
No. _____

In the
Supreme Court of the United States

DAVID JOSEPH BUNEVACZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

The calculations in David Joseph Bunevacz's plea agreement generated a Sentencing Guidelines range of 78-108 months. The 210-sentence imposed by the district court resulted from various breaches by the government. Among other breaches, the government requested legally invalid Guidelines enhancements which violated the express language of the Guidelines. While rejecting the government's proposed enhancements as legally invalid, the district court nonetheless employed the government's rationales to impose upward variances under *United States v. Booker*, 543 U.S. 220 (2005) (which upward variances the government was prohibited from requesting under the plea agreement). Furthermore, the district court departed upward in criminal history category after the government presented invalid bases for doing so, including by asking the court to depart upward based upon alleged business disputes in the Philippines which were characterized as "rumor," "gossip" and "chatter" in the entertainment blogs relied upon by the government.

The government's breaches signaled to the district court that the government did not support the low-end sentence that it was contractually obligated to recommend. The government's arguments were not made in good faith to advance the objectives of the plea agreement, but to obtain a higher sentence than authorized by the plea agreement.

The questions presented are:

1. Whether petitioner David Joseph Bunevacz's convictions should be reversed because the government breached the plea agreement, in violation of this Court's admonition in *Santobello v. New York*, 404 U.S. 257, 262 (1971), that when a plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled.
2. Whether the Ninth Circuit's decision conflicts with decisions in other Circuit Courts, which have held that conduct such as the government's in this case constitutes a breach of the plea agreement requiring reversal.

RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

United States v. Bunevacz, No. 22-50295

Unpublished Memorandum disposition affirming Bunevacz's convictions
and sentence filed on July 22, 2024 (App. 2)

Order denying petition for rehearing and rehearing en banc filed on
November 1, 2024 (App. 1)

United States District Court for the Central District of California

United States v. Bunevacz, No. 22-CR-175-DSF

Judgment and Commitment Order filed on November 21, 2022 (App. 6)

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PETITION FOR WRIT OF CERTIORARI

David Joseph Bunevacz petitions for a writ of certiorari to review the judgment and Memorandum decision of the United States Court of Appeals for the Ninth Circuit in his case.

OPINIONS BELOW

The Ninth Circuit's Memorandum decision in *United States v. Bunevacz*, No. 22-50295, was not published. (App. 2) The district court's Order in *United States v. Bunevacz*, Central District of California Case No. 22-CR-175-DSF, also was not published. (App. 6)

JURISDICTION

The Ninth Circuit issued its Memorandum decision affirming the district court judgment on July 22, 2024. (App. 2) The Ninth Circuit issued its order denying rehearing and rehearing en banc on November 1, 2024. (App. 1) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U.S.S.G. §3C1.1

U.S.S.G. §4A1.1

U.S.S.G. §4A1.3

These provisions are included in Appendix D. (App. 13)

STATEMENT OF THE CASE

A. Indictment

Alleging securities fraud and wire fraud, the indictment claimed that from 2010 to 2022, Bunevacz controlled and solicited investments in various business entities that he represented were in the business of selling vape pens containing cannabis products. In fact, the indictment claimed, the businesses were sham. (ER-272-78)

B. Guilty Plea

Within a month after appointment of counsel, Bunevacz pleaded guilty. In the plea agreement, Bunevacz and the USAO agreed to the following Sentencing Guidelines factors: base offense level 7; a 22-level enhancement for loss between \$25-65,000,000; a two-level enhancement for more than ten victims; and a three-level reduction for acceptance of responsibility. With criminal history category I, those factors would generate a Sentencing Guidelines range of 78-97 months.

