

10-413  
United States v. Woltmann

**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

August Term, 2009

(Argued: June 9, 2010

Decided: July 6, 2010)

Docket No. 10-413

- - - - -x

UNITED STATES OF AMERICA,

Appellee,

- v. -

GARY WOLTMANN,

Defendant-Appellant.

- - - - -x

Before: JACOBS, Chief Judge, WINTER and WALKER,  
JR., Circuit Judges.

Defendant-appellant Gary Woltmann pled guilty in the United States District Court for the Eastern District of New York (Platt, J.) to one count of tax fraud. Woltmann filed a notice of appeal challenging the sentence, and the government countered with a motion to dismiss on the basis of the appeal waiver provision in the plea agreement. We conclude that the waiver is unenforceable, and we vacate and remand to a different district judge for re-sentencing.

1  
2 RICHARD M. LANGONE, Langone &  
3 Associates, Levittown, New York,  
4 for Appellant.

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6 CHARLES P. KELLY, for Loretta E.  
7 Lynch, United States Attorney's  
8 Office for the Eastern District  
9 of New York, Brooklyn, New York,  
10 for Appellee.

11  
12  
13 DENNIS JACOBS, Chief Judge:

14  
15 Defendant-appellant Gary Woltmann pled guilty in the  
16 United States District Court for the Eastern District of New  
17 York (Platt, J.) to one count of tax fraud. Woltmann filed  
18 a notice of appeal challenging the sentence, and the  
19 government countered with a motion to dismiss, citing  
20 Woltmann's waiver of appeal in the plea agreement ("the  
21 Agreement"). We conclude that the waiver is unenforceable,  
22 and we vacate and remand to a different district judge for  
23 re-sentencing.

24  
25 **I**

26 Pursuant to the Agreement, Woltmann pled guilty in  
27 September 2007. After signing the Agreement but before  
28 sentencing, Woltmann provided substantial assistance to the  
29 government in its (ultimately successful) prosecution of

1 another criminal tax fraud case. In exchange for this  
2 cooperation, the government submitted a letter to the  
3 district court pursuant to U.S.S.G. § 5K1.1 "urg[ing] the  
4 Court to consider formulating a sentence below the advisory  
5 guidelines" range of 18 to 24 months' imprisonment.<sup>1</sup>

6 At a December 11, 2009 hearing ("December 11 Hearing"),  
7 defense counsel and the government urged the district court  
8 to consider the 5K1.1 letter and the factors enumerated in  
9 18 U.S.C. § 3553(a) when imposing sentence. Notwithstanding  
10 these prompts, the district court deemed the 5K1.1 letter an  
11 improper effort by the parties to repudiate, modify, or  
12 amend the Agreement, and ruled that the Agreement  
13 constituted Woltmann's consent to any sentence at or below  
14 27 months (the upper limit of the appeal waiver provision).  
15 Accordingly, the judge discounted the 5K1.1 letter and the  
16 other factors enumerated in § 3553(a).

17 At a hearing on January 22, 2010 ("January 22  
18 Hearing"), the district court sentenced Woltmann principally  
19 to 18 months' imprisonment (the low end of the Guidelines

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<sup>1</sup> Section 5K1.1 provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

1 range). In short succession, Woltmann filed a notice of  
2 appeal in this Court; the government moved to dismiss on the  
3 basis of the appeal waiver provision in the Agreement; and  
4 Woltmann moved for bail pending appeal.

5 On April 7, 2010, we granted Woltmann's bail motion.  
6 See United States v. Woltmann, 10-0413-cr (Apr. 7, 2010)  
7 (order). The government's motion to dismiss was then  
8 submitted to this panel. Because the facts, rules, and  
9 considerations that bear upon the motion likewise control  
10 the merits of the underlying appeal, we heard oral argument  
11 on the merits, and we resolve the merits together with the  
12 motion: The government's motion is denied, Woltmann's  
13 sentence is vacated, and the matter is remanded to a  
14 different district court judge for re-sentencing.

