case:

> ...we hold prosecutors to the most meticulous standards of both promise and performance" in the plea-agreement context. United States v. Marín-Echeverri, 846 F.3d 473, 478 (1st Cir. 2017) (internal quotation marks omitted) (quoting United States v. Almonte-Nuñez, 771 F.3d 84, 89 (1st Cir. 2014)). These strict standards "require more than lip service to, or technical compliance with, the terms of a plea agreement." Id. (quoting Almonte-Nuñez, 771 F.3d at 89); see also id. ("[W]e frown on technical compliance that undercuts the substance of the deal."); United States v. Quiñones-Meléndez, 791 F.3d 201, 204 (1st Cir. 2015) ("The government is barred not only from 'explicit repudiation of the government's assurances' contained in a plea agreement but also—'in the interest of fairness'— from undertaking 'end-

> runs around them.' " (quoting United States v. Rivera-Rodríguez, 489 F.3d 48, 57 (1st Cir. 2007))). Instead, "a defendant is entitled not only to the government's 'technical compliance' with its stipulations but also to the 'benefit of the bargain' struck in the plea deal and to the good faith of the prosecutor." United States v. Matos-Quiñones, 456 F.3d 14, 24 (1st Cir. 2006) (citation omitted) (quoting United States v. Clark, 55 F.3d 9, 11 (1st Cir. 1995)); see also United States v. Frazier, 340 F.3d 5, 11 (1st Cir. 2003) ("[A]s in all contracts, plea agreements are accompanied by an implied obligation of good faith and fair dealing" (quoting United States v. Ahn, 231 F.3d 26, 35-36 (D.C. Cir. 2000)))...

United States v. Ubiles-Rosario, 867 F.3d 277, 283 (1st Cir. 2017).

"[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 v. New York, 404 U.S. 257, 262 (1971). Thus, the prosecution's material breach of a plea agreement violates a defendant's due process rights. United States v. Mosely, 505 F.3d 804, 809 (8th Cir. 2007). When such a violation occurs, the remedy announced by Santobello and applied by the Eighth Circuit is either permitting withdrawal of the guilty plea or ordering specific performance and sentencing before a different judge. Santobello, 404 U.S. at 263; United States v. McCray, 849 F.2d 304, 305–06 (8th Cir. 1988). A judge cannot continue to preside over a sentencing hearing after a prosecutor's breach, even if the breach will have no impact on the sentence the judge ultimately imposes. See Mosley, 505 F.3d at 811–12 (collecting cases and concluding resentencing before a different judge is required and harmless-error analysis is unavailable). It also does not matter if the defendant breaches after the government has breached under the first breach rule. Mosley, 505 F.3d at 811.

The panel majority's "distinction" of U.S. v. Thompson is not credible and is actually a disregard of that precedent. In Thompson that Court addressed a very similar circumstance to Beattie's case. In Thompson the Court described what happened:

> The plea agreement makes clear that the government was aware of the facts that the district court ultimately relied upon to find that Thompson had committed a felonious assault. In its discretion, the government decided not to charge Thompson with this conduct and limited the applicable guidelines to those that would not account for the uncharged conduct. The government could have offered as a term of the plea agreement that section 2K2.1 would be the applicable guideline section for the offense of conviction, without specifying a particular paragraph under that section. It offered instead the narrower provision of section 2K2.1(a). This became a bargained-for term of the agreement. Although not binding on the probation officer or the district court, the plea agreement obligated the prosecutor, at a minimum, to refrain from advocating against the applicability of section 2K2.1(a). The prosecutor's argument to the district court that Thompson's factual stipulations supported felonious assault, prior to any request by the district court for such information, was *essentially an argument* that section 2K2.1(c)(1) should apply to Thompson's sentence. *In essence*, then, the prosecutor was arguing for the negation of the applicability of section 2K2.1(a).In *DeWitt,* the government and the defendant entered into a plea agreement specifying that "[t]he amount of pseudoephedrine to be used to calculate the sentencing guidelines is 1.12 grams." *Id.* at 668. The probation officer recommended a base level offense premised on the defendant's being accountable for 53.02 grams of pseudoephedrine, which included the 1.12 grams identified in the plea agreement and an additional 51.9 grams related to conduct for which the defendant was not charged. *Id.* at 669. At sentencing, the prosecutor introduced evidence to establish the larger drug quantity set forth in the presentence investigation report. *Id.* The prosecutor stated, "I understand that the parties had an understanding of what they believed the amount would be, and that's listed further in the plea agreement, but that amount does not prevent any party from presenting additional information. And that's what the government has done today." *Id.* We concluded that the prosecutor's conduct constituted a breach of the plea agreement. *Id.* at 669-70.The prosecutor's actions here are similar to those taken by the prosecutor in *DeWitt.* Although nothing in the record suggests that the prosecutor here acted in bad faith, we conclude that his *unrequested*

