In the United States Court of Appeals
For the Third Circuit

No. 13-3407

UNITED STATES OF AMERICA

vs.

CHRISTOPHER ERWIN,

Appellant.

On petition for rehearing of the Court's judgment dated August 26, 2014

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING BY THE PANEL OR BY THE *EN BANC* COURT

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I. Interest of *Amicus*

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges. NACDL is dedicated to advancing the proper, efficient and just administration of justice, including the administration of criminal law.

NACDL files numerous *amicus curiae* briefs each year in various courts across the country seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal-justice system as a whole. NACDL believes the panel's decision in this case has broad and troubling consequences.[1]

NACDL certifies that all parties have consented to the filing of this brief.

II. Discussion

Common-law principles of contract law generally govern the enforcement of plea agreements. *See United States v. Castro*, 704 F.3d 125, 135 (3d Cir. 2013). They do so, however, within a broader context of constitutional criminal procedure designed to protect defendants' rights. *See United States v. Nolan-Cooper*, 155 F.23d 221, 235-36 (3d Cir. 1998). The Court has recognized that the government has "tremendous bargaining power" in the context of plea agreements so that

[1] *Amicus* certifies that no counsel for any party authored the brief in whole or in part and that no party or its counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus* or its counsel contributed money that was intended to fund preparing or submitting this brief.

courts should "strictly construe" the text of such agreements against the government. *See United States v. Schwartz*, 511 F.3d 403, 405 (3d Cir. 2008); *United States v. Moschalaidis*, 868 F.2d 1357, 1361 (3d Cir. 1989).

A. The Panel erred in relieving the government of its obligation to perform.

Only a *material* breach of a contract will relieve the other party of its duty to perform. *See* Restatement (Second) of Contracts § 241.[2] The restatement sets out a series of factors to consider in determining if a breach was material – the first being "the extent to which the injured party will be deprived of the benefit which he reasonably expected." *Id.* The question of whether a breach is substantial enough to justify suspension of performance by the non-breaching party is a matter of degree and requires consideration of many factors. *See Magnet Res., Inc. v. Summit MRI, Inc.*, 723 A.2d 976, 981 (N.J. App. Div. 1998).

The Panel did not address whether Mr. Erwin's purported breach was "material" so as to relieve the government of its obligation to file the Section-5K1.1 motion.[3]

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[2] The case law provides no clear guidance regarding what should be the source of a federal court's contract-law guidance in plea-agreement situations. *Amicus* will rely most prominently on the American Law Institute's Restatement (Second) of the Law of Contracts, which is most generally accepted.

[3] It is of no moment that the plea agreement includes a provision purporting to relieve the government of its obligations – including the obligation to file a Section-5K1.1 motion – if Mr. Erwin breached any part of the agreement. By the time Mr. Erwin breached the plea agreement, the government had already filed the Section-5K1.1 motion. Nothing in that provision of the plea agreement entitled the government to *vacatur* of an already imposed sentence and a subsequent withdrawal of its Section-5K1.1 motion. Again, plea agreements must be strictly construed against the government. *See Schwartz*, 511 F.3d at 405. The agreement in this case did not afford the government any right to re-open a final sentence, but the Panel read the agreement liberally to allow the government just such a right.

Materiality is far from a given here. Mr. Erwin promised to plead guilty to conspiracy, to cooperate with authorities and to waive his right to appeal. *See* Panel Op. at 3-4. There is no question that Mr. Erwin pleaded guilty and that he cooperated fully with the government. Indeed, the government wrote to the district judge that Mr. Erwin's assistance was "important and timely." *Id.* at 5. He did all key things the plea agreement required of him.[4]

There is a broader reason for courts to be reluctant to find a material breach in appellate-waiver cases. As the Court recognized in *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001), every waiver includes at least an implicit exception where enforcement would cause a manifest injustice. Filing an appeal that advances a non-frivolous claim of error, supported by a non-frivolous contention that the issue to be advanced is outside the prohibition of the appeal waiver cannot be considered a material breach of the plea agreement, if it constitutes a breach at all. Even if a motions panel later determines, in response to a government motion for summary action as contemplated by *United States v. Goodson*, 544 F.3d 529, 535 n.2 (3d Cir. 2008), that the appeal, although non-frivolous, cannot proceed, there has been no material breach, since the cost of litigating a motion for summary action is contemplated by all plea agreements containing appeal waivers. Surely, the standard cannot be, as the Panel Opinion suggests, that if the defendant does not prevail on the merits then he will be deemed retroactively to have breached the agreement by appealing at all. If it were, no defendant could afford the risk of advancing, in good faith, a claim of miscarriage of justice, particularly a novel one.

[4] Notably, in the special context of plea bargains, this Court's cases have long held that selection of the appropriate remedy is a matter of discretion for the district court, not a matter of law for this Court. *See Moschalaidis*, 868 F.2d at 1361.

Cf. Castro, 704 F.3d at 136-39 (defendant's construction of agreement as authorizing appeal rejected, but miscarriage of justice found). The panel opinion overlooks these important preliminary considerations.

B. Assuming Mr. Erwin breached the plea agreement, the Panel awarded a remedy that placed the government in a better position than it would have been in but for the breach and that punished Mr. Erwin.

Ordinarily, when there has been a breach of contract, a court's goal is to place the injured party in the position it would have been in but for the breach. *See* Restatement (Second) of Contracts § 344, cmnt a. A court is not to punish the breaching party or to use the remedy to deter others from breaching. *See* Restatement (Second) of Contracts § 355, cmnt a. Specific performance, the remedy courts most often employ when there has been a breach of a plea agreement, follows these principles: the court orders the breaching party to perform so that the other party receives the benefit of its bargain. *See* Restatement (Second) of Contracts § 357.