15  
16 **II**

17 Three provisions of the Agreement have bearing  
18 on this appeal:

- 19 • Paragraph 2 states that the applicable  
20 Guidelines term of imprisonment is 18-24  
21 months.  
22  
23 • Paragraph 2 acknowledges that "the Guidelines  
24 are advisory and the court is required to  
25 consider any applicable Guidelines provisions  
26 as well as other factors enumerated in 18

1 U.S.C. § 3553(a) to arrive at an appropriate  
2 sentence in this case.”  
3

- 4 • Paragraph 4 contains an appeal waiver  
5 provision: “The defendant agrees not to . . .  
6 appeal . . . the conviction or sentence in the  
7 event that the Court imposes a term of  
8 imprisonment of 27 months or below. This  
9 waiver is binding without regard to the  
10 sentencing analysis used by the Court.”  
11

12 Provisions like these are common, and their inclusion in the  
13 Agreement is unexceptional.

14 At the December 11 Hearing, the government reiterated  
15 its position, expressed in the 5K1.1 letter, that the court  
16 should impose a below-Guidelines sentence due to Woltmann’s  
17 substantial assistance. See, e.g., Tr. of December 11  
18 Hearing at 8. The district court refused. It viewed the  
19 Agreement as the “governing” or “controlling” instrument,  
20 e.g., id. at 4-5, and reasoned that the government’s  
21 advocacy of a below-Guidelines sentence on the basis of the  
22 5K1.1 letter was an impermissible attempt to “repudiate,”  
23 “modify,” or “amend” the Agreement, e.g., id. at 5, 14. The  
24 district court felt free to ignore the 5K1.1 letter and the  
25 § 3553 factors because Woltmann had ostensibly “consented to  
26 such and such a sentence” by agreeing both to the Guidelines  
27 calculation in Paragraph 2 and the appeal waiver in  
28 Paragraph 4. Id. at 6. In effect, the district court

1 believed that because of the appeal waiver, any sentence at  
2 or below 27 months was appropriate, regardless of whether or  
3 how the 5K1.1 letter and the § 3553(a) factors--if  
4 considered--would bear on the sentence.

5 At the January 22 sentencing hearing, the district  
6 court stated that it had "considered the [A]greement that  
7 was made with the government and the provision that we just  
8 read, paragraph four [i.e., the appeal waiver provision],  
9 and the court feels that under the circumstances here and  
10 the family circumstances that an 18 month sentence is an  
11 appropriate one." Tr. of January 22 Hearing at 12. The  
12 court also intimated, as it had done at the December 11  
13 Hearing, that consideration of the 5K1.1 letter would  
14 constitute an impermissible repudiation of the Agreement:

15 [Defense Counsel]: I would just like to point  
16 out to the court, judge,  
17 first, that all of the  
18 guideline calculations were  
19 based upon an estimate  
20 prior to any cooperation or  
21 5K1 letter.

22 The Court: Are you saying he wants to  
23 repudiate the plea  
24 agreement?  
25

26  
27 Id. at 4

28 Woltmann filed a notice of appeal, and the government

1 moves to dismiss citing the appeal waiver in Paragraph 4 of  
2 the Agreement. Woltmann in turn argues that the district  
3 court's treatment of the 5K1.1 letter and the § 3553(a)  
4 factors requires us to vacate the sentence and remand for  
5 re-sentencing. We agree.

### 7 III

8 Plea agreements are reviewed "in accordance with  
9 principles of contract law." United States v. Vaval, 404  
10 F.3d 144, 152 (2d Cir. 2005) (internal quotation marks  
11 omitted). We consider "the reasonable understanding of the  
12 parties as to the terms of the agreement." United States v.  
13 Colon, 220 F.3d 48, 51 (2d Cir. 2000). Moreover, because  
14 plea agreements are "unique contracts, . . . we temper the  
15 application of ordinary contract principles with special due  
16 process concerns for fairness and the adequacy of procedural  
17 safeguards." United States v. Granik, 386 F.3d 404, 413 (2d  
18 Cir. 2004) (internal quotation marks omitted). Such  
19 contracts are narrowly construed. Id.

