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# *United States v. Erwin* and the Folly of Intertwined Cooperation and Plea Agreements

Kevin Bennardo\*

## *Abstract*

*Cooperation agreements and plea agreements are separate and independent promises by criminal defendants to: (1) assist the Government in the prosecution of another person and (2) plead guilty. A defendant's breach of one should not affect the Government's obligation to perform under the other. All too often, however, these agreements are inappropriately intertwined so that a minor breach of the plea agreement relieves the Government of its obligation to move for a downward sentencing departure in recognition of the defendant's substantial assistance. This intertwining undermines sentencing policy as set forth in the federal sentencing statute. Thus, a district court should continue to consider a defendant's substantial assistance when imposing a criminal sentence even if a breach of the plea agreement alleviates the Government of its duty to move for a sentence reduction under an intertwined cooperation agreement.*

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Cooperation agreements and plea agreements should be kept separate. They confer unrelated benefits for unrelated promises. A defendant's performance—or breach—of one should not affect the Government's duty to perform under the other. All too often, however, the two agreements are intertwined.

As its name describes, a cooperation agreement is a promise by the defendant to cooperate with the Government. This cooperation most often comes in the form of assisting the Government in investigating or prosecuting another person. In exchange, the Government promises to confer some benefit to the defendant. This benefit usually comes in the form of a Government motion for a sentence reduction,<sup>1</sup> for a downward departure in the calculation of the defendant's advisory sentencing range under the U.S. Sentencing Guidelines Manual (the Guidelines),<sup>2</sup> or both. A notable incentive for many defendants is that a Government motion premised on substantial assistance permits the district court to sentence a defendant below an otherwise-applicable mandatory minimum sentence.<sup>3</sup>

The main promise in a plea agreement is the defendant's agreement to plead guilty to a criminal charge. A plea agreement may contain other promises, such as a waiver by the defendant of her right to appeal or to collaterally attack her conviction or sentence.<sup>4</sup> In exchange, the Government may agree to dismiss or to not bring other charges, or to recommend a certain sentence or

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1. See 18 U.S.C. § 3553(e) (2012) (permitting a court to reduce a sentence below the statutory minimum if the defendant provided substantial assistance in the investigation or prosecution of another person); FED. R. CRIM. P. 35(b) (permitting a court to reduce a defendant's sentence if the defendant provided substantial assistance after sentencing in the investigation or prosecution of another person).

2. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2013) (permitting a court to depart from the Guidelines if the defendant provided substantial assistance and providing factors for the court to consider when determining the extent of the departure).

3. See 18 U.S.C. § 3553(e); FED. R. CRIM. P. 35(b).

4. See, e.g., Plea Agreement Between United States Attorney for the District of New Jersey and Christopher Erwin at 4, *United States v. Erwin*, No. 12-cr-00364-FLW (D.N.J. Mar. 26, 2012) [hereinafter *Erwin Plea Agreement*] (“[T]his Office and Christopher Erwin waive certain rights to file an appeal, collateral attack, writ or motion after sentencing, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2255.”).

Guidelines calculation at the sentencing hearing.<sup>5</sup> The defendant and the Government may also submit a plea agreement to the district court with a binding sentencing recommendation, but the district court is not required to accept this—or any other—type of plea agreement.<sup>6</sup>

Cooperation agreements and plea agreements contain completely independent promises: to aid in the investigation or prosecution of another and to plead guilty. The parties may enter into one without the other. However, when the parties enter into both, they are often inexplicably intertwined, and a defendant's breach of one agreement relieves the Government of its duty to perform under both agreements.<sup>7</sup> This intertwining undermines sentencing policy and the purposes of punishment set forth in the federal sentencing statute.<sup>8</sup> The circumstances underlying the recent Third Circuit decision in *United States v. Erwin*<sup>9</sup> provide an example of intertwined agreements and the resulting folly.

In *Erwin*, the defendant, Christopher Erwin, executed separate plea and cooperation agreements with the Government.<sup>10</sup> In the plea agreement, Erwin agreed to plead guilty to one count of conspiracy to distribute and possess with intent to distribute oxycodone.<sup>11</sup> Erwin's plea agreement also contained an appellate waiver provision in which he promised not to appeal his sentence if it fell within or below the advisory range corresponding to offense level thirty-nine in the Guidelines.<sup>12</sup> For

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5. See FED. R. CRIM. P. 11(c)(1) (setting forth the permissible types of plea agreements in the federal system).

