

DOCKET NO.
05-7048-cr

In The
**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,
Appellee,

-v-

WILLIAM S. YAGER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**BRIEF ON APPEAL FOR DEFENDANT-APPELLANT
WILLIAM S. YAGER**

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STATEMENT OF JURISDICTION PURSUANT TO F.R.A.P. 28(a)(2)

1. This appeal is taken from a Judgment of Conviction entered against the Defendant-Appellant, William S. Yager, in the United States District Court for the Northern District of New York, by the Hon. David N. Hurd, United States District Court Judge, on December 21, 2005.

2. The District Court had subject matter jurisdiction, pursuant to 18 U.S.C. § 3231, because this was a criminal case alleging violations 18 U.S.C. §§ 1341, 1343, 371 and 1956(a)(1)(B)(i) and (h) .

3. Jurisdiction in this appeal is invoked in this Court pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

4. A Notice of Appeal was timely filed on December 14, 2005, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Whether the district court erroneously calculated Mr. Yager's advisory guideline range of imprisonment by applying enhancements for a managerial role and the use of sophisticated means thereby rendering the sentence unreasonable.
2. Whether the government breached the plea agreement by adopting the position set forth in the PSR that Mr. Yager was not entitled to acceptance of responsibility after agreeing to recommend the adjustment in the plea agreement and during Mr. Yager's plea colloquy.

STATEMENT OF THE CASE

On February 26, 2004, the defendant-appellant, William S. Yager, and his co-defendant, Anthony Marone¹ were charged in a two count indictment. The first count charged a Conspiracy to Commit Wire Fraud and Mail Fraud, in violation of 18 U.S.C §§ 1341, 1343, and 371. (A 5,17). The second count charged a Conspiracy to Launder Money, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and (h). (A 5,47). The indictment was superseded on December 9, 2004. (A 9,17).

Mr. Yager pled guilty to the superseding indictment on June 10, 2005. (A 11). There was a plea agreement and an addendum to the plea agreement in this case. (A 11,12,64,86).

On December 9, 2005, the district court sentenced Mr. Yager to 121 months imprisonment, to be followed by a three year term of supervised release. (A 166, 167). Restitution in the amount of \$538,624.12, and a special assessment of \$200, was ordered. (A 169).

Mr. Yager timely filed a Notice of Appeal on December 14, 2005. (A 174).

¹ The case against Mr. Marrone was dismissed on January 9, 2006, due to the fact that Mr. Marrone passed away on December 21, 2005, the date he was scheduled to be sentenced for the instant offense. (A 14-15).

STATEMENT OF THE FACTS

I. The Offense Conduct.

This case involved the selling of counterfeit art through eBay² between 1999 and 2004. (PSR³ ¶ 22). The defendants misrepresented items for auction on eBay as original works by famous artists such as Milton Avery, Edgar Degas, Edward Hopper, Emile A. Gruppe, Willem de Kooning, and Philip Guston. (PSR ¶ 22).

The defendants used the internet service provider, America OnLine (AOL) and obtained various internet email accounts, to correspond with bidders and purchasers. (PSR ¶ 23, A 20-21). Payments were made to the defendants by wire transfer, check, or through PayPal⁴ accounts. (PSR ¶ 23). After receiving payment, the artworks were shipped to the purchasers via the United States Postal Service, Federal Express, or the United Parcel Service. (PSR ¶ 24). The defendants shared the proceeds with each other and used the money to pay

² eBay is an online internet service located in the State of California through which items can be auctioned or sold. (PSR ¶ 1).

³ “PSR” refers to the Presentence Investigation Report, dated October 25, 2005 and is included as sealed under separate cover. References are to the paragraph contained in the original.

⁴ PayPal is a company which enables any individual or business with an email account to send and receive payments online. (PSR ¶ 1).

personal debts. (PSR ¶ 24).

II. The Plea

The written plea agreement included the elements of the offense under both counts of the superseding indictment, numerous overt acts, and a detailed factual basis for the plea. (A 64-79). During the plea colloquy, Mr. Yager admitted to the allegations set forth in the superseding indictment, the plea agreement, and the government's statements regarding what their proof would be if the case proceeded to trial. (A 89- 92, 96-108).

