

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS GILBERT BEATTIE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in determining that, in the circumstances of this case, the government did not breach its obligation under the plea agreement to recommend an acceptance-of-responsibility reduction under Sentencing Guidelines § 3E1.1, when it recommended a three-level reduction while noting that the district court would ultimately determine whether a reduction was warranted, and later observed that certain post-agreement conduct came close to relieving the government of its recommendation obligation.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Beattie, No. 17-cr-17 (May 16, 2018)

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

United States v. Beattie, No. 18-2197 (Apr. 1, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 919 F.3d 1110.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2019. A petition for rehearing was denied on May 21, 2019 (Pet. App. 14a). The petition for a writ of certiorari was filed on August 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted on one count of receiving visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2) and (b)(1). Pet. App. 1a; Judgment 1. The district court sentenced petitioner to 190 months of imprisonment, to be followed by 20 years of supervised release. Pet. App. 1a-2a; Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-13a.

1. On November 16, 2015, a concerned citizen notified law enforcement that someone under the username "incestlvr87" -- later revealed to be petitioner -- had posted in an online chatroom a 53-second video of an adult performing a sex act on an infant. Presentence Investigation Report (PSR) ¶ 10. Between November 17 and November 19, the concerned citizen and petitioner exchanged numerous messages in which petitioner proposed starting an "incest family" with her and discussed his desire to "mak[e] love to [his] kids." PSR ¶¶ 11-13. Law enforcement traced the communications to a cell phone and computer belonging to petitioner. Ibid.

Law enforcement executed search warrants at petitioner's place of business and at his home, where they seized numerous electronic devices, including an iPhone and an iPad. PSR ¶¶ 14-15. After law enforcement obtained an additional search warrant to require petitioner to provide his passcode to open the seized

iPhone and iPad, petitioner "provided a series of incorrect numbers." PSR ¶ 15. Forensic analysis of the other seized electronic devices revealed a total of 30 videos (in addition to the one that petitioner had posted online) and 20 images of child pornography, including depictions of additional prepubescent children being forced to engage in sexual acts. PSR ¶¶ 16-19.

2. A grand jury in the United States District Court for the Southern District of Iowa charged petitioner with one count of receipt of visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2) and (b)(1); and one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Indictment 1-2. Petitioner and the government entered into a plea agreement, under which petitioner agreed to plead guilty to the receipt count and the government agreed to dismiss the possession count. Plea Agreement 1-12.

The plea agreement provided as follows with respect to petitioner's acceptance of responsibility:

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

Plea Agreement 4. In a neighboring provision, the agreement specified that the parties "may make whatever comment and evidentiary offer they deem appropriate at the time of sentencing and entry of plea, provided that such offer or comment does not violate any other provision" of the agreement. Id. at 5. And it observed that "the sentencing judge [wa]s not required to accept any factual or legal stipulations agreed to by the parties." Ibid. The agreement contained no provisions regarding the calculation of petitioner's total offense level under the Sentencing Guidelines, and it contained no provisions regarding any enhancement for obstruction of justice under Sentencing Guidelines § 3C1.1. The district court accepted the plea agreement. D. Ct. Doc. 45 (Nov. 14, 2017).

In its presentence report, the Probation Office applied a two-level increase under Section 3C1.1 to petitioner's offense level for obstruction of justice "based on [petitioner's] failure to disclose correct passcodes" for his iPhone and iPad, and applied no credit for acceptance of responsibility under Section 3E1.1. Pet. App. 3a; see PSR ¶¶ 34, 37. The government responded to the presentence report explaining that it "adhere[d] to its agreement to recommend a 3-level reduction for acceptance of responsibility" under Section 3E1.1. Pet. App. 3a; see Gov't Objections to PSR 1. The government did not address the obstruction of justice enhancement under Section 3C1.1, but stated 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 a sufficient obstruction of justice to merit denial of acceptance of responsibility." Gov't Objections to PSR 1 (citing Sentencing Guidelines § 3E1.1, comment. (n.4)). Petitioner responded to the presentence report by "object[ing] to the assertion that he failed to comply with the search warrant," contending that he had attempted to unlock his phone using its "fingerprint detection capability" as well as "all the numerical codes he could remember." Def. Objections to PSR 2-3; see Addendum to PSR 2.