> *advocacy of the application of a guideline provision that undermined the applicability of section 2K2.1(a) breached the plea agreement.*

United States v. Thompson, 403 F.3d 1037, 1040–41 (8th Cir. 2005)(italics added). Thompson looked to the "essence" of what the government was arguing- the negation of something they had stipulated to recommend and whether the advocacy undermined the agreement and was unrequested. In Dewitt the government argued that it did not breach a plea agreement containing a total attributable drug quantity stipulation lower than the presentence report recommended because it merely presented evidence to support the report's conclusion while also noting the stipulation in the plea agreement. U.S. v. Dewitt, 366 F.3d 667 (8th Cir. 2004). Judge Collolton, joined by Judges Beam and Melloy, found this was a breach.

In U.S. v. Benchimol, 471 U.S. 453 (1985), the defendant, Benchimol, was offered a plea bargain of a recommendation for probation with restitution in exchange for a guilty plea. During the sentencing hearing the Government took a very passive stance:

> ...the presentence report incorrectly stated that the government would stand silent. Benchimol's counsel informed the court that the government instead recommended probation with restitution. The Assistant United States Attorney then stated: "That is an accurate representation."

Id. at 454-455. After analyzing that record, the Court of Appeals held the Government had made no effort to explain the leniency suggested in the plea agreement, and rather left the court with an impression of "less than enthusiastic support." *Id.* However, the Supreme Court held the Government does not need to offer its reasoning for the recommended sentence, nor does it need to recommend the sentence with enthusiasm, and therefore found no breach on part of the

Government. *Id.* at 456. Although the government's attorney need not recommend the plea deal with enthusiasm, the Supreme Court distinguished this circumstance from United States v. Grandinetti, 564 F.2d 723 (CA5 1977), and United States v. Brown, 500 F.2d 375 (CA4 1974), which include instances where the government expressed personal reservations about the recommended plea bargains. U.S. v. Benchimol, at 456. The government's attorney in United States v. Grandinetti said:

> The defendant contends that the government attorney at the revocation hearing acted as though he had never seen the agreement when he said: Excuse me. May it please the Court. I understand there is a written agreement which should be in the Court file. Might I have a look at that while counsel is making his remarks to the Court? This statement, plus the government's responses to the defense attorney's statement that the government had recommended concurrent sentences, are the basis for the breach allegation. The government's response to the concurrent sentence recommendation was: And I have very serious problems with that, Your Honor, so I'd like to look at the stipulation. After looking at the stipulation, the Assistant United States Attorney concluded his remarks by saying: I think, Your Honor, based on that particular instrument that the Government is locked-in to the language of that thing. I'm not too sure of the legality of it nor the propriety, but none the less it is there. The defendant contends that the Assistant United States Attorney not only failed to actively advocate the government's position as set forth in the agreement, but he actually did more harm by his statements. The result being that Judge Roettger rejected the government's recommendation, and sentenced the defendant to serve the balance of his previously imposed sentence consecutive to that sentence imposed by Judge King.