With respect to Mr. Yager's potential sentence, in the plea agreement, and during the plea colloquy, the parties agreed to litigate at sentencing the amount of loss, the number of victims, and Mr. Yager's role in the offense. (A 80-81,93). The parties further agreed that the government would recommend a downward adjustment for acceptance of responsibility and Mr. Yager's prompt entry of a guilty plea. (A 81-82, 93-94). Mr. Yager agreed to waive his right to appeal any sentence of 60 months or less. (A 84-85, 94).

Following Mr. Yager's guilty plea, the parties entered into another agreement set forth in an addendum to the plea agreement. The parties agreed that the loss exceeded \$400,000 and that there were 50 or more victims. (A 87). All other provisions of the plea agreement remained in full force and effect. (A 86).

III. The Sentence

Following his guilty plea, the United States Probation Office prepared a Presentence Investigation Report which calculated Mr. Yager's advisory guideline range of imprisonment under the United States Sentencing Guidelines. Pursuant to U.S.S.G. § 2B1.1, the base offense level was 6. (PSR ¶ 58). Since the loss involved in the offense was more than \$400,000, but less than \$1,000,000, 14 levels were added pursuant to § 2B1.1(b)(1)(H). (PSR ¶ 58). An additional 4 levels were added under § 2B1.1(b)(2)(B), because the offense involved more than 50, but less than 250 victims. (PSR ¶ 58). These calculations were agreed to by the parties. (PSR ¶ 58, A 86-88).

The PSR added 2 levels pursuant to § 2B1.1(b)(9)(C) on the ground that the offense involved sophisticated means. (PSR ¶ 58). The PSR classified Mr. Yager as an organizer, leader, manager, or supervisor in the criminal activity and added 2 more levels pursuant to § 3B1.1(c). (PSR ¶ 62). The PSR failed to credit Mr. Yager with acceptance of responsibility pursuant to § 3E1.1. (PSR ¶ 65). The PSR found a total offense level of 30 and a criminal history category of I, resulting in an advisory guideline range of 97 to 121 months imprisonment. (PSR ¶ 103).

Prior to the sentencing hearing, Mr. Yager filed a sentencing memorandum that sought a sentence "sufficient, but not great than necessary" to comply with the

four governing purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). (A 12). Mr. Yager's submission was intended to illustrate to the district court that the 5 years of his life during which he engaged in the offense conduct, did not define his entire life. (A 12,147-149). For example, his submission included examples of his volunteer work and good works in the community with supporting documentation. (A 12, 147-149). Mr. Yager is the father of 2 girls he adopted from Korea. He obtained a Bachelor of Arts Degree from SUNY Brockport and a Masters of Fine Arts Degree from SUNY Buffalo. (A 12, 147-149). He was a high school art teacher and was highly regarded by his colleagues. (A 12, 147-149). Mr. Yager also volunteered for numerous memorial projects including a Korean War Veterans Memorial honoring Monroe County Soldiers that were killed in the Korean War. (A 12, 147-149).

Mr. Yager's submission also set forth objections to the PSR's failure to credit him with acceptance of responsibility. (A 12, PSR Addendum). Mr. Yager further objected to the enhancements imposed for his alleged managerial role in the offense and the enhancement for sophisticated means. (A 12,PSR Addendum).

A. Role in the Offense

The PSR classified Mr. Yager as an organizer, leader, manager, or supervisor of the criminal activity on the ground that Mr. Yager obtained the

artwork and set the selling price. (PSR ¶ 62). The PSR also stated that Mr. Yager directed David Gruszka and Margaret Cook to open eBay accounts. (PSR ¶ 62).

Mr. Yager objected to the enhancement because only he and Mr. Marrone participated in the offense, each had their own responsibilities, and they shared the proceeds of the offense . (A 12, PSR Addendum). Neither Mr. Gruska, nor Ms. Cook, had any knowledge of the criminal activity. (A 12, PSR Addendum).

At the sentencing hearing, the district court found that only Mr. Yager and Mr. Marrone were participants in the offense and that Mr. Yager was the leader and therefore applied the 2 level enhancement. (A 146).

B. Sophisticated Means Enhancement

The PSR reasoned that the enhancement was justified because the defendants used the fictitious name “Sam Clay” and the fictitious business name of “Dome Investments, Inc.,” to communicate with purchasers and to conduct financial transactions for the purpose of concealing their identities as well as their scheme to defraud. (PSR ¶ 58).