In a subsequent sentencing memorandum, the government again noted that petitioner had "refused to unlock his cell phone, both before and after law enforcement had a warrant requiring him to do so," but emphasized that he "nevertheless[] admitted his offense conduct after he was charged," Gov't Sent. Mem. 2. The government accordingly maintained that "this [was] one of those 'extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1,'" for obstruction of justice and for acceptance of responsibility, "'may apply.'" Ibid. (quoting Sentencing Guidelines § 3E1.1, comment. (n.4)).

3. Petitioner thereafter filed a motion to compel specific performance of the plea agreement. The motion contended that the government's argument in favor of an obstruction of justice enhancement was "based on facts well known to the Government before

the plea agreement and entry of [petitioner's] guilty plea," and was therefore "an implicit breach of the plea agreement." Def. Mem. in Supp. of Mot. for Specific Performance 3.

In response, the government noted that the plea agreement included no provisions with respect to obstruction of justice under Section 3C1.1, and that it continued to recommend a reduction in petitioner's Guidelines range under Section 3E1.1, in accordance with the plea agreement. Gov't Resp. to Mot. for Specific Performance 1-2. The government also noted that the plea agreement contained an exception to the government's obligation to request an acceptance of responsibility reduction if petitioner engaged in post-plea conduct inconsistent with the acceptance of responsibility, and it brought to the court's attention two of petitioner's filings in which he appeared to argue that his offense conduct was at least in part a result of his methamphetamine use and that he could not recall portions of his offense conduct. Id. at 2-3. The government maintained, however, that "[n]otwithstanding" those filings, which came "perilously near to engaging in conduct not consistent with acceptance of responsibility," it "afford[ed] [petitioner] the benefit of the doubt and adhere[d] to its general obligation in the Plea Agreement to ask the court to give him credit for accepting responsibility." Id. at 3-4.

The district court denied petitioner's motion to compel, explaining that the government's "advocacy [was] not in conflict with the plea agreement," which "contain[ed] no statement of * * * either party's position as to an obstruction-of-justice enhancement." 5/7/18 D. Ct. Order 6.

4. Petitioner then filed a second motion to compel specific performance. He argued that the government's response to the first motion to compel had effectively argued against an acceptance of responsibility reduction, and that its "statement that it w[ould] stand by its obligations under the plea agreement is but 'lip service' to its obligation." Def. Mem. in Supp. of Second Mot. for Specific Performance 3.

In the meantime, during a routine pre-trial visit to petitioner's residence, a probation officer discovered an iPhone, which petitioner was not permitted to possess under the terms of his pre-trial release. Pet. App. 5a. Although petitioner initially told the officer that it was his fiancée's, he subsequently admitted that the phone belonged to him, but provided only inaccurate passcodes to the probation officer -- preventing the officer from accessing the contents of the phone. Ibid. Following those events, the government filed a supplemental sentencing memorandum, in which it argued for the first time that petitioner's post-plea conduct rendered petitioner ineligible for

an acceptance of responsibility reduction. Gov't Supp. Sent. Mem. 3-4; see Sent. Tr. 11-12.

At the sentencing hearing, the district court found that petitioner's post-plea conduct related to the iPhone "clearly" permitted the government to argue against an acceptance of responsibility reduction under the plea agreement. Sent. Tr. 14. The court thus denied petitioner's second motion to compel specific performance of the plea agreement. Id. at 15-16.

The district court further determined that petitioner's conduct was, in fact, inconsistent with acceptance of responsibility under Section 3E1.1 and that petitioner had obstructed justice under Section 3C1.1. Sent. Tr. 67-69, 79-80. It thus accepted the guidelines calculations in the presentence report. Id. at 80. After hearing from counsel and petitioner, the court sentenced petitioner to a below-Guidelines sentence of 190 months of imprisonment. Sent. Tr. 100; see Judgment 2-3. The court noted that the 190-month sentence was "the same sentence [it] would have given whether or not [it] granted a reduction for acceptance of responsibility or an adjustment for obstruction of justice." Sent. Tr. 101.