Id. at 724. The previous colloquy was deemed a "halfhearted" recommendation with expressed reservations where the attorney failed to advocate the government's positions, and rather, caused the defendant more harm. *Id.* at 725. That defendant's sentence was vacated because the government's attorney was "not only an unpersuasive advocate for the plea agreement, but, in effect, argued against it." *Id.* at 727. Moreover, the court held "the defendant did not receive the benefit of his

bargain that benefit being a forceful and intelligent recommendation..." *Id.* Similarly, the prosecutor in United States v. Brown, responded to the court's question regarding whether they believed it was the correct sentence recommendation by saying, "Well Your Honor, I do have some problems with that, anyhow, but that is the way I understand it." *Id.* at 377. The Fourth Circuit reversed, and stated that in this situation the government had failed to keep its bargain." United States v. Brown, at 377. With this statement made by the prosecutor, the Government "effectively undercut the agreement before the defense counsel began to speak." *Id.* at 378. Those two cases are distinguished by the Supreme Court in Benchimol because the government expressed reservations about the recommendation they agreed to make. By expressing reservations contrary to the plea bargain, the Government is not fulfilling their promised recommendation. These cases recognize quite clearly that expressed reservations about a recommendation in plea agreement violate the plea agreement, even if the prosecutor couples those reservations with a statement recommending what was agreed upon.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

Dated: August 7, 2019.

No. _____

SUPREME COURT OF THE UNITED STATES

NICHOLAS GILBERT BEATTIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PROOF OF SERVICE

I, Dean Stowers , do swear or declare that on this date, August 7 , 2019, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States Room 5614

Department of Justice, 950 Pennsylvania Ave., N.W.

Washington D.C. 20530-0001.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 7, 2019

Dean Stowers

APPENDIX A- Court of Appeals opinion

United States Court of Appeals

For the Eighth Circuit

No. 18-2197

United States of America

Plaintiff - Appellee

v.

Nicholas Gilbert Beattie

Defendant – Appellant

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: January 18, 2019
Filed: April 1, 2019

Before GRUENDER, WOLLMAN, and SHEPHERD, Circuit Judges.

WOLLMAN, Circuit Judge.

Nicholas Gilbert Beattie pleaded guilty to receiving visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1). The district court sentenced him to 190 months' imprisonment, to be [1]

[1] The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

followed by 240 months' supervised release. Beattie appeals, arguing that the government breached the plea agreement and asking that we vacate his sentence and remand for resentencing by a different judge. Beattie further argues that the district court erred in applying a 2-level increase for obstruction of justice pursuant to § 3C1.1 of the U.S. Sentencing Guidelines (U.S.S.G. or Guidelines) and that the court erred in failing to credit Beattie with acceptance of responsibility under U.S.S.G. § 3E1.1.

In an online chat room in November 2015, Beattie, under the username "incestlvr87," posted a fifty-three-second video of an adult performing a sex act on an infant. A concerned citizen reported the video, and law enforcement officials traced the username to Beattie. The concerned citizen also reported that Beattie had tried to persuade her to start an incestuous family, that his prior marriage had ended in divorce because he desired to have an incestuous family, and that his ex-wife had found incest videos on his phone. Beattie also told the concerned citizen his first name, his phone number, and his place of employment.

Law enforcement officers executed a search warrant at Beattie's workplace and residence in December 2015. The officers found drugs and drug paraphernalia on Beattie's bed. Several electronic devices were seized from his home, but Beattie refused to unlock his cell phone upon the officers' request. Beattie was then taken into custody on an unrelated warrant. Law enforcement obtained a second search warrant to compel Beattie to provide the passcode to a seized iPhone and iPad, in response to which Beattie provided incorrect passcodes.

Twenty images and thirty-one videos of child pornography were found on certain electronic devices that were not passcode-protected. The child pornography displayed prepubescent minors engaging in masturbation, oral and vaginal sex, and

bestiality. Beattie had also carried out a number of searches and downloads for incest pornography and bestiality.

Beattie pleaded guilty in October 2017. The plea agreement was subsequently accepted by the district court and provided in part that:

> The Government agrees to recommend that Defendant receive credit for acceptance of responsibility under USSG § 3E1.1. The Government reserves the right to oppose a reduction under § 3El.1 if after the plea proceeding Defendant obstructs justice, fails to cooperate fully and truthfully with the United States Probation Office, attempts to withdraw Defendant's plea, or otherwise engages in conduct not consistent with acceptance of responsibility.