The parties reserved the right to argue that additional specific offense characteristics, adjustments and departures under the Sentencing Guidelines were appropriate. The government reserved the right to seek an enhancement for substantial financial hardship to five or more victims. (ER-

254) The government agreed to recommend a sentence at the low-end of the Sentencing Guidelines range. (ER-245)

C. Sentencing

1. PSR and Sentencing Recommendation Letter

Offense Level Computation. During the federal offense from 2010-2022, Bunevacz was convicted in LASC Case No. BA449456 for unlawful sale of a security in 2017. The PSR found that LASC BA449456 constituted relevant conduct under §1B1.3. Both cases involved using various means to cause investors to invest in and purchase false securities in the same fraudulent companies. In the state case, Bunevacz was sentenced to probation and one year in jail. The jail term was stayed because Bunevacz paid \$273,000 in restitution to investors. (CSD-146-49)

The PSR stated that actual loss was \$35,795,932 from Bunevacz' conduct in both the instant offense and relevant conduct in LASC BA449456. (CSD-149) The PSR calculated offense level 32, based upon base offense level 7; a 22-level enhancement for loss between \$25-65,000,000; a four-level increase for substantial financial hardship to five or more victims; a two-level increase for sophisticated means; and a three-level deduction for acceptance of responsibility. (CSD-149-151)

Criminal History. The PSR calculated that Bunevacz had zero criminal history points, establishing criminal history category I. (CSD-152-

55) The PSR stated that the government provided information that Bunevacz was “possibly involved in other criminal conduct while in the Philippines.”¹ (CSD-155-56)

Offense level 32 and criminal history category I generated a Sentencing Guidelines range of 121-151 months. The probation officer recommended 151 months.

2. Government’s Sentencing Position

The government sought various additional sentence increases. The government agreed with the PSR that the state offense constituted relevant conduct. However, the government sought an enhancement for obstruction of justice under §3C1.1, on the ground that Bunevacz avoided jail in the state offense by using new criminal proceeds to pay restitution to state court investors. (ER-193-98)

The government further contended that Bunevacz’ commission of the federal offense while serving a state probationary sentence warranted an upward departure in criminal history category. The government observed

¹ The government’s source was the article “PEP SCOOP” in the Philippine Entertainment Portal blog, and a Dubai blog. The PEP blog cited unsourced “rumors,” “murmurings” and “chatter.” The blogs contained no indication of any official investigation into, arrest of, or charges against Bunevacz. (ER-201 n.2)

that the court could not depart upward to reflect Bunevacz' conviction for his state securities offense. However, the government claimed, were it not relevant conduct, the state securities conviction would have resulted in three criminal history points: one point under §4A1.1(c) for a sentence of less than sixty days; and two points under §4A1.1(d) (status points)² for "commit[ing] the instant offense while under any criminal justice sentence." The government argued that the court should therefore find that defendant's criminal history warranted an upward departure to category II. (ER-196-97; ER-201)

The government contended that an upward departure to Bunevacz' criminal history was also appropriate because "press reports" alleged that Bunevacz scammed business partners in a cosmetic surgery clinic in the Philippines.³ (ER-201-02)

² In 2023, status points were retroactively deleted from the Sentencing Guidelines, after Commission research determined they had no predictive value. Accordingly, were the state court case not relevant conduct, Bunevacz' criminal history category would remain unchanged. Thus the government's claim was meritless.

³ The "press reports" identified by the government were actually two entertainment blogs peddling gossip, murmurings and chatter. (ER-201-02, nn.2-3)

The government argued that Bunevacz' offense level was 34, comprised of base offense level 7; plus 22 for loss between \$25-65,000,000; plus four for substantial financial hardship; plus two for sophisticated means; plus two for obstruction of justice; minus three for acceptance of responsibility. The government contended that the court should depart upward to criminal history category II, resulting in a Sentencing Guidelines range of 168-210 months imprisonment. The government requested a low-end sentence of 168 months. (ER-92-95)

The government told the court that Bunevacz had made opulent expenditures with victim funds. The government quoted extensively from the victim statements. The government told the court the seriousness of the offense could not be captured in mere dollars and cents. The government argued that the wounds inflicted by Bunevacz caused the same harm associated with violent crimes, and that Bunevacz "caused these harms at a scale rarely seen." Quoting the victims at length, the government characterized Bunevacz as insatiably greedy, remorseless, the worst human being, particularly evil, deeply malevolent, selfish, and willing to hurt others. (ER-92-105)

3. Bunevacz's Sentencing Position

Based upon the plea agreement calculations, plus the sophisticated means enhancement recommended in the PSR, the defense calculated offense level 30 and criminal history category I, generating an advisory Guidelines range of 97-121 months. The defense requested a sentence of 87 months.