5. The court of appeals affirmed. Pet. App. 1a-11a. The court rejected petitioner's argument that the government breached the plea agreement either when it (1) recommended an acceptance of responsibility reduction in response to the presentence report but

noted that the district court would ultimately decide whether petitioner's pre-plea conduct warranted such a reduction; (2) argued in favor of an obstruction of justice enhancement in its sentencing memorandum, in conjunction with an acceptance-of responsibility reduction; or (3) noted in response to petitioner's first motion to compel that petitioner's sentencing filings came "dangerously close" to releasing the government from its obligation to request a reduction for acceptance of responsibility. Id. at 6a-8a.

With respect to the first alleged breach, the court of appeals explained that "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." Pet. App. 6a. With respect to the second alleged breach, the court reasoned 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." Id. at 7a. And with respect to the third alleged breach, the court explained that the government had only "pointed out its right to argue against an acceptance of responsibility reduction for [petitioner's] post-plea conduct," and that it did not breach the plea agreement when it "chose not to assert that right." Id. at 8a.

Judge Gruender dissented. Pet. App. 11a-13a. In his view, the government's initial response to the presentence report "was, at the very least, a violation of the 'spirit' of the plea agreement." Id. at 13a (citation omitted).

ARGUMENT

Petitioner renews his contentions (Pet. 6-15) that the government breached the plea agreement when it stated in response to the presentence report that the district court would have to decide whether petitioner's pre-plea conduct warranted the denial of an acceptance of responsibility reduction to the guidelines range and when it asserted in its initial sentencing memorandum that petitioner's post-plea conduct came "dangerously close" to releasing the government from its obligation to recommend such a reduction. Pet. 7 (citation omitted). The court of appeals correctly rejected those contentions. Its factbound determinations do not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that the government complied with its obligations under the plea agreement in this case. "[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). The determination whether the government violated any particular

plea agreement by not fulfilling such a promise involves a case-specific inquiry into the terms of that agreement and the specific conduct at issue. See United States v. Benchimol, 471 U.S. 453, 455 (1985) (per curiam) (summarily reversing a court of appeals decision for “read[ing] into” a plea agreement an “implied-in-law” requirement to “enthusiastically” make an agreed-upon sentencing recommendation). Because plea agreements are contractual in nature, courts “begin [their] analysis as [they] would with any contract” by “examin[ing] first the text of the contract.” United States v. Gebbie, 294 F.3d 540, 545 (3d Cir. 2002); see also United States v. Mosley, 505 F.3d 804, 808 (8th Cir. 2007); United States v. Hahn, 359 F.3d 1315, 1324-1325 (10th Cir. 2004) (en banc) (per curiam), cert. denied, 555 U.S. 891 (2008).

Here, the government promised in the plea agreement “to recommend that [petitioner] receive credit for acceptance of responsibility under [Sentencing Guidelines] §3E1.1,” unless “after the plea proceeding [petitioner] obstruct[ed] justice, fail[ed] to cooperate fully and truthfully” with the Probation Office, “attempt[ed] to withdraw [his] plea, or otherwise engage[d] in conduct not consistent with acceptance of responsibility.” Plea Agreement 4. The government’s conduct in the district court complied with that promise. Petitioner contends (Pet. 6-8) that the government breached the agreement first in its response to the presentence report and “went into undeniable full

breach status" through its response to petitioner's first motion to compel specific performance. Pet. 7. Neither contention has merit.

In its response to the presentence report, the government "merely noted" in one sentence "that the [district] court would ultimately determine whether the facts supported a denial of a reduction for acceptance of responsibility" while nevertheless recommending such a reduction, as the plea agreement obligated it to do. Pet. App. 6a; see Gov't Objections to PSR 1. Although Judge Gruender described the government's filing as "affirmatively direct[ing] the district court to consider specific facts" -- namely, petitioner's pre-plea refusal to comply with the search warrant -- that undermined the government's recommendation, Pet. App. 12a, the draft presentence report to which the government was responding had itself already identified those facts as the basis for denying an acceptance of responsibility reduction. See PSR ¶¶ 22-23.