20 It is a "well-settled legal principle that the  
21 sentencing judge is of course not bound by the estimated  
22 range in a plea agreement." United States v. Hamdi, 432

1 F.3d 115, 124 (2d Cir. 2005) (internal quotation marks  
2 omitted). To the contrary, before imposing sentence, a  
3 district court must consider both a 5K1.1 letter (if one is  
4 proffered), United States v. Campo, 140 F.3d 415, 418-19 &  
5 n.5 (2d Cir. 1998) (per curiam), and the factors enumerated  
6 in § 3553(a), Gall v. United States, 552 U.S. 38, 49-51  
7 (2007).

8 Ordinarily, appeal waivers are enforced--and for good  
9 reason. See United States v. Morgan, 386 F.3d 376, 380 (2d  
10 Cir. 2004) (explaining that voiding such waivers "would  
11 render the plea bargaining process and the resulting  
12 agreement meaningless" (internal quotation marks omitted));  
13 United States v. Gomez-Perez, 215 F.3d 315, 318 (2d Cir.  
14 2000) ("[T]he benefits of such waivers inure to both  
15 government and the defendant alike, with the government  
16 receiving the benefit of reduced litigation, and the  
17 defendant receiving some certainty with respect to his  
18 liability and punishment."); United States v. Yemitan, 70  
19 F.3d 746, 747-48 (2d Cir. 1995) ("If this waiver does not  
20 preclude a challenge to the sentence as unlawful, then the  
21 covenant not to appeal becomes meaningless and would cease  
22 to have value as a bargaining chip in the hands of

1 defendants.”). But we will not enforce an appeal waiver  
2 where--as here--the “sentencing decision . . . was reached  
3 in a manner that the plea agreement did not anticipate,”  
4 United States v. Liriano-Blanco, 510 F.3d 168, 174 (2d Cir.  
5 2007); see also United States v. Roque, 421 F.3d 118, 123-24  
6 (2d Cir. 2005) (suggesting that an appeal waiver would be  
7 unenforceable if the defendant failed to “underst[an]d fully  
8 the consequences of his bargain, both in terms of what he  
9 was gaining and what he was giving up”), or where “the  
10 sentencing court failed to enunciate any rationale for the  
11 defendant’s sentence, thus amounting to an abdication of  
12 judicial responsibility subject to mandamus,” Gomez-Perez,  
13 215 F.3d at 319 (brackets and internal quotation marks  
14 omitted).

15 Applying these principles, we hold that vacatur is  
16 required because the district court: (1) improperly “relied”  
17 on the Agreement to the exclusion of the 5K1.1 letter and  
18 the § 3553(a) factors; and (2) misread the Agreement as  
19 manifesting Woltmann’s enforceable concession that any  
20 sentence at or below 27 months obviated the need to consider  
21 the 5K1.1 letter and the § 3553(a) factors. In so doing,  
22 the district court failed to give effect to the parties’

1 expectations and deprived Woltmann of the benefit that he  
2 (and the government) agreed he would receive from signing  
3 the Agreement (i.e., a weighing of the 5K1.1 letter and the  
4 § 3553 factors). At the same time, the court also  
5 “abdicated” its judicial responsibility in the way posited  
6 by Gomez-Perez, 215 F.3d at 319.