The Panel's opinion did not follow these principles or this Court's precedent governing plea agreements and its case law discussing the implementation and enforcement of appeal waivers.

First, the Panel's remedy is not, in fact, specific performance. The Panel did not require Mr. Erwin to meet some contractual obligation he had failed to meet. Instead, the Panel relieved the government of one of its obligations and did so in a way that served only to punish Mr. Erwin for his breach. Court-ordered specific performance of a contractual undertaking to refrain from taking an action (such as appealing) would be to require that the forbidden action be undone, that is, here, to dismiss the appeal.

Second, a new sentencing proceeding in which the government would be relieved of its obligation to seek a downward departure would not place the government in the position it would have been in but for the breach. The government complains that it has expended resources on the appeal. A new sentencing proceeding would not restore those resources to the government; to the contrary, it would impose more expense and effort on the government, the defendant and the district court.

Third, it is difficult to see the Panel's remedy as anything other than a punishment and a warning to criminal defendants about the consequences of breaching appellate waivers. In making its request, the government plainly sought to stem the flow of appeals from defendants who have agreed to waivers, and the Panel noted that there are thousands of plea agreements each year in this circuit and that the "corrosive effect" of breaches "cannot be countenanced." Panel Op. at 14. But contract remedies are to be compensatory rather than punitive or deterrent. *See* Restatement (Second) of Contracts § 355, cmnt a. Put another way, if the Panel were following the principles of contract law, it would be concerned not at all with whether any *other* defendant complied with an appellate waiver in another proceeding.

There is a form of specific performance that more closely matches the expectations of the parties than the punitive remedy the Panel imposed. As directed by this Court in *Goodson*, 544 F.3d at 535 n.2, the government routinely files motions for summary dismissal of appeals subject to appellate waivers, and the Court frequently grants them. *See* Panel Op. at 19 n.10 (encouraging government to file motions to dismiss based on appellate waivers and noting that, in 2013 alone, more than 50 such motions were filed in the Third Circuit and most were

granted). In granting such motions, the Court effectively affords the government specific performance and allows it to avoid most of the expenses of an appeal. *See, e.g., United States v. Estrada-Bahena,* 201 F.3d 1070, 1071 (8th Cir. 2000) (dismissal of appeal serves as specific performance of promise not to appeal). But at the same time, the defendant is afforded a fair opportunity to show that the appeal presents a non-frivolous issue that arguably comes within an exception to the waiver. Dismissal on an early (and properly supported) motion more closely restores the parties' bargained-for expectations. The government, which bargained to avoid the expense and inconvenience of an appeal (subject to the defendant's right to invoke an exception), obtains that benefit. The defendant, who bargained to give up his right to an appeal in most but not all circumstances, does not obtain appellate review on the merits (unless, of course, he can demonstrate in his response to the motion that his appeal should proceed notwithstanding the waiver). This is precisely the bargain that the parties actually made.

C. The Panel's approach is inappropriate as a matter of public policy.

The fiction that a plea agreement is like any other contract has plain limitations. In a case like this, one party is the government, which wields tremendous power, and the other party is a criminal defendant who is confronted with a significant loss of liberty. Most often, appellate and collateral-review waivers are part of the boilerplate of the government's agreement, and the defendant has no meaningful opportunity to negotiate over their inclusion. They are contracts of adhesion. *See Rudbart v. North N.J. District Water Supply Comm'n,* 605 A.2d 681, 685 (N.J. 1992). In some circumstances, courts have found contracts of adhesion to be procedurally unconscionable and, therefore,

unenforceable. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991). Even if the bargaining imbalance does not rise to the level of being unconscionable, the Court should at the least consider it in determining whether a breach is "material" and in fashioning any remedy.

Moreover, there are certainly cases in which a defendant might *reasonably* question whether his plea was entered knowingly and voluntarily or whether an express or implied exception to the waiver might allow him an appeal. *See Khattak*, 273 F.3d at 562. But the Panel Opinion makes no distinction between plainly baseless appeals and close-but-ultimately-unsuccessful appeals. As a result, the Panel's precedent may well cause all but the most risk-insensitive defendants to forego appeals even when they may have valid claims.

Some might see that deterrent effect as beneficial, but there is a reason the Court recognizes that waivers must be entered into knowingly and voluntarily and, even in the strictest appellate waivers, that there must be an implicit exception for miscarriages of justice. *See Khattak*, 273 F.3d at 558. Unlike most civil contract actions, cases involving plea agreements implicate constitutional rights and, usually, one party's liberty. *See Santobello v. New Yor*k, 404 U.S. 257, 262 (1971); *cf. United States v. Hyde*, 520 U.S. 670, 677-78 (1997) (using contract law to explain a principle in the law of plea agreements). Given the interests at stake, the Court should be sure that any remedy for a breach of an appellate waiver does no more than necessary to restore the parties' expectation interests in the specific case before the Court lest a punitive remedy chill other, later litigants who might have strong – but not ultimately prevailing – claims that their waivers should not be given effect.

III. Conclusion

The Panel's remedy is inconsistent with contract law and sound policy, and the Court should rehear this appeal.

Respectfully submitted,

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November 5, 2014

ELECTRONIC FILING CERTIFICATION

I hereby certify that the attached brief as provided to the Court in electronic form includes the same text as the "hard copies" of the brief filed by U.S. Mail with the Court. I also certify that this electronic file has been scanned with Symantec Anti-Virus software.

/s/ David R. Fine
David R. Fine

CERTIFICATE OF SERVICE

I certify that on November 5, 2014, I filed the attached document with the Court's ECF system such that all counsel of record will be served automatically.

s/ David R. Fine