6. See *id.* 11(c)(1)(C), (c)(3).

7. See, e.g., Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 567 (1999) (noting that “[i]n one light cooperation agreements may be seen as simply a subset of plea agreements”).

8. See 18 U.S.C. § 3553(a); *infra* notes 31–33 and accompanying text.

9. 765 F.3d 219 (3d Cir. 2014).

10. *Id.* at 223–24.

11. *Id.* at 223; see also Erwin Plea Agreement, *supra* note 4, at 1.

12. *Erwin*, 765 F.3d at 224; Erwin Plea Agreement, *supra* note 4, at 9. The Guidelines assign an advisory imprisonment range based on the seriousness of the offense conduct and the defendant's recent past criminal convictions. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, cmt. n.1 (2013). The “offense level” measures the seriousness of the offense conduct on a scale of one to forty-three. *Id.* The “criminal history category” grades the defendant's criminal history on a scale of I to VI. *Id.* The resulting intersection of those two figures on the Sentencing Table yields the recommended range of imprisonment. *Id.* Erwin

its part, the Government promised in the plea agreement that it would not bring any further criminal charges against Erwin in connection with the conspiracy.<sup>13</sup> The Government also provided a mutual appellate waiver—it agreed not to appeal any sentence that fell within or above the Guidelines range corresponding to offense level thirty-nine.<sup>14</sup>

In a separate cooperation agreement, the parties agreed that the Government would move for a downward departure from the Guidelines range of imprisonment if it determined that Erwin had substantially assisted in the investigation or prosecution of another person.<sup>15</sup> The cooperation agreement further provided that any breach by Erwin of either the plea agreement or the cooperation agreement would release the Government of its obligation to perform under both agreements.<sup>16</sup>

Erwin pleaded guilty to the oxycodone trafficking conspiracy, and, at sentencing, the district court set Erwin's offense level at thirty-nine and his criminal history category at I.<sup>17</sup> These two calculations produced a Guidelines range of imprisonment of 262 to 327 months, which the district court then reduced to 240 months because the offense of conviction had a statutory maximum of twenty years' imprisonment.<sup>18</sup> In recognition of Erwin's substantial assistance, the Government moved for a five offense level downward departure and the court granted the motion.<sup>19</sup> Without objection, the court recalculated Erwin's Guidelines range using offense level thirty-four, thereby

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agreed not to appeal his sentence if it fell at or below the range corresponding to offense level thirty-nine at whatever criminal history category the district court calculated at sentencing. *Erwin*, 765 F.3d at 223; Erwin Plea Agreement, *supra* note 4, at 9.

13. *Erwin*, 765 F.3d at 223; Erwin Plea Agreement, *supra* note 4, at 1.

14. See Erwin Plea Agreement, *supra* note 4, at 9.

15. *Erwin*, 765 F.3d at 224.

16. *Id.*

17. *Id.* at 225. Based on the drug quantity, Erwin's base offense level was thirty-eight. He then received a four-level increase for his leadership role in the oxycodone conspiracy and a three-level decrease for acceptance of responsibility. *Id.*

18. *Id.* An advisory Guidelines range of imprisonment may not extend beyond the maximum punishment permitted by statute. See U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(a) (2013).

19. See *Erwin*, 765 F.3d at 225.

producing a range of 151 to 188 months' imprisonment.<sup>20</sup> The district court sentenced Erwin within the Guidelines range to a prison term of 188 months.<sup>21</sup>