7  
8 **A**

9 As the transcript of the December 11 Hearing  
10 unambiguously shows, the district court felt itself entitled  
11 to rely on the Agreement notwithstanding our law that such  
12 reliance is misplaced. See Hamdi, 432 F.3d at 124. For  
13 example, when the government raised the 5K1.1 letter at the  
14 outset of the hearing, the court responded: “[T]his is all  
15 very good, but we have--starting this case off, with an  
16 agreement that you and counsel for the defendant made, and  
17 signed by the defendant, and as far as I’m concerned, that  
18 is still the governing instrument here. . . . The plea  
19 agreement is the controlling instrument.” Tr. of December  
20 11 Hearing at 4-5. Other examples abound. See, e.g., id.  
21 at 5 (“[The government], the defendant, and the defense  
22 lawyer made an agreement, and that agreement has been, in my

1 book, controlling right from the start here."); id. at 7  
2 ("[A]s I see it at the moment, [the Agreement] overrides all  
3 else in this picture."); id. at 11 ("[Y]ou made an agreement  
4 and I'm entitled to rely on it."); id. at 15 ("I'm troubled  
5 by the government's position that I may ignore this  
6 agreement, which I don't think that I can or I may, I can,  
7 but I may not."); id. at 20 ("What is controlling in my book  
8 is the agreement. . . .").

9 This (improper) reliance caused the district court to  
10 misread the Agreement and, as a result, to impose a sentence  
11 inconsistent with the parties' expectations in signing the  
12 Agreement. The Agreement--by its own terms, as it was  
13 unambiguously understood by both parties, and as it was  
14 initially understood by the district court--contemplated  
15 that sentence would be imposed only *after* the district court  
16 considered the 5K1.1 letter and the § 3553(a) factors. See  
17 Agreement ¶ 2 ("The defendant understands that . . . the  
18 Guidelines are advisory and the court is required to  
19 consider any applicable Guidelines provisions [i.e.,  
20 § 5K1.1] as well as other factors enumerated in 18 U.S.C.  
21 § 3553(a) to arrive at an appropriate sentence in this  
22 case."); id. ¶ 3 ("The Guidelines estimate set forth in

1 [P]aragraph 2 is not binding on . . . the Court.");  
2 Transcript of Plea Colloquy at 15 (September 18, 2007)  
3 (district court summarizing Paragraph 2 of the Agreement and  
4 ensuring that Woltmann understood that his sentence would be  
5 based on "any applicable guidelines together with the  
6 factors contained in 18 U.S.C. [§] 3553(a)"); December 11  
7 Hearing at 8 (government urging the court to impose a below-  
8 Guidelines sentence pursuant to the 5K1.1 letter); see also  
9 Tr. of January 22 Hearing at 4 (defense counsel emphasizing  
10 to the court "that all of the guideline calculations were  
11 based upon an estimate prior to any cooperation or 5K1[.1]  
12 letter").

13 Moreover, the government explained to the district  
14 court that although some plea agreements preclude both  
15 parties from making any motions, this Agreement did not:

16 This agreement does not preclude motions by any  
17 party. Occasionally we will insert in these  
18 agreements that the parties agree that no motions  
19 will be filed in connection with the sentencing.  
20 That sentence is not in this agreement. And since  
21 the signing of the agreement, Mr. Woltmann has  
22 cooperated, and I was--the government was simply  
23 trying to bring that to the Court's attention in  
24 formulating a sentence.

25  
26 Tr. of December 11 Hearing at 15-16. This omission was  
27 intentional: The government intended to preserve its

1 ability to offer a 5K1.1 letter for the court's  
2 consideration at sentencing.

3 Notwithstanding all this, the court concluded that, in  
4 urging consideration of the 5K1.1 letter, the parties were  
5 improperly attempting to repudiate or modify the Agreement--  
6 and repeatedly rebuked them for doing so. See, e.g., id. at  
7 9 ("[T]he government is changing its position here with  
8 respect to this waiver."); id. at 11 (sparring with the  
9 government and finding it necessary to "read [the Agreement]  
10 to you again because you apparently have not been reading  
11 it"); id. at 11-12 ("I never had a case where the government  
12 has made a firm agreement and then goes out and tries to  
13 modify it, in effect."); id. at 13 ("[The government is]  
14 trying to modify that agreement."); id. at 14 ("[The  
15 government] can't amend it this way, as I see it."); id. at  
16 15 ("And to attempt to modify that agreement in this fashion  
17 I find very troubling."); id. at 16 ("I don't think that you  
18 can modify this agreement that you made here").