The plea agreement was silent on the government's obligation regarding an obstruction of justice enhancement under § 3C1.1. Following the plea proceeding, the government advised the probation office of its belief that Beattie's Guidelines range was 151-188 months.

The draft presentence report (PSR) determined that Beattie's base offense level was 22. It applied a 2-level increase for obstruction of justice based on Beattie's failure to disclose correct passcodes, along with several other enhancements not at issue on appeal, and determined that Beattie's total offense level was 39. The PSR did not apply any reduction for acceptance of responsibility. With a criminal history category of I, the Guidelines sentencing range was 262 to 327 months' imprisonment, with a statutory maximum sentence of 240 months' imprisonment. The government objected to the PSR's denial of acceptance of responsibility on December 27, 2017, but remained silent on the obstruction of justice enhancement. The government stated that it "adheres to its agreement to recommend a 3-level reduction for acceptance of responsibility" but added that "[t]he court will have to determine whether the defendant's refusal to comply with a state warrant to provide access to his phone is

sufficient obstruction of justice to merit denial of acceptance of responsibility." Beattie objected to the PSR recommendations as well, challenging the application of the obstruction of justice enhancement and the denial of the acceptance of responsibility reduction.

The government argued in its sentencing brief that the increase for obstruction of justice was warranted based on Beattie's failure to furnish the passcodes in December 2015. In response, Beattie filed his first motion to compel specific performance of the plea agreement, arguing that the government had breached the agreement by requesting an obstruction of justice enhancement for conduct that occurred prior to the plea proceeding. The government then asserted that although it still adhered "to its general obligation in the Plea Agreement to ask the court to give [Beattie] credit for accepting responsibility," Beattie had engaged in post-plea conduct that called into question his acceptance of responsibility. Specifically, that Beattie had offered expert reports wherein he claimed that he did not remember collecting child pornography. The district court denied Beattie's first motion to compel because the plea agreement did not prohibit the government from advocating for an obstruction of justice enhancement.

In response to the government's reply to his first motion, Beattie filed a second motion to compel, arguing that the government had breached the plea agreement by indicating that Beattie's statements in the expert reports might warrant a denial of an acceptance of responsibility reduction, even though it ultimately recommended acceptance of responsibility. The district court denied Beattie's second motion to compel, stating at the sentencing hearing that "[h]ere, the Government, in its response to the original motion for a specific performance, highlighted aspects of the defenses's case that gave it pause, and yet it continued to recommend acceptance of responsibility."

A probation officer found a powered-on iPhone at Beattie's residence during a routine visit on May 3, 2018. The conditions of Beattie's pretrial release prohibited him from possessing internet-capable devices. Beattie told the probation officer that the iPhone was his fiancée's. The probation officer tried to call Beattie's fiancée, whereupon Beattie confessed that the iPhone was his and that he had found it while packing for his anticipated term of imprisonment. Beattie provided the officer with an unworkable passcode, which prevented the officer from checking its contents. Beattie's father later claimed that the iPhone had been in his possession. Beattie then equivocally claimed that his father had given the iPhone to him and that he may have tried to access it. Beattie's pretrial release was then revoked based on his possession of the iPhone.

During the May 16, 2018, sentencing hearing, the government argued that Beattie should be denied an acceptance of responsibility reduction. The court concluded that Beattie's conduct was inconsistent with acceptance of responsibility and denied the reduction. The district court also concluded that Beattie had obstructed justice. The district court varied downward from the 240-month statutory maximum sentence and imposed a 190-month sentence "to account for [Beattie's] positive aspects in his history and characteristics that are not otherwise accounted for in the guideline[s, and] the brevity of the criminal conduct as highlighted by the defense."

I.