Mr. Yager argued in his submission that the use of anonymous names is common practice for those who use eBay, email, and PayPal services. (A 12, PSR Addendum). Additionally, the accounts created by Mr. Yager and Mr. Marrone were easily traceable to both Mr. Yager and Mr. Marrone, as illustrated in the

PSR, where it was noted that the internet and bank accounts involved in the offense were in the names of either Mr. Yager or Mr. Marrone with their residential addresses. (PSR ¶¶ 1, 30-31, 33-34, 37-38, 42). Further, the business, Dome Investments, Inc., was not a fictitious company. (A 12, PSR Addendum). It was a business owned and operated by Mr. Marrone and his mother.

At the sentencing hearing, the district court agreed that Dome Investments, Inc., was not a fictitious company (A 122), but applied the enhancement stating the operation took a lot of planning and was intricate. (A 143).

C. Acceptance of Responsibility

The PSR failed to credit Mr. Yager with acceptance of responsibility stating that Mr. Yager “admits the conduct alleged in the Superseding Indictment and minimally accepts responsibility for this offense.” (PSR ¶ 55). The PSR found that a reduction was not warranted based upon Mr. Yager’s pre-plea conduct that occurred while he was on pretrial release. (PSR ¶ 65). This conduct occurred 6 months following his arrest and 15 months prior to his plea of guilty. (A 5,9,11).

1. Pre-Plea Conduct

On March 3, 2004, Mr. Yager was released on a \$50,000 unsecured bond with conditions. (PSR ¶ 12). On September 2, 2004, a representative from the United States Probation Department filed a violation report alleging that Mr.

Yager attempted to sell a counterfeit Emile Gruppe painting to the Cincinnati Art Gallery by email on July 27, 2004. (PSR ¶ 13). The gallery agreed to buy the painting for \$2,000 and Mr. Yager mailed the painting to the gallery. (PSR ¶¶ 13-14). Upon receipt, the gallery became suspicious that the painting was not an original and contacted the FBI. (PSR ¶ 14). The FBI began an investigation and determined that the painting was counterfeit. (PSR ¶ 16). Mr. Yager never received payment for this painting. (PSR ¶ 15). A bond revocation hearing was held on September 17, 2004. (A 9). After hearing testimony, Mr. Yager's bond was revoked and he was ordered detained pending trial. (A 9). Thereafter, pursuant to a motion by defense counsel, and with the consent of the government, Mr. Yager was again released on conditions on March 25, 2005. (A 11, 59-63).

2. Plea Negotiations

In May and June of 2005, Mr. Yager and the government entered into plea negotiations and executed a written plea agreement. (A 64). In the plea agreement, the government agreed to recommend a downward adjustment for acceptance of responsibility and Mr. Yager's prompt entry of a guilty plea. (A 81-82). On the advice of counsel, Mr. Yager agreed to litigate at sentencing issues pertaining to loss and victims. (A 126-127). Primarily, because the discovery in the case involved over 18,000 pages contained in numerous boxes. (A 126-127).

After examining the discovery and discussing the contents with Mr. Yager, a meeting was held with the government to discuss these issues. (A 128). At the meeting, Mr. Yager was shown a chart prepared by the government that set forth the monetary loss and the victims of the offense. (A 128). Mr. Yager readily admitted to the contents of the chart and thereafter signed an addendum to the plea agreement whereby he agreed to the government's calculations pertaining to the amount of loss and the number of victims. (A 86-88).

3. The Government adopted the position in the PSR

The PSR was created the following month. Mr. Yager objected to the failure to credit him with acceptance of responsibility because he had in fact fully admitted the offense conduct in this case through the plea agreement, during his plea colloquy, in the addendum to the plea agreement, and during his interview with probation. (A 12, 64-91, 95-108, PSR Addendum). Moreover, it was contemplated by the parties during plea negotiations that the government would agree to a reduction for acceptance of responsibility and for Mr. Yager's prompt entry of a plea. (A 12, 93-95, PSR Addendum). This agreement was set forth in the plea agreement, stated on the record by the government during Mr. Yager's plea, and reinforced in the addendum to the plea agreement. (A 81-82,86,94).