The defense refuted the government's request for an enhancement for obstruction of justice under §3C1.1. The government had not even tried to explain how its argument complied with the language of the Guideline, which required the defendant to obstruct the *instant federal case*. (ER-115-17)

And the government's contention that the court should depart upward in criminal history category under §4A1.3 similarly violated the language of the very Guideline relied upon by the government. (ER-117-18)

Although the government asked the court to consider alleged criminal conduct in the Philippines, the only "evidence" were two blogs quoting unnamed individuals about an alleged business dispute. Bunevacz was never charged or arrested. Accordingly, it would violate Ninth Circuit precedent to consider this dispute. (ER-118-19)

4. Victim Statements Submitted by Government

The government submitted voluminous victim statements, including a lengthy statement from GH (CSD-118-20), who indisputably suffered no pecuniary loss from the offense or related conduct. The government asked the

victims to complete Victim Impact Statement forms in which they were directed to tell the court their thoughts on sentencing the defendant and any other information they would like the court to consider in imposing sentence. Thus the victims did not limit their statements to the impact on the victims, but also opined about Bunevacz and the appropriate sentence. For example, the victims gave their lay opinions on Bunevacz' psychology (e.g., sociopathic, malevolent, evil), told the court he would never be rehabilitated and would do it again if released, and asked the court to sentence him to the maximum possible sentence so he would never be released and would "rot in Hell!" (CSD-5-6, CSD-56-61, CSD-79-105, CSD-118-29)

5. Addendum to the PSR

The probation officer rejected the government's request for a two-level increase for obstruction of justice, on the ground that §3C1.1 provided for an increase only if the defendant willfully obstructed the sentencing "of the instant offense of conviction." Bunevacz' obstructive actions related to his sentencing in his state case, not the instant offense of conviction. (CSD-112)

The probation officer similarly rejected the government's request for an upward departure in criminal history category. Bunevacz' prior criminal history did not fall within any of the factors listed in §4A1.3(a)(2). Additionally, the government had not submitted any information that there

had been a criminal filing in the Philippines. LASC BA449456 was captured in the offense conduct section, as it was considered relevant conduct.

Criminal history category I was reserved for defendants with no-to-limited criminal history, which was appropriate here because Bunevacz did not have a lengthy criminal history outside of his misconduct related to the instant fraud case. (CSD-113)

6. Sentencing Hearing

The government reiterated its arguments for upward departures without addressing the probation officer's and defense's refutation thereof. (ER-23-24) The government focused on the "destruction that this defendant has wrought on people's lives." The government told the court that the victims had actually suffered as if they had been victims of a violent offense, as if they had been robbed at gunpoint; the victims experienced trauma, psychological pain and economic destruction. (ER25)

The court asked to hear from the victims. As with the written statements, the victims did not limit their statements to victim impact but also vilified and dehumanized Bunevacz; for example, telling the court he would never be rehabilitated and asking for him to be sentenced to multiple decades of imprisonment with no possibility for appeal or reduction for good behavior. (ER-29-48)

The court declined to impose the government's requested two-level enhancement for obstruction of justice because the first requirement of §3C1.1 was not met. (ER-49-51) Instead, the court imposed a two-level upward variance for obstruction. (ER-63)

The court observed that the government contended that the Guidelines did not limit the court's ability to impose an upward departure in criminal history category for committing the instant offense while under a criminal justice sentence under §4A1.1(d).⁴ The court stated that she agreed with the government that category I substantially underrepresented the seriousness of defendant's criminal history and the likelihood that the defendant would commit other crimes. (ER-51-52)

The court opined that the issue here was very similar to §4A1.3(a)(2)(D), as advocated by the government (ER-197), which suggested that an upward departure was appropriate when defendant was pending trial or sentencing on another charge at the time of the offense. (ER-52) The court relied upon the government's statement that Bunevacz had violated the terms of probation (ER-52-53) [even though the government had offered no information whatsoever regarding the nature of the violation; and whatever

⁴ §4A1.1(d) has been retroactively deleted from the Guidelines.

the violation was, it resulted only in reinstatement of probation under the same terms and conditions (ER-94)].