We review *de novo* questions regarding the interpretation and enforcement of plea agreements. United States v. Mosley, 505 F.3d 804, 808 (8th Cir. 2007). "Where a plea agreement has been accepted by the court, we generally interpret the meaning of the terms in the agreement according to basic principles of contract law." Id. If we conclude that the government has breached the plea agreement, the case

should be remanded to a different judge for resentencing. Id. at 812 (citing Santobello v. New York, 404 U.S. 257, 263 (1971)).[2]

Beattie contends that the government first breached the plea agreement in its December 27, 2017, objections to the PSR. Specifically, the government recommended a reduction for acceptance of responsibility but stated that it was ultimately for the court to decide whether Beattie's pre-plea conduct would "merit denial of acceptance of responsibility." Beattie contends that the government's conduct here is similar to that in United States v. Thompson, 403 F.3d 1037, 1040-41 (8th Cir. 2005), wherein we concluded that the government had breached the plea agreement by arguing that the factual stipulations surrounding the defendant's conduct supported the applicability of U.S.S.G. § 2K2.1(c)(1) because of a felony assault, which the government had promised not to argue. Specifically, the prosecutor stated that the facts the defendant admitted "in and of themselves establish felonious assault." Id. at 1038. But unlike Thompson, the government here did not argue that the facts surrounding Beattie's pre-plea conduct *ipso facto* established a denial of acceptance of responsibility. Instead, the government merely noted that the court would ultimately determine whether the facts supported a denial of a reduction for acceptance of responsibility, a declaration that fell short of a breach of the plea agreement.

2 The district court indicated at sentencing that it would have imposed the same sentence regardless of whether it had granted a reduction for acceptance of responsibility or an adjustment for obstruction of justice. In light of our holding that no breach occurred, we need not consider whether our precedent precluding the application of harmless error analysis in breach cases should be reconsidered by the court en banc. See Mosley, 505 F.3d at 810, 811-12.

Beattie next argues that the government breached the plea agreement when it argued for an obstruction of justice enhancement in its sentencing brief. He claims that such conduct amounted to a *de facto* argument against an acceptance of responsibility reduction. The government explained, however, that Beattie's situation was one of the extraordinary cases in which adjustments under both § 3C1.1 and § 3E1.1 may apply. See United States v. McDonald, 826 F.3d 1066, 1072 (8th Cir. 2016) (per curiam) ("Absent extraordinary circumstances, obstruction of justice 'ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct.'" (quoting U.S.S.G. § 3E1.1 cmt. n.4)). We conclude that the government's argument in favor of an obstruction of justice enhancement was not synonymous with an argument against an acceptance of responsibility reduction.

United States v. St. Pierre, 912 F.3d 1137 (8th Cir. 2019), is instructive. In that case, the defendant's plea agreement did not mention an obstruction of justice enhancement under § 3C1.1 but did recommend a reduction under § 3E1.1. Id. at 1141-42. The PSR applied an obstruction of justice enhancement and included an addendum defending its application. Id. at 1142. The government adopted the PSR addendum but asked that the court nonetheless grant a reduction for timely acceptance of responsibility. Id. We held that the government had not breached the plea agreement, because it had fulfilled its promise to recommend the agreed-upon Guidelines range set out in the plea agreement. Id. at 1143. Here, the plea agreement also does not mention § 3C1.1, and the government thus did not breach the plea agreement by arguing for an obstruction of justice enhancement for Beattie's pre-plea conduct, while at the same time adhering to its recommendation for an acceptance of responsibility reduction under § 3E1.1. See United States v. Has No Horses, 261 F.3d 744, 750-51 (8th Cir. 2001) (noting that the government may argue for an obstruction of justice enhancement without necessarily breaching a plea agreement duty to recommend an acceptance of responsibility reduction).

Beattie also argues that, in its response his first motion to compel, the government breached the plea agreement when it suggested that Beattie's comments in the expert reports came "dangerously close" to abrogating the government's duty to recommend acceptance of responsibility, pointing to Beattie's attempts to minimize his criminal conduct by blaming his behavior on his methamphetamine use and stating that he did not remember committing the offense. Notwithstanding this statement, the government continued by "afford[ing Beattie] the benefit of the doubt and adher[ing] to its general obligation . . . to ask the court to give him credit for accepting responsibility." We thus conclude that the government did not breach the plea agreement when it pointed out its right to argue against an acceptance of responsibility reduction for Beattie's post-plea conduct but chose not to assert that right.

Nor did the government breach the plea agreement when it argued against acceptance of responsibility following revocation of Beattie's pretrial release. Beattie's evasive conduct during the probation officer's home visit was sufficient to trigger the exception to the government's duty to argue for an acceptance of responsibility reduction, because Beattie had "fail[ed] to cooperate fully and truthfully with the United States Probation Office."