In response to Mr. Yager's objection, the government took the position set

forth in the PSR and vigorously argued against the adjustment. (A 13, PSR Addendum). The government relied on Mr. Yager's pre-plea conduct, that was known to the government prior to entering plea negotiations. (A 13, PSR Addendum). Despite the fact that Mr. Yager entered into the addendum to the plea agreement following his plea, the government argued that Mr. Yager did not accept responsibility because he failed to admit to the loss and number of victims during his plea colloquy. (A 13, PSR Addendum).

Two days prior to Mr. Yager's sentencing, a probation department representative filed a Declaration Petition⁵ alleging that Mr. Yager violated a special condition of his pretrial release by using a computer with online or email capabilities. The district court issued a warrant for Mr. Yager's arrest.

At the sentencing hearing, Mr. Yager waived a hearing on the Declaration Petition and went forward with sentencing. (A 118-119). The district court adopted the position of the probation department and the government and denied a reduction for acceptance of responsibility. (A 138-139).

At the conclusion of the sentencing hearing, the district court imposed a "guideline sentence" of 121 months imprisonment. (A 163).

⁵ The Declaration Petition, dated December 7, 2005, is included as sealed under separate cover with the PSR.

SUMMARY OF THE ARGUMENT

Mr. Yager's sentence should be vacated and the case remanded for resentencing because it is unreasonable within the meaning of United States v. Booker, 125 S.Ct. 738 (2005). Although Mr. Yager set forth various factors under 18 U.S.C. § 3553(a), in support of leniency, at the sentencing hearing, the district court instead focused on the guidelines and sentenced Mr. Yager at the high end of his guideline range of imprisonment.

The district court erred in calculating Mr. Yager's offense level by classifying Mr. Yager as a leader in the offense and by finding that the offense involved the use of sophisticated means.

The guideline range of imprisonment was also erroneously calculated because it failed to credit Mr. Yager with acceptance of responsibility. During plea negotiations, the government had agreed to recommend at sentencing a departure for Mr. Yager's acceptance of responsibility and for his prompt entry of a plea of guilty. The government breached the agreement when it adopted the position set forth in the PSR, that Mr. Yager's pre-plea conduct did not entitle him to the adjustment. The government further argued that it was not satisfied with Mr. Yager's plea colloquy. All information used against Mr. Yager was known to the government during the time the parties entered plea negotiations.

POINT I

THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS UNREASONABLE BECAUSE THE DISTRICT COURT ADOPTED THE GUIDELINE CALCULATIONS IN THE PSR, THEREBY TREATING THE GUIDELINE RANGE AS PRESUMPTIVELY REASONABLEABLE, AND IMPOSED A SENTENCE THAT WAS GREATER THAN NECESSARY TO MEET THE PURPOSES OF SENTENCING.

A. Standard of Review

Following the Supreme Court’s decision in United States v. Booker, 125 S.Ct. 738 (2005), sentences imposed upon federal criminal defendants are reviewed for “reasonableness.” Id. at 765. This Court most recently held that a sentence imposed under the United States Sentencing Guidelines is not entitled to a presumption of reasonableness. United States v. Fernandez, 443 F.3d 19, 27-28 (2d Cir. 2006).

1. The Booker decision.

Booker reaffirmed the constitutional mandate first announced in Apprendi v. New Jersey, 530 U.S. 466 (2000), that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. In order to comply with the Sixth Amendment right to a jury trial, the “statutory maximum” is the maximum sentence a judge

may impose solely on the basis of facts found by a jury or admitted by the defendant. Blakely v. Washington, 124 S.Ct. 2531, 2537 (2004).

Booker held that the mandatory nature of the United States Sentencing Guidelines violates the Sixth Amendment. As a result of this conclusion, the Supreme Court excised those provisions of the Federal Sentencing Reform Act of 1984 that make the Guidelines mandatory. These are 18 U.S.C. § 3553(b)(1), mandating use of the Guidelines, and 18 U.S.C. § 3742(e), which “sets forth standards of review on appeal.” Booker, 125 S.Ct. at 756-757. Instead of being bound by the Sentencing Guidelines, a sentencing court is now required to consider the Guideline ranges along with the statutory factors set forth in 18 U.S.C. § 3553(a).