19 In effect, the court refused to consider the 5K1.1  
20 letter and the § 3553(a) factors on the ground that the  
21 appeal waiver and the sentencing range in the Agreement  
22 obviated anything else. This erroneous conclusion denied

1 the parties their bargain and reasonable expectations. In  
2 this way, the district court erred, and the appeal waiver  
3 provision is unenforceable. Liriano-Blanco, 510 F.3d at  
4 174; Roque, 421 F.3d at 123-24.

5  
6 **B**

7 The district court misconstrued the Agreement as an  
8 enforceable concession by Woltmann that any sentence at or  
9 below 27 months was appropriate--without regard to any 5K1.1  
10 letter and the § 3553(a) factors. For example, the  
11 following colloquy took place at the December 11 hearing:

12 [Prosecutor]: [T]he government does not  
13 believe that [the 5K1.1 letter]  
14 affects the plea agreement in  
15 any way. However, when the  
16 Court moves to set a sentence  
17 under 3553(a), we ask the Court  
18 to consider a sentence below the  
19 guidelines in part because of  
20 the cooperation of Mr. Woltmann.  
21 So I think it plays a role in  
22 the second step, when you get to  
23 the 3553(a) factors.

24  
25 The Court: *What need do I have to get to*  
26 *that level when I have a plea*  
27 *agreement where he has consented*  
28 *to such and such a sentence?*

29  
30 [Prosecutor]: Well, what's been consented to  
31 and agreed to is the guidelines.

32  
33 The Court: No. No.

1 December 11 Hearing at 6-7 (emphasis added). Similarly:  
2

3 [Prosecutor]: [P]aragraph 4 of the plea  
4 agreement . . . is simply a  
5 waiver of appeal or challenge to  
6 the sentence. All it does is  
7 set a ceiling below which there  
8 cannot be any appeal. . . . It  
9 is not an agreement to a  
10 sentence of that length. It is  
11 simply a waiver of appeal. What  
12 the parties have agreed within  
13 the agreement is that the  
14 guidelines are 18 to 24 months,  
15 and then if the Court accepts  
16 that and moves from the  
17 agreement to 3553, and considers  
18 the factors under 3553, the  
19 government believes one of the  
20 factors is Mr. Woltmann's  
21 cooperation, which the  
22 government believes warrants a  
23 sentence below the 18 to 24  
24 month guideline.

25  
26 The Court: That is a lot of double-talk  
27 when you get right down to [it].  
28

29 Id. at 8. And again:  
30

31 [Prosecutor]: There's an appeal waiver up to  
32 27 months. That was never a  
33 sentencing recommendation of the  
34 government. There's a guideline  
35 of 18 to 24 months. Those two  
36 facts come out of the plea  
37 agreement. At that point when  
38 the Court enters its 3553  
39 analysis, the guidelines [are]  
40 one of the things that the  
41 Court--one of the items that the  
42 Court looks at in formulating a  
43 sentence. So there's a  
44 guideline of 18 to 24 months,

1 and then one of the things the  
2 Court considers--

3  
4 The Court: What you're saying is that this  
5 is, I'm not entitled to rely on  
6 the agreement that the defendant  
7 has made.

8  
9 [Prosecutor]: You are entitled to rely on it.  
10 He has waived his appeal and any  
11 challenge to it for a sentence  
12 up to 27 months. He agrees that  
13 the guidelines are 18 to 24  
14 months. Those two things are  
15 agreed. But then the Court is  
16 required to move under Gall,  
17 G-A-L-L, over to the 3553.

18  
19 The Court: *I don't have to do anything if I*  
20 *have this agreement. Because*  
21 *it's not challengeable according*  
22 *to you, the agreement itself.*

23  
24 [Prosecutor]: But the agreement doesn't  
25 contain any sentencing  
26 recommendation.