Later, in response to petitioner's first motion to compel, the government briefly discussed petitioner's post-plea conduct, which it described as coming close to "conduct not consistent with acceptance of responsibility," such that it would have been relieved from its obligation to recommend an acceptance of responsibility reduction. Gov't Resp. to Mot. for Specific Performance 2 (quoting Plea Agreement 4). But the government

ultimately “afford[ed] [petitioner] the benefit of the doubt” and adhered to its position that an acceptance of responsibility reduction was appropriate. Id. at 4. While petitioner argues (Pet. 7) that the government’s discussion of his post-plea conduct “undeniabl[y]” breached the plea agreement, the plea agreement contained no provision precluding the government from making reference to such post-plea conduct. Indeed, the agreement expressly reserved the parties’ rights to “make whatever comment * * * they deem[ed] appropriate at the time of sentencing and entry of plea,” as long as the comment “d[id] not violate any other provision” of the plea agreement. Plea Agreement 5. The court of appeals thus correctly declined to read into the agreement a requirement not to mention any such post-plea conduct, and petitioner’s factbound arguments to the contrary do not warrant this Court’s review. Cf. Benchimol, 471 U.S. at 455 (noting that “in a particular case,” the government may well “commit itself to ‘enthusiastically’ mak[ing] a particular recommendation,” but refusing to imply such an obligation).

2. Petitioner does not identify (Pet. 12-15) any decision of another court of appeals finding a breach of a plea agreement in similar circumstances.

Petitioner principally argues (Pet. 12-13) that the court of appeals “disregard[ed]” its own prior decisions in United States v. Thompson, 403 F.3d 1037 (2005), and in United States v. DeWitt,

366 F.3d 667 (2004). But in Thompson, the government did not merely point out that the district court would ultimately be required to determine the applicable guidelines range, it argued that the parties' factual stipulations in the plea agreement affirmatively established the grounds for a base offense level higher than the base offense level that the parties had agreed upon. See 403 F.3d at 1038 (recounting the prosecutor's statement that the "things that the defendant admitted in the plea agreement * * * in and of themselves establish felonious assault"). And in DeWitt, the government initiated the presentation of evidence inconsistent with the parties' factual stipulations concerning the relevant drug quantities. 366 F.3d at 669-670. As the court of appeals expressly recognized with respect to Thompson, see Pet. App. 6a, the circumstances of this case are markedly different.

Here, the government never argued that the pre-plea conduct established the basis for denying an acceptance of responsibility reduction, nor did it offer any evidence contrary to its own factual stipulations. Instead, prior to petitioner's post-plea obstruction of justice, the government maintained its position that an acceptance of responsibility reduction was appropriate, Gov't Objections to PSR 1, and simply argued that "this [was] one of those 'extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1,'" for obstruction of justice and for acceptance of responsibility, "'may apply,'" Gov't Sent. Mem. 2 (quoting

Sentencing Guidelines § 3E1.1, comment. (n.4)). In any event, this Court does not generally grant review to resolve claims of intra-circuit conflict, see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam), and no reason exists to do so here.

The two other court of appeals decisions on which petitioner relies (Pet. 14-15) likewise involve circumstances unlike the ones here. In each of those case, unlike this one, the government at sentencing expressed an affirmative disagreement with a promise it had previously made in a plea agreement. In United States v. Grandinetti, 564 F.2d 723 (1977), the Fifth Circuit found that the government had breached a plea agreement requiring it to recommend concurrent sentences when it stated at sentencing that it had "very serious problems" with the agreed-upon disposition and that it was "not too sure of the legality * * * nor the propriety" of it. Id. at 725. And in United States v. Brown, 500 F.2d 375 (1974), the Fourth Circuit found that the government had breached a plea agreement requiring it to recommend a particular sentence when it stated at sentencing that it "ha[d] some problems with" the very sentence it had agreed to recommend. Id. at 377.

Here, in contrast, the government never expressed any similar reservations or concerns with the agreement it entered into in this case. And neither decision on which petitioner relies suggests that those circuits would find that the government failed to fulfill the obligations imposed by the plea agreement in the

particular circumstances presented here. See, e.g., United States v. Casillas, 853 F.3d 215, 217 (5th Cir.), cert. denied, 138 S. Ct. 205 (2017) (finding no breach where the government “recommended a role reduction but subsequently put on argument and supporting evidence that undermined that recommendation”); United States v. Olislager, 439 Fed. Appx. 275, 278 (4th Cir. 2011) (per curiam) (noting that “no breach occurs as long as [the] Government’s recommendation (‘however grudgingly’) occurs before sentencing”) (citation omitted). No further review of petitioner’s factbound claim is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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