2. The reasonableness standard.

This Circuit noted several important aspects of Booker that concern the selection of sentences:

- (1) the Guidelines are no longer mandatory;
- (2) the sentencing judge must consider the Guidelines and all of the other factors listed in 18 U.S.C. § 3553(a)⁶;

⁶ 18 U.S.C. § 3553(a) provides: (A) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider ----

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

- (3) consideration of the Guidelines will normally require determination of the applicable Guideline range;
- (4) the sentencing judge should decide, after considering the Guidelines and the § 3553(a) factors whether (i) to impose the sentence that would have been imposed under the Guidelines, i.e., a sentence within the applicable Guidelines range or within permissible departure authority; or (ii) to impose a non-Guideline sentence;
- (5) the sentencing judge is entitled to find all the facts appropriate for determining either a Guideline sentence or a non-Guideline sentence.

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- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) the kinds of sentence available and the sentencing range established for —
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines —
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
 - (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
 - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 - (7) the need to provide restitution to any victims of the offense.

United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005).

Process, as well as substance, factor into the reasonableness of the sentence imposed by the district court. Id. at 114. If a sentencing judge commits any of the following procedural errors, the sentence will be considered unreasonable:

- (1) making factual findings and mandatorily enhancing a sentence above the range applicable to facts found by a jury or admitted by a defendant;
 - (2) mandatorily applying the applicable Guideline range that was based solely on facts found by a jury or admitted by a defendant;
 - (3) failing to consider the applicable Guideline range as well as the factors listed in § 3553(a), and instead simply selecting what the judge deems an appropriate sentence; and
 - (4) limiting consideration of the applicable Guideline range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guideline range, as required by § 3553(a)(4), based on the facts found by the court.
- Id. at 114-115.

An error that occurs in calculating the advisory Guideline range that “appreciabl[y] influence[s]” the sentencing decision could render the final sentence unreasonable. United States v. Rubenstein, 403 F.3d 93, 98 (2d Cir. 2005); see also United States v. Skoczen, 405 F.3d 537,549 (7th Cir. 2005)(stating that “[e]ven under the advisory regime, if a district court makes a mistake in calculations under the Guidelines, its judgment about a reasonable sentence would presumably be affected by that error”).

B. Errors occurred in calculating Mr. Yager’s advisory guideline range that appreciably influenced the district court’s decision rendering the final sentence unreasonable.

At the sentencing hearing, Mr. Yager sought a sentence “sufficient, but not great than necessary” to comply with the four governing purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). (A 12). The district court was provided with evidence that the 5 years of Mr. Yager’s life, during which he engaged in the offense conduct, did not define his entire life. (A 12,147-149). Mr. Yager is the father of 2 girls he adopted from Korea. He obtained a Bachelor of Arts Degree from SUNY Brockport and a Masters of Fine Arts Degree from SUNY Buffalo. (A 12, 147-149). He was a high school art teacher and was highly regarded by his colleagues. (A 12, 147-149). Mr. Yager also volunteered for numerous memorial projects including a Korean War Veterans Memorial honoring Monroe County Soldiers that were killed in the Korean War. (A 12, 147-149). Despite these arguments, the district court instead focused on the PSR’s guideline calculations and imposed a guideline sentence of 121 months. (A 163). The guideline sentence was based on the erroneous calculations⁷ and was therefore unreasonable.

⁷ The district court’s unreasonable calculation included the failure to credit Mr. Yager with acceptance of responsibility. This argument is set forth in Point II of Mr. Yager’s brief regarding the government’s breach of the plea agreement.

1. Mr. Yager was not an organizer, leader, manager, or supervisor in the criminal activity.

U.S.S.G. § 3B1.1(c) provides for a 2 level enhancement “if the defendant was an organizer, leader, manager, or supervisor” in the offense committed. In determining whether this enhancement should apply, factors the court should consider include:

the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.
U.S.S.G. § 3B1.1, comment., n. 4.