Despite his previous promise not to appeal his sentence as long as it fell at or below the range corresponding to offense level thirty-nine, Erwin did exactly that.<sup>22</sup> Erwin argued on appeal that the district court should have deducted the five offense levels for substantial assistance from a baseline of 240 months rather than starting at offense level thirty-nine.<sup>23</sup> In its responsive brief, the Government argued that Erwin's appeal violated his appellate waiver and sought a remand to the district court to allow it "to pursue its contractual remedies for breach."<sup>24</sup> Siding with the Government, the Third Circuit found that Erwin's appellate argument was foreclosed by the appellate waiver provision in the plea agreement and remanded for resentencing.<sup>25</sup> The Government's position is that Erwin's breach relieves it of its obligation to seek a substantial assistance downward departure at Erwin's resentencing hearing.<sup>26</sup> Because a substantial assistance departure requires a Government motion, the district court cannot grant the departure in the absence of a motion by the Government.<sup>27</sup> If the Government withholds the motion, Erwin's advisory Guidelines sentence will be 240 months when he is resentenced rather than the range of 151 to 188 months at his original sentencing hearing. But, because the Guidelines are only advisory, the district court would remain free to exercise its discretion to grant a variance and impose a sentence less severe

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20. *Id.*

21. *Id.* Erwin's sentence also included three years of supervised release and a \$100 special assessment. *Id.*

22. *Id.*

23. *Id.* at 225–26.

24. Brief for Appellee at 19, *Erwin*, 765 F.3d 219 (No. 13-3407), 2014 WL 785396.

25. *See Erwin*, 765 F.3d at 226–32.

26. *See* Brief for Appellee, *supra* note 24, at 28–40.

27. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2013).

than the 240 months recommended by the Guidelines.<sup>28</sup> As of this writing, Erwin has yet to be resentenced.<sup>29</sup>

In a literal sense, Erwin is getting just what he bargained for. By the terms of the cooperation agreement, the Government's obligation to move for a substantial assistance reduction was contingent on Erwin keeping all of his promises under both the cooperation agreement and the plea agreement.<sup>30</sup> Erwin broke one of the promises in his plea agreement and now the Government is relieved of its duties under the cooperation agreement. The problem with this sort of horse-trading, however, is that it divorces the sentencing outcome from the defendant's actual conduct. In doing so, it ignores the policy rationales underlying federal sentencing.

Federal statute sets forth the appropriate factors that a district court must consider in imposing an appropriate sentence.<sup>31</sup> Under the parsimony clause, the sentence must be sufficient, but not greater than necessary, to achieve the enumerated goals.<sup>32</sup> The relevant factors include the need for the sentence to provide just punishment, deter criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with educational training and other correctional treatment.<sup>33</sup> When resentencing Erwin, the district court should focus on these enumerated factors rather than the unrelated bargains brokered in the plea and cooperation agreements.

Quite simply, little has changed since Erwin's initial sentencing. The fact remains that he substantially assisted the Government in the investigation or prosecution of at least one

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28. See *United States v. Booker*, 543 U.S. 220, 245 (2005) (downgrading the Guidelines to "advisory" status).

29. See *Erwin*, 765 F.3d at 236 n.13 (noting that, per Third Circuit protocol, the case must be reassigned to another district court judge for resentencing). At the time of this writing, Erwin had received an extension of time to file a petition for rehearing and rehearing en banc in front of the Third Circuit, but had yet to file his petition.

30. See *Erwin Plea Agreement*, *supra* note 4, at 1.

31. See 18 U.S.C. § 3553(a) (2012) (listing numerous factors for sentencing courts to consider).

32. *Id.*

33. *Id.* § 3553(a)(2).

other individual.<sup>34</sup> Both the Government and the district court agreed that the magnitude of Erwin's assistance merited a five-offense-level reduction.<sup>35</sup> Returning to the sentencing factors, such a reduction sensibly reflects Erwin's demonstration of his respect for the law and his concomitant diminished need for extended incapacitation or rehabilitation. Erwin earned that five-level reduction through his substantial assistance. Based on the statutory sentencing factors, the reduction should not be forfeited by Erwin's breach of the appellate waiver provision in his separate plea agreement.<sup>36</sup>

At resentencing, the district court must determine what, if anything, Erwin's breach of his appellate waiver agreement says about his likelihood to reoffend or his need for rehabilitation. Perhaps it displays a very modest lack of respect for the law, or perhaps it does not. Perhaps it speaks louder about the lack of consistency in federal appellate case law in applying the "miscarriage of justice" exception to the enforcement of an otherwise-applicable appellate waiver agreement.<sup>37</sup> Either way, it should merit only a small increase in Erwin's sentence, if any increase at all.