II.

Beattie next contends that the court erred when it applied a 2-level increase for obstruction of justice under § 3C1.1. We review a district court's interpretation and application of the Guidelines *de novo* and its factual findings for clear error. United States v. Bates, 584 F.3d 1105, 1108 (8th Cir. 2009). "We give great deference to a district court's decision to impose an obstruction of justice enhancement, reversing only when the district court's findings are insufficient." United States v. Cunningham, 593 F.3d 726, 730 (8th Cir. 2010). Section 3C1.1 of the Guidelines

provides that a violation requires proof that the defendant (1) "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction"; and (2) that "the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense." Such obstruction may include "providing materially false information to a probation officer in respect to a presentence or other investigation for the court." U.S.S.G. § 3C1.1 cmt. n.4(H).

The district court found that Beattie first obstructed justice when, in response to a warrant, he provided incorrect passcodes to his iPhone and iPad in December 2015. Beattie contends that the furnishing of passcodes was testimonial and that he was asserting his Fifth Amendment privilege against compelled self-incrimination. But the court did not clearly err when it found that, in light of his similar post-plea conduct, Beattie was not honestly unable to recall the passcodes. United States v. Lange, 918 F.2d 707, 709 (8th Cir. 1990) ("There is no constitutional right to lie."). Furthermore, Beattie's failure to provide correct passcodes impeded the investigation into his possession of child pornography. The district court thus did not err in determining that Beattie's December 2015 conduct obstructed justice and warranted an increase under the Guidelines.

The court also concluded that Beattie obstructed justice by lying to the probation officer about the iPhone that he possessed in violation of the conditions of his pretrial release. Beattie argues that his lie was not related to the instant offense of his conviction, as in United States v. Galaviz, 687 F.3d 1042, 1043 (8th Cir. 2012), wherein the defendant, after he had pleaded guilty, conspired to murder a confidential informant from his case. We concluded that the defendant "could not have intended to obstruct justice 'with respect to the instant offense' by plotting to kill [the informant] unless he thought that [the informant] was going to testify against him at sentencing." Id. Here, in contrast, the probation officer's findings regarding the iPhone could have

been used against Beattie during sentencing. We conclude that by providing false information about possessing a device with internet capability—conduct he knew was forbidden—Beattie committed a willful obstruction of the administration of justice related to his sentencing. See United States v. St. James, 38 F.3d 987, 988 (8th Cir. 1994) (concluding that defendant's materially false statements to a pretrial services officer investigating the defendant's pretrial release warranted an obstruction of justice enhancement).

Beattie also argues that his false statement to the probation officer was not material. He cites United States v. Yell, 18 F.3d 581, 583 (8th Cir. 1994), in which we concluded that the defendant's false statement to a probation officer was not material and did not merit an obstruction of justice enhancement under § 3C1.1. But in Yell, the defendant first was truthful about the information, then he briefly lied to the probation officer, then subsequently corrected the inconsistency. Id. Here, Beattie lied initially about the iPhone's owner and subsequently told multiple different stories about the phone. Beattie's false statement was thus material and warranted an obstruction of justice enhancement.

III.

Beattie contends that the district court also erred when it denied him a reduction for acceptance of responsibility. "Whether the defendant accepted responsibility is a factual question that depends largely on credibility assessments made by the sentencing court. This Court gives great deference to the district court's denial of a request for a reduction for acceptance of responsibility and reviews the decision for clear error." United States v. Vega, 676 F.3d 708, 723 (8th Cir. 2012) (quoting United States v. Ayala, 610 F.3d 1035, 1036 (8th Cir. 2010) (per curiam)).