This offense involved two participants, Mr. Yager and Mr. Marrone. In order for this enhancement to apply, there had to be evidence that Mr. Yager “exercise[d] some degree of control over others involved in the commission of the offense....or play[ed] a significant role in the decision to recruit or to supervise lower-level participants.” United States v. Burgos, 324 F.3d 88, 92 (2d Cir. 2003)(citations omitted). Although the PSR states that Mr. Yager recruited David Gruszka and Margaret Cook to open eBay accounts that were used to sell counterfeit artwork, these people were not participants in the offense and had no knowledge of the criminal activity.

Probation and the government argued that Mr. Yager was a leader because he obtained the artwork and established the selling price. Their argument failed to acknowledge Mr. Marrone's role in the offense. The record, specifically Mr. Marrone's testimony during his plea allocution, clearly demonstrates that Mr. Marrone was an equal partner in the conspiracy. For example, Mr. Marrone informed the court that Mr. Yager handled the artwork end of the operation, whereas Mr. Marrone opened eBay accounts, email accounts, and bank accounts to further the offense. (A 114-116). The offense could not have occurred but for Mr. Marrone's conduct. Most telling is Mr. Marrone's statement regarding payments received from purchasers. Mr. Marrone directed payments to himself, deposited the money into bank accounts that were in his name and then paid Mr. Yager. (A 114-116). It was Mr. Marrone, not Mr. Yager, who had control over the fruits of the offense. (A 116). As the PSR acknowledges, the proceeds were split between Mr. Marrone and Mr. Yager. (PSR ¶ 62).

In *Burgos*, this Court reversed a district court's imposition of a managerial role adjustment in a bank fraud conspiracy case. Burgos, 324 F.3d at 93. The defendant, Dyckman owned a business which was the location of some of the criminal activity and also where he employed one of his co-conspirators. Id. at 89. The conspiracy involved bank employees bringing stolen checks to Dyckman. Id.

Dyckman would then take the checks to a different bank where he had a contact that would cash them at a discounted rate. Id. The district court found that Dyckman was a manager in the offense because the bank employee brought the checks to Dyckman who then secured payment for the bank employee in return for the checks. Id. at 92. This Court reversed on the ground that Dyckman was simply a broker of stolen checks and there was no evidence that he directed anyone to steal the checks. Id. Additionally, the fact that Dyckman's role as a co-conspirator was to hold the money and to distribute it, did not support an inference of management. Id. at 93.

In this case, the evidence was also lacking as to Mr. Yager's control over Mr. Marrone. Like the defendants in *Burgos*, each party served the other. Id. Therefore, the district court improperly classified Mr. Yager as a manager or leader of the offense.

2. The defendants did not use sophisticated means to conceal the offense.

U.S.S.G. § 2B1.1(b)(9)(C) calls for a 2 level enhancement if the offense involved sophisticated means. Sophisticated means is defined as,

especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one

jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means. U.S.S.G. § 2B1.1, comment., n.8(B).

The PSR reasoned that the enhancement was appropriate because the “defendants used the fictitious name of ‘Sam Clay’ and the fictitious business name ‘Dome Investments, Inc.’ to communicate with purchasers and to conduct financial transactions for the purpose of concealing their identities as well as their scheme to defraud.” (PSR ¶ 58). The district court relied on the contents of the PSR and applied the enhancement⁸. (A 143).

The means used by the defendants to execute the offense were neither “especially complex” nor “especially intricate.” In fact, it is customary practice for those who use internet services such as eBay and email accounts to create “usernames” when accounts are opened. Moreover, the PSR illustrates that all internet and bank accounts involved in the offense were easily traceable to Mr. Yager or Mr. Marrone.

As set forth in the PSR, the eBay account “tonymarr” was opened with the email address of aamarr131@aol.com under the name of Anthony Marrone and

⁸ The district court specifically found that Dome Investments, Inc., was not a fictitious company. (A 122).

billed to either Mr. Marrone's wife or mother. (PSR ¶ 30). The eBay account "artfair" was opened with the email address wsyager@hotmail.com, under the account name of Stewart Yager with an address in Rochester and billed to Mr. Yager at his home address. (PSR ¶ 30). The eBay account "marrml" was opened with the email address marrml131@hotmail.com, under the name of Mr. Marrone's wife or mother with Mr. Marrone's residence as the account address. (PSR ¶ 33). The bank accounts used in the offense are in the names of Anthony Marrone, William Yager, Roselawn Galleries, Lois Brady, and Mary Yager. (PSR ¶ 37).