The Court departed upward to criminal history category II. (ER-53)

Offense level 32 and criminal history category II generated a Guidelines range of 135-168 months. (ER-43-54)

The court concluded that Bunevacz' fraud on the state court [repayment of state investors with federal offense funds] was an extremely aggravating circumstance that compelled a significant upward variance in his sentence. This conduct was so closely related to §3C1.1 that the court concluded that a two-level upward variance was appropriate for this reason alone. (ER-55-57)

The court characterized the victim impact statements as heartbreaking. The enhancement for substantial financial harm was appropriate. But to the extent the Guidelines did not fully capture the seriousness and devastation of financial fraud, the emotional and physical harm, the court found these factors justified another upward variance and a sentence at the high end of the range. (ER-58-59)

The court stated that a four-level upward variance to level 36 and a statutory maximum sentence of 240 months would be reasonable. The court then reduced the sentence to 210 months to account for Bunevacz' acceptance of responsibility. (ER-61-67)

D. Ninth Circuit Memorandum

The Ninth Circuit Memorandum affirmed Bunevacz' sentence.

The Memorandum observed that the plea agreement specifically allowed both parties to “argue [for] additional specific offense characteristics, adjustments, and departures under the Sentencing Guidelines.” There was also no agreement regarding Bunevacz’s “criminal history or criminal history category.” The Memorandum concluded:

“Accordingly, it was not plain error for the government to argue for upward departures, while maintaining its obligation to request a low-end sentence within the applicable guideline range. Cf. [*United States v. Farias-Contreras*, 104 F.4th 22, 30-31 (9th Cir. 2024) (en banc)] (concluding there was no plain error where the government implicitly breached a plea agreement, which required the government to recommend a low-end sentence, by going too far in responding to a defendant’s arguments for a below guidelines sentence).”⁵

⁵ The *Farias-Contreras* Court held that because then-existing precedent was not sufficiently clear, the government’s breach in that case was not plain error. The *Farias-Contreras* Court then “clarif[ied] our law on the subject” of the government’s implicit breach. *Id.* at 30. Accordingly, for cases like Bunevacz’ which were decided after *Farias-Contreras*, the error is plain and requires reversal. *Henderson v. United States*, 568 U.S. 266, 279 (2013).

REASONS FOR GRANTING THE WRIT

A. Bunevacz's Convictions Must Be Reversed Because the Government Breached the Plea Agreement, in Conflict with the Relevant Decisions of this Court

This Court has held that a conviction must be vacated where a prosecutor breaches a plea agreement, emphasizing that “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 262 (1971).

When the government agrees to recommend a certain sentence, the benefit to the defendant is that it presents a "united front" to the court. The idea is that when the sentencing court hears that both sides believe a certain sentence is appropriate and reasonable in the circumstances, this is more persuasive than only the defendant arguing for that sentence. Presenting this "united front" is the defendant's benefit of the plea bargain. The chance that the court will follow the joint recommendation is often the basis upon which defendants waive their constitutional right to trial. *United States v. Camarillo-Tello*, 236 F.3d 1024, 1028 (9th Cir. 2001).

Accordingly, where the government agrees to a sentence, any “attempt by the prosecutor to influence the court to give a higher sentence” is a breach.

United States v. Johnson, 187 F.3d 1129, 1135 (9th Cir. 1999); see also *United States v. Morales Heredia*, 768 F.3d 1220, 1231 (9th Cir. 2014) (the government “may not superficially abide by its promise to recommend a particular sentence while also making statements that serve no practical purpose but to advocate for a harsher one”). In such situations, the government has “implicitly” breached the plea agreement. *Id.* That is what happened here.