In denying an acceptance of responsibility reduction, the district court pointed to the false information Beattie furnished to his probation officer. As explained above, conduct amounting to an obstruction of justice ordinarily signals that a defendant has not accepted responsibility, absent extraordinary circumstances. McDonald, 826 F.3d at 1072. We conclude that this case does not present the extraordinary circumstance needed for both an acceptance of responsibility reduction and an enhancement for obstruction of justice. In addition to his false statements, Beattie minimized his conduct by placing blame on his methamphetamine use and claiming that he could not remember collecting child pornography, conduct which is inconsistent with acceptance of responsibility. See United States v. Zeaiter, 891 F.3d 1114, 1123-24 (8th Cir. 2018); see also United States v. Johnson, 22 F. App'x 646, 646-47 (8th Cir. 2001) (unpublished) (affirming the denial of an acceptance of responsibility reduction in a child pornography case "because [the defendant] continued to minimize his acts and describe them in a way that was both unbelievable and very self-serving" and "people with [the defendant's] sexual tendencies typically minimize their behavior").

The judgment is affirmed.

GRUENDER, Circuit Judge, dissenting.

I would hold that the Government breached the plea agreement on December 27, 2017 when it invited the district court to consider denying Beattie a reduction for acceptance of responsibility on the basis of his alleged pre-plea obstruction of justice. Accordingly, I would vacate his sentence and remand for resentencing before a different judge. *See United States v. Mosley*, 505 F.3d 804, 809-12 (8th Cir. 2007).

While "[c]ontract principles often provide a useful means by which to . . . ensure the defendant what is reasonably due to him in the circumstances," a plea

agreement "is not simply a contract between two parties." *United States v. Norris*, 486 F.3d 1045, 1048 (8th Cir. 2007). "Plea agreements are an essential component of the administration of justice, and fairness is presupposed in securing such agreements." *United States v. Mitchell*, 136 F.3d 1192, 1194 (8th Cir. 1998) (internal quotation marks omitted). Thus, technical adherence by the Government to promises it makes in plea agreements is not enough. *Id.* The Government must also uphold the "spirit" of those promises. *Id.*; *see also United States v. Vennes*, 103 F. Supp. 3d 979, 992 (D. Minn. 2015) (noting that the Government "cannot take steps amounting to an end run around the [plea] agreement").

Here, the Government promised to recommend that Beattie "receive credit for acceptance of responsibility under USSG § 3E1.1." The Government reserved the right to oppose such a reduction only if "after the plea proceeding Defendant obstructs justice, fails to cooperate fully and truthfully with the United States Probation Office, attempts to withdraw Defendant's plea, or otherwise engages in conduct not consistent with acceptance of responsibility." On December 27, 2017, the Government purported to adhere to its promise by recommending a reduction for acceptance of responsibility but then added that "[t]he court will have to determine whether the defendant's refusal to comply with a state warrant to provide access to his phone is sufficient obstruction of justice to merit denial of acceptance of responsibility."

This statement involved more than "merely not[ing] that the court would ultimately determine whether the facts supported a denial of a reduction for acceptance of responsibility." *Ante*, at 6. Rather, the Government affirmatively directed the district court to consider specific facts that undermined the Government's promise to recommend the acceptance of responsibility reduction. Specifically, the Government's statement implied that Beattie's alleged refusal to comply with a warrant for access to his phone could be a "sufficient obstruction of justice to merit

denial of acceptance of responsibility." But Beattie's alleged refusal to comply with the warrant for access to his phone occurred *before* the plea proceedings. And the plea agreement only gave the Government the right not to recommend a reduction for acceptance of responsibility on the basis of an obstruction of justice if that obstruction occurred *after* the plea proceeding. Thus, while the Government purported to recommend a reduction for acceptance of responsibility, it nonetheless invited the district court to deny a reduction on the basis of an alleged pre-plea obstructive act. I would hold that this was, at the very least, a violation of the "spirit" of the plea agreement. *See Mitchell*, 136 F.3d at 1194.

Accordingly, I would vacate Beattie's sentence and remand for resentencing before a different judge. This is the proper remedy regardless of whether the Government was subsequently entitled to oppose a reduction for acceptance of responsibility on the basis of Beattie's post-plea conduct. *See Mosley*, 505 F.3d at 810 (holding that "the government's breach of the plea agreement is not subject to traditional harmless-error analysis").

APPENDIX B- Court of appeals opinion denying rehearing

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2197

United States of America

Appellee

v.

Nicholas Gilbert Beattie

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:17-cr-00017-RGE-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

May 21, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____/s/ Michael E. Gans