Even with respect to the use of "Sam Clay," this account was also traceable to Mr. Yager. A PayPal account was opened under the account name of William S. Yager and the email address of samclay@aol.com. (PSR ¶ 42). Additionally, during communication with a potential purchaser, the defendants were questioned about the name Sam Clay, to which they replied Sam Clay is "a fictional figure from the Pulitzer prize winning novel Kavalier and Clay...It is also our PayPal name." (A 117).

All fraudulent schemes involve a degree of deception and concealment. Mr. Yager, however, did not employ sophisticated means to conceal his fraud. The defendants listed counterfeit artwork on eBay, sold it, shipped it, received

payment, deposited the money into bank accounts, and split the proceeds. They did little to conceal their identity as their names and home addresses were used to open internet and bank accounts. In fact, they left a paper trail so obvious, that the government was able to locate them and arrest them for the instant offense.

POINT II

THE GOVERNMENT BREACHED THE PLEA AGREEMENT BY ADOPTING THE POSITION SET FORTH IN THE PSR THAT MR. YAGER DID NOT ACCEPT RESPONSIBILITY.

The PSR correctly acknowledged that Mr. Yager admitted the conduct alleged in the superseding indictment but failed to credit him with acceptance of responsibility stating that he “minimally accepted responsibility for the offense.” (PSR ¶ 55). The PSR relied upon Mr. Yager’s pre-plea conduct to deny the adjustment. This conduct occurred 6 months following his arrest and 15 months prior to his release. (A 5,9,11). His bond was revoked and he was detained for 7 months. (A 125-126). He was subsequently released from custody with the consent of the government. (A 59-63).

After Mr. Yager was released, he entered into plea negotiations with the government. He signed a written plea agreement whereby he admitted to the offense conduct, including numerous overt acts, and the government’s very detailed factual basis for the plea. (A 64-85). The plea agreement addressed sentencing issues, whereby the parties agreed to litigate at sentencing, enhancements pertaining to the monetary loss and the number of victims. (A 80-82). Mr. Yager agreed to waive his right to appeal any sentence of 60 months or

less and the government agreed to recommend departures for Mr. Yager's acceptance of responsibility and his prompt entry of a plea of guilty. (A 81-82,84-85). These provisions were reiterated during Mr. Yager's plea colloquy. (A 93-94).

On the advice of counsel, Mr. Yager at that time did not agree to the government's allegations pertaining to loss and the number of victims. (A 126-127). This was because the discovery in the case involved over 18,000 pages and counsel could not properly advise Mr. Yager on these enhancements without first reviewing the contents with him. (A 126-127). After doing so, a meeting was held with defense counsel, Mr. Yager and government agents. (A 127-128). At the meeting, Mr. Yager was shown a chart prepared by the government setting forth the victims in the offense and the monetary loss. (A 128). Mr. Yager readily admitted to the government's assessment and signed a plea agreement addendum that stated the loss in the offense was over \$400,000 and that there were 50 or more victims. (A 86-88,128). The addendum stated that all other provisions of the original plea agreement remained in full force and effect. (A 86).

The guidelines instruct that an adjustment for acceptance of responsibility is warranted when a defendant truthfully admits conduct comprising the offense of conviction, and truthfully admits any additional relevant conduct for which the

defendant is accountable under § 1B1.3. U.S.S.G. § 3E1.1, comment., n. 1(a). A defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under this section.

Id. The facts surrounding Mr. Yager’s plea, clearly indicate that he fully and truthfully admitted the offense conduct contained in the superseding indictment.

A. Standard of Review

Interpretations of plea agreements are reviewed de novo and in accordance with principles of contract law. United States v. Vaval, 404 F.3d 144, 152 (2d Cir. 2005) (*quoting* United States v. Riera, 298 F.3d 128, 133 (2d Cir. 2002)). Plea agreements are construed strictly against the government and the government’s conduct will be scrutinized to ensure that it comports with the highest standard of fairness. Vaval 404 F.3d at *Id.* (*citing* United States v. Lawlor, 168 F.3d 633, 637 (2d Cir. 1999)). Prosecutors are held to meticulous standards of performance because plea bargains require defendants to waive fundamental constitutional rights. Id.