Removing Erwin's five-offense-level reduction for substantial assistance would result in a sentence "greater than necessary" to achieve the enumerated purposes of punishment.<sup>38</sup> The Guidelines are calibrated so that an increase in six offense levels approximately doubles the recommended term of imprisonment.<sup>39</sup>

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34. See *Erwin*, 765 F.3d at 224 (describing the nature of Erwin's cooperation).

35. See *supra* notes 19–20 and accompanying text.

36. See 18 U.S.C. § 3553(a)(2).

37. The Third Circuit will not enforce an otherwise valid appellate waiver if doing so would result in a "miscarriage of justice." See *United States v. Khattak*, 273 F.3d 557, 562–63 (3d Cir. 2001). This standard has been criticized as vague and difficult to apply. See, e.g., *United States v. Hahn*, 359 F.3d 1315, 1344 n.9 (10th Cir. 2004) (Murphy, J., dissenting) (criticizing the miscarriage-of-justice exception because its vagueness encourages defendants with appellate waivers to appeal); Kristine Malmgren Yeater, Comment, *Third Circuit Appellate Waivers: The Mysterious Miscarriage of Justice Standard*, 14 DUQ. CRIM. L.J. 94, 103 (2010) (criticizing the Third Circuit's failure to adequately define the miscarriage-of-justice exception).

38. See 18 U.S.C. § 3553(a)(2) (requiring that sentences not be "greater than necessary").

39. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2013). Indeed, the



Increasing Erwin's punishment so severely would significantly overstate the harm caused or the information learned by his breach of the appellate waiver provision. Thus, the district court should vary downwardly from the 240-month sentence recommended by the Guidelines because that sentence significantly overstates the appropriate punishment given Erwin's substantial assistance to the Government. Upon resentencing, an appropriate sentence would remain in the neighborhood of Erwin's original 188-month sentence.<sup>40</sup>

From a contractual perspective, Erwin's breach of the appellate waiver provision relieves the Government of its broader promise under the plea agreement to refrain from bringing other charges against Erwin related to the oxycodone conspiracy. Should it wish to do so, nothing prevents the Government from filing additional charges.<sup>41</sup> This severe consequence highlights the additional problem created by incorporating appellate waiver agreements within larger plea agreements. Here, Erwin's breach of a secondary agreement in the plea agreement results in his loss of the entire benefit of the bargain even though he upheld his primary promise to plead guilty. The consequence of Erwin's breach sharply outweighs the nature of the breach. In order to impose a consequence proportional to a defendant's breach, a better structure would be to separate appellate waiver provisions from plea agreements altogether. By separating the appellate waiver promise and the bargained consideration from the larger agreement to plead guilty, the penalty for breaching the appellate waiver agreement—the loss of whatever consideration was bargained in that agreement—would be inherently proportional to the severity of the breach.<sup>42</sup>

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shortest possible sentence corresponding to offense level thirty-nine (262 months) is more than nine years longer than the shortest sentence corresponding to offense level thirty-four (151 months). *See id.* at ch. 5, pt. A.

40. This statement assumes, of course, that Erwin's original 188-month sentence was appropriate.

41. *See* Erwin Plea Agreement, *supra* note 4, at 1.

42. For a lengthier discussion on separating appellate waiver agreements from plea agreements, see Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM (forthcoming 2015), available at <http://ssrn.com/abstract=2263389>.

The *Erwin* case illustrates the inappropriateness of intertwining promises that are fundamentally independent. The defendant agreed to plead guilty, to not appeal his sentence, and to cooperate with the Government. He upheld two of those promises. His breach of the third—and least significant—promise should not result in his loss of the entirety of the benefit of all three promises. A defendant's guilty plea and cooperation with the Government are relevant to her sentence, regardless of whether the Government has any obligation to note it at sentencing (or resentencing, as the case may be). An unrelated breach of an appellate waiver provision may provide information relevant to sentencing as well, but on a much smaller scale. Fairness demands that defendants' actions must be considered separately at sentencing. And, going forward, the best practice would be to keep separate promises separate and not intertwine the promises and consequences set forth in cooperation agreements with unrelated promises and consequences contained in plea agreements.