As the plea agreement dictated, the government told the court that it recommended a low-end sentence. (ER-24-25; ER-54; ER-105) But as in *Morales Heredia*, while superficially abiding by its promise, the government implicitly advocated for a harsher sentence. The government breached its obligations under the plea agreement by advocating enhancements that had no legal basis and were in fact contrary to the language of the Guidelines. The government’s legally baseless requests induced the court to depart and vary upward to achieve the result sought by the government, which variances the government was prohibited from requesting under the plea agreement. Furthermore, the government urged the district court to assign Bunevacz to a higher *criminal history category*, based upon gossip in an entertainment blog about an *alleged business dispute*.

In seeking invalid enhancements premised upon unreliable evidence, the government’s conduct communicated to the district court that the

government did not support a low-end Guidelines sentence. The government's breaches of the plea agreement deprived Bunevacz of the united front for which he had waived his Constitutional right to trial.

1. The Government's Request for a Two-Level Obstruction of Justice Enhancement Under §3C1.1 Violated the Express Language of the Guideline

The government's request for a two-level obstruction of justice enhancement under §3C1.1 violated the express language of the Guideline (ER-197-99) and for that reason was flatly rejected by the probation officer and the court as legally baseless. (CSD-112-13; ER-50-51) However, the court achieved the increased sentence sought by the government by granting a four-level upward variance, two levels of which were premised upon the finding that the conduct was "closely related to" §3C1.1. (ER-57)

The government defended its conduct by arguing that the plea agreement permitted the government to seek additional departures under the Sentencing Guidelines. (GAB40) The government's argument missed the point. The government's obligations, under the plea agreement and otherwise, prohibit it from seeking enhancements that are legally invalid.

The government's request for an obstruction of justice enhancement under §3C1.1 was summarily rejected by the probation officer and court as legally baseless. Section 3C1.1 requires that the defendant obstruct "the

investigation, prosecution, or sentencing of the instant offense of conviction.”

The government contended that since the state conviction was relevant conduct, then by obstructing the state sentencing, Bunevacz was obstructing the sentencing of the instant offense. (ER-198)

The government’s argument is defeated by the language of §3C1.1, which in different subsections draws a distinction between “the instant offense of conviction” (§3C1.1(1)) and the “offense of conviction and any relevant conduct” (§3C1.1(2)). Thus the language of §3C1.1 provides that subsection (1) does not apply to relevant conduct. The government further ignored the fact that §1B1.1 specifies that when the term “instant” is used in connection with “offense,” it distinguishes the offense of conviction from prior offenses or offenses before another court (e.g., an offense before a state court involving the same underlying conduct).” (§1B1.1, App. Note (I)).

But despite the clear language of the Guideline, the government sought an upward departure under §3C1.1 on the ground that Bunevacz had allegedly obstructed the “state securities conviction” [*not* the instant offense of conviction] by using new criminal proceeds to repay earlier victims of his state securities scheme. (ER-197-98) The government’s request for an enhancement that was contrary to the language of the Guideline is a violation of the government’s obligations. As the Ninth Circuit has held:

“[p]rosecutors are subject to constraints and responsibilities that don't apply to other lawyers. See, e.g., *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). While lawyers representing private parties may - indeed, must - do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules.” *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993). Asking the court to impose an enhancement that is explicitly precluded by the Guidelines language is not staying within the rules.

2. The Government's Request for an Upward Criminal History Departure Under §4A1.3(a)(2)(A) Violated the Express Language of the Guideline

Similarly, the government's request for an upward criminal history departure based upon §4A1.3(a)(2)(A) violated the express language of the Guideline and was rejected by the probation officer and the court. (CSD-113; ER-51-52)

Instead, the court granted the requested upward departure not on the government's proposed ground but under §4A1.3(a)(2)(D). (ER-52)

The government asked the court to impose an upward departure for underrepresentation of criminal history based upon Bunevacz' involvement in

the instant offense while on state court probation. The government conceded that the district court could not depart based upon Bunevacz' state securities conviction. Instead the government contended that the court should depart upward for Bunevacz committing the instant offense while under any criminal justice sentence. Notably, the factor that the government cited was from §4A1.1(d), which by its terms did not apply to Bunevacz' sentencing and which has since been retroactively deleted.