In *Vaval*, the defendant and the government entered into a plea agreement whereby the government agreed “based upon information now known to” the United States Attorney’s Office, it “would take no position concerning where

within the Guidelines range determined by the court the sentence shall fall,” and “make no motion for an upward departure.” Vaval 404 F.3d at 149. A PSR was prepared that placed the defendant in a criminal history category II rather than III as was contemplated by the parties during plea negotiations. At sentencing, this Court held that the government breached the plea agreement when it “volunteered highly negative characterizations of appellant’s criminal history as ‘appalling’ and his purported contrition as ‘disingenuous.’” Id. at 153. The government further breached the agreement by arguing that it could “technically” argue for an upward departure based on the PSR’s criminal history calculations. Id. The government then offered arguments in support of an upward departure. Id.

Here, the government vigorously argued against an adjustment for acceptance of responsibility based upon Mr. Yager’s pre-plea conduct that led to the revocation of his bond, and because he did not fully admit the amount of loss and number of victims during his plea colloquy. The government was fully aware of this information during plea negotiations. This Court has previously held “that the government may not base its dissatisfaction with a defendant’s performance of an agreement on facts known to the government at the time the agreement is executed. United States v. Roe, ___ F.3d ___, 2006 WL 925185, *5(2d Cir.). Not only is it unfair, “it would have been fraudulent to have induced a defendant’s plea

with a promise that the government already knew it was not going to keep.” Id.
(citations omitted).

What is most troubling is the government’s argument centered around Mr. Yager’s plea colloquy. Pursuant to the original plea agreement the parties agreed to litigate issues at sentencing pertaining to loss and victims. (A 80-82). During Mr. Yager’s plea colloquy the government acknowledged this and also stated that it would recommend a departure for acceptance of responsibility. (A 93-94). If the government was dissatisfied with Mr. Yager’s on the record statements at his plea, then it should have notified the court and the defendant at that time.

Moreover, any dissatisfaction with these statements were cured when Mr. Yager thereafter entered into an addendum to the plea agreement admitting to the government’s loss and victim calculations. (A 86-88). Again, if the government was dissatisfied with Mr. Yager’s conduct, it had the opportunity to inform Mr. Yager by withdrawing the promise to make a recommendation for acceptance of responsibility. Instead, the addendum states that all provisions of the original plea agreement remain in full force and effect. Mr. Yager learned for the first time, after the PSR was prepared, that the government had no intent to follow through with the promise set forth in the plea agreement and stated on the record during Mr. Yager’s plea colloquy. (A 130).

B. Remedies for breach.

Remedies for a breached plea agreement is either to permit the plea to be withdrawn or to order specific performance of the agreement. Vaval 404 F.3d at 154 (citations omitted). “[I]n order to preserve the integrity of plea bargaining procedures and public confidence in the criminal justice system, a defendant is generally entitled to the enforcement of a plea agreement without showing a tangible harm resulting from a breach.” Id. at 155.

The record clearly illustrates that the government breached the plea agreement when it adopted the position in the PSR. Although a Declaration Petition was filed two days prior to Mr. Yager’s sentencing hearing, the arguments advanced in the PSR and vigorously supported by the government, centered around facts that were known to the government during plea negotiations. The district court did consider the allegations set forth in the Declaration Petition, however, the court stated that even without the new allegations, it would have denied acceptance of responsibility to Mr. Yager based upon the contents of the PSR. There can be no doubt that the arguments advanced by the government influenced the district court in its decision to deny Mr. Yager this adjustment.

Therefore, Mr. Yager’ sentence should be vacated and remanded for resentencing based upon the government’s breach of the plea agreement.

CONCLUSION

For the reasons advanced above, Mr. Yager's sentence must be vacated and remanded to the District Court for resentencing.

DATED: May 5, 2006

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

This brief complies with the type-volume limitation of Fed.R.App.P.32(a)(7)(B) because this brief contains 6567 words, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii).

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

Docket No.: 05-7048-cr

V.

WILLIAM S. YAGER,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, Valarie Bruni, the Legal Secretary for the Federal Public Defender's Office, do hereby state under penalty of perjury that on May 5, 2006, I served a copy of the Brief on Appeal and Appendix of the Defendant-Appellant, William S. Yager, on the following:

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DATED: May 5, 2006

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