27  
28 The Court: The agreement says he may not  
29 challenge anything that the  
30 Court does . . . in the event  
31 the Court imposes a term of  
32 imprisonment of 27 months or  
33 below. This waiver is binding  
34 without regard to the sentencing  
35 analysis used by the Court. The  
36 defendant waives all defenses  
37 . . . . You're trying to modify  
38 that agreement.

39  
40 [Prosecutor]: No. The fact--

41  
42 The Court: I don't think you may.

43  
44 [Prosecutor]: The fact that nobody can

1 challenge it does not mean that  
2 it's the appropriate sentence or  
3 that anybody--  
4

5 The Court: *It's not a question of an*  
6 *appropriate sentence. It is*  
7 *appropriate by both sides[']*  
8 *agreement if it's 27 months or*  
9 *below.*

10  
11 [Prosecutor]: Well, not that it's appropriate,  
12 but that no one will appeal it  
13 or challenge it in any way.  
14

15 Id. at 12-14 (emphases added).

16 The district court's actions "amount[ed] to an  
17 abdication of judicial responsibility," Gomez-Perez, 215  
18 F.3d at 319, requiring us to deem the appeal waiver  
19 unenforceable. The mandate of Campo, 140 F.3d at 418-19 &  
20 n.5, and Gall, 552 U.S. at 49-51, is that a district court  
21 must consider a 5K1.1 letter and the § 3553(a) factors when  
22 formulating the appropriate sentence. Refusal to consider  
23 these things is an error categorically different from a  
24 misapplication of a guideline, or a mistake of law, or a  
25 dubious finding of fact. What happened here is in the  
26 category of error contemplated in Gomez-Perez, 215 F.3d at  
27 319, which states that an appeal waiver is unenforceable  
28 when the district court abdicates its duties in imposing  
29 sentence.

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**IV**

On remand, Woltmann's re-sentencing should proceed before a different district court judge.

Three considerations guide our analysis: "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." United States v. Hernandez, 604 F.3d 48, 55-56 (2d Cir. 2010) (internal quotation marks, brackets, and ellipses omitted). These considerations favor reassignment.

1. In light of the scorn with which Judge Platt approached the matters pertaining to sentencing, we have considerable doubt as to whether on remand he would give fair consideration to the 5K1.1 letter and the § 3553(a) factors. Our doubt is reinforced by events at the December 11 Hearing, when the district court considered itself to be (in terms or effect) a party to the Agreement, or a

1 beneficiary of the appeal waiver. For example, the court  
2 declared: "I am entitled to rely on an agreement. I want to  
3 make that abundantly clear that's my position." Tr. of  
4 December 11 Hearing at 22; see also id. at 11 ("[The  
5 government] made an agreement and I'm entitled to rely on  
6 it."). And: "[The government] made an agreement *with*  
7 *respect to all three of us. . . ,*" id. at 14 (emphasis  
8 added).

9 The district court's strange misconception of its role  
10 vis-a-vis the parties and the Agreement may explain the  
11 court's asserted right to "rely" on the Agreement, and its  
12 conspicuous frustration at what the court viewed  
13 (erroneously) as the parties' attempt to repudiate or modify  
14 the Agreement. It also casts doubt on the ability of the  
15 judge on remand to suppress a view of the Agreement premised  
16 on his own claim of right.

17 2. In considering the appearance of justice, we must  
18 consider Judge Platt's pattern of error regarding 5K1.1  
19 letters. See United States v. Doe, 348 F.3d 64 (2d Cir.  
20 2003) (per curiam); Campo, 140 F.3d 415.

21 3. Finally, reassignment would not waste substantial  
22 judicial resources, because all the district court must do

1 on remand is what district courts do as a matter of routine:  
2 consider the 5K1.1 letter and the § 3553(a) factors, and  
3 impose sentence accordingly.

4

5

**CONCLUSION**

6 For the foregoing reasons, we vacate the sentence and  
7 remand for re-sentencing before a different district court  
8 judge.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

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