The government relied upon *United States v. McCrudden*, 894 F.2d 338, 339 (9th Cir. 1990). But *McCrudden* invalidated the government's demand for an upward departure. *McCrudden* relied upon the empirical 1987 Sentencing Commission data which formed the original basis for the status points in §4A1.1(d):

“The criminal history factors were adopted to address the concerns of just punishment and deterrence. United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, at 41 (June 18, 1987). These factors reflect the frequency, seriousness and recency of the prior criminal history, and were selected because of their empirical relationship to the likelihood of future criminal behavior.” *Id.*

But subsequent empirical Sentencing Commission data revealed that the 1987 conclusions were erroneous and that status points did not have

predictive value regarding the likelihood of recidivism. For that reason the Sentencing Commission retroactively deleted §4A1.1(d) in 2023. Yet again, the government based its argument on a fallacy.

3. The Government Advocated an Upward Departure in Criminal History Category Under §4A1.1(d), Which the Sentencing Commission Deleted from the Guidelines

The government also advocated an upward departure in criminal history category under §4A1.1(d), which the Sentencing Commission subsequently retroactively deleted from the Guidelines. Since §4A1.1(d) has been retroactively deleted, it cannot be relied upon as a basis for Bunevacz' excessive sentence.

4. The Government Improperly Asked the Court to Depart Upward in Criminal History Category Based Upon Alleged Business Disputes in the Philippines Which Were Touted in an Entertainment Blog as Based Upon "Rumor," Gossip," and "Chatter"

The government improperly asked the court to depart upward in criminal history category based upon alleged business disputes in the Philippines which were hyped as nothing more substantial than "rumor," "gossip" and "chatter" in the entertainment blogs cited by the government (which the government misleadingly characterized as "press reports"). (ER-201-02)

This was improper for two reasons. First, the government misleadingly characterized the source of its information to make it appear reputable.

Second, the government asked for an upward departure based upon gossip about alleged business disputes. Again, the government's position violated the express language of the Sentencing Guidelines, which admonish in all capital letters: "PROHIBITION.--A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement." §4A1.3(a)(3). Here the government's blog did not even rise to the level of an arrest, much less an investigation. It was merely gossip about a dispute. And reliance upon gossip also violated the requirement that sentencing be based upon reliable evidence. It was improper for the government to seek an upward departure based upon rumor, gossip, and chatter. The government produced no evidence, let alone reliable evidence, of criminal conduct.

5. The Government Flooded the Sentencing Process with Inflammatory Characterizations and Rhetoric Regarding Bunevacz

The government's sentencing position spoke at length and inflammatorily about the offense; an unidentified probation violation; the extravagant expenditure of victims' funds; included lengthy prejudicial excerpts from the victim impact statements; described Bunevacz as gaslighting his suffering victims; referenced Bunevacz' alleged "selfishness

and willingness to hurt others”; characterized Bunevacz as malevolent, the worst human being, insatiably greedy, particularly evil, and remorseless; argued that “the seriousness of defendant’s offense cannot be captured in mere dollars and cents”; and stated that Bunevacz caused harm at a scale rarely seen. While paying lip service to a low-end recommendation, in substance the government’s inflammatory rhetoric demanded an above-Guidelines sentence. (ER-92-104)

Furthermore, the government offered inflammatory and improper victim impact evidence, including evidence from GH, who suffered no economic loss whatsoever from the instant offense or relevant conduct. The government sought and presented improper evidence from the victims in which the victims told their court their opinions on Bunevacz and the appropriate sentence.⁶

⁶ Valid victim impact evidence--the evidence of the impact on the victim--has a valuable function at sentencing. However, the types of improper evidence introduced and highlighted by the government included baseless opinions about Bunevacz’ alleged psychology and proposed punishment; e.g., that Bunevacz was a sociopath and was unredeemable; and that Bunevacz should never be allowed out of prison and should rot in hell with no possibility of appeal.

The district court repeatedly and explicitly relied upon the government's aggravating arguments in imposing its excessive sentence. For example, the court stated that the Guideline sentence calculated by the probation officer even with the criminal history category II advocated by the government was insufficient because "As the government points out, lesser sentences do little to dissuade people." (ER-61-62)

In finding that the criminal history category was underrepresented, the court noted that "as the government points out, defendant admitted to violating the terms of his probation" (ER-52), even though there was no evidence regarding the nature of the violation.

In calculating its upward variance, the court relied upon the argument that "as the government points out, the purpose of his fraud was not for some desperate need to help a family member deal with unforeseen medical issues" but to finance an extravagant lifestyle. (ER-58)

In determining the upward variance, the court agreed "with the government that the seriousness of defendant's conduct cannot be captured in mere dollars and cents." (ER-58)

Thus the court relied upon the government's arguments in aggravation to support the court's four-level upward variance from the Sentencing Guidelines range and its upward departure in criminal history category.

In evaluating the government's conduct it must be kept in mind that prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. *Berger v. United States*, 295 U.S. 78, 88 (1935). Prosecutors are required to stay well within the rules. *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993). Asking the court to impose Guidelines enhancements and departures that violate the express language of those Guidelines is not staying well within the rules. Similarly unacceptable is asking the court to depart upwards in criminal history category based upon rumors of a business dispute, where there was no evidence of any criminal proceedings, as well as inflammatory rhetoric.

Equally inappropriate was the government's repeated reference to Bunevacz' probation violation (ER-94, ER-102, ER-196), when the government offered no evidence regarding the nature thereof.

The government argued for departures that were contrary to the law, and therefore were not made in good faith. The Ninth Circuit has held that the government's arguments must be made in good faith and advance the objectives of the plea agreement. *United States v. Farias-Contreras*, 104 F.4th 22, 31 (9th Cir. 2024) (en banc). The Memorandum never addressed Bunevacz' contention that the government violated its obligations when it sought departures that would have violated the law had the court imposed them. When the government requested illegal departures, it violated its

obligation to act in good faith, and it signaled to the district court that the government believed a low-end Guidelines sentence was insufficient. And the court responded by granting the excessive sentence sought by the government through other means, including variances which the government was barred from requesting under the plea agreement.

Consequently, the government breached the plea agreement. Moreover, the breach of the plea agreement constituted plain error, requiring reversal. All four prongs of the plain error test are met here. *United States v. Whitney*, 673 F.3d 965, 970-74 (9th Cir. 2012).

B. The Ninth Circuit Memorandum Conflicts With Decisions Of Other Circuit Courts Of Appeal On The Same Important Matter

The Ninth Circuit Memorandum conflicts with authoritative decisions of other Circuit Courts, that have held that conduct such as the government's in this case constitutes a breach of the plea agreement requiring reversal. (AOB-57-62; ARB-21-31)

For example, in *United States v. Davis*, 105 F.4th 541 (3rd Cir. 2024), the Third Circuit held that this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), and its progeny forbid end-runs around the government's obligations under the plea agreement. The *Davis* Court held that the government breaches the plea agreement when its overall conduct is

inconsistent with what was reasonably understood by the defendant when entering a guilty plea. *Davis*, 105 F.4th at 549.

The *Davis* Court emphasized that because a defendant surrenders several Constitutional rights by entering into a plea agreement, courts must closely scrutinize closely the promises made by the government to determine whether those promises have been fulfilled. In sum, the government must honor the spirit, as well as the letter, of the plea agreement. *Id.*

The *Davis* Court held that the government's comments about the defendant's greed, moral bankruptcy, callousness and contempt for others constituted a transparent effort to influence the severity of the sentence in violation of the plea agreement. According to the *Davis* Court, "when the Government highlights the reprehensibility of the defendant's conduct or extensively criticizes his character, culpability or blameworthiness, it essentially recommends a higher sentence." *Id.* at 550.

The *Davis* Court further held that the government breaches a plea agreement by using victim impact evidence to implicitly support a higher sentence. Although victim-impact evidence does not per se undermine a low-end Guidelines recommendation, where the government has agreed to recommend a low-end sentence, its allocution must align with its recommendation. *Id.* at 551.

Here, as in *Davis*, “The Government's comments highlighting Davis's intent, the reprehensible nature of his crime, and the harm suffered by the victims “could [not] possibly be construed as advocating for the lower half of the [Guidelines] range.” *Id.*

The government here engaged in precisely the violative conduct condemned in *Davis*. The government presented voluminous reprehensible characterizations of Bunevacz, including references to victim and non-victim statements, claiming Bunevacz was selfish, willing to hurt others, malevolent, the worst human being, insatiably greedy, particularly evil, and remorseless. (E.g., AOB-40-44; ER-99-102)

Similarly, in *United States v. Mojica-Ramos*, 103 F.4th 844 (1st Cir. 2024), the First Circuit relied upon this Court’s admonition in *Santobello* that the prosecutor’s agreement in the plea agreement must be fulfilled. Because a defendant waives a panoply of Constitutional rights by pleading guilty, the Court holds prosecutors to the most meticulous standards of promise and performance. *Id.* at 850.

The *Mojica-Ramos* Court held that the government’s submission of uncorroborated evidence of uncharged conduct (images from defendant’s cellphone) constituted a breach of the plea agreement. The sentencing court may not rely upon unproven charges absent proof by a preponderance of the evidence that the defendant engaged in the alleged conduct. In *Mojica-*

Ramos, as here, the government did not attempt to demonstrate by a preponderance of evidence that the defendant was involved in the purported crimes (or, here, that there even was a crime). *Id.* at 852.

The First Circuit held that the government's insistence that the sentencing court consider unproven conduct (in violation of the caselaw limitations on considering uncharged conduct) "signaled to the court that the prosecutor did not genuinely believe that the recommended guidelines sentence was appropriate." The government's violative conduct against Bunevacz was even more egregious; the government asked the district court to depart upward based upon "rumor," "gossip" and "chatter" about alleged business disputes, as well as an unknown probation violation.

The First Circuit held that the government's conduct was a serious and unacceptable misstep. The government's characterization of the offense and the defendant as exceptional violated the plea agreement mandate in *Mojica-Ramos* that the government request a within-Guideline sentence. The Guidelines heartland contemplates a typical or mine-run case. Calling the offense exceptional implied that the government saw the case as falling outside the heartland. Similarly, here the government repeatedly used characterizations placing Bunevacz outside the heartland; e.g., worst human being, insatiably greedy, particularly evil, remorseless, causing harm at a scale rarely seen.

The government in this case engaged in conduct far more egregious than the conduct found violative in *Davis* and *Mojica-Ramos*. For example, in *Davis* and *Mojica-Ramos* the government did not seek legally invalid enhancements and departures, as the government did against Bunevacz. But here the government also did everything that the First and Third Circuits condemned as clear violations of the plea agreement. For example, the government's repeated characterizations of Bunevacz as evil and reprehensible, including by soliciting and employing inflammatory victim-impact evidence to support its malignant characterizations, essentially recommended a higher sentence. Such characterizations signaled to the sentencing court that that the government believed that Bunevacz fell outside the Guidelines' heartland. The government's sentencing submissions presented inflammatory rhetoric improperly suggesting that Bunevacz did not fall within the mine-run of cases warranting a Guidelines sentence. And the government's insistence that the court consider unproven evidence of conduct that was not even a crime, further highlighted the government's implicit demand for an above-Guidelines sentence. (E.g., AOB-60-61, ER-99-102)

Bunevacz surrendered numerous Constitutional rights in pleading guilty, and promptly acknowledging his culpability. In response, the government repeatedly violated Bunevacz' rights under the plea agreement.

By its conduct the government successfully obtained a much higher sentence (210 months) than the sentence contemplated by the plea agreement (78-108 months). The government's breaches of the plea agreement should not be tolerated, and Bunevacz' sentence should be reversed.


CONCLUSION

For the foregoing reasons, Bunevacz respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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