Hon. Darrell Issa  
Chairman  
House Oversight and Government Reform Committee  
2347 Rayburn House Office Building  
Washington, DC 20515

Re: Aaron Swartz/United States Attorney Carmen M. Ortiz

Dear Chairman Issa:

I understand you are reviewing the prosecution of Aaron Swartz by the United States Attorney’s Office for the District of Massachusetts. I generally don’t like anonymous letters, but as a lawyer who represents clients being prosecuted by the United States Attorney’s Office in Boston, I am very concerned that speaking out against United States Attorney Ortiz will lead to retaliation against my clients.

I write to bring to your attention the opinion of the First Circuit Court of Appeals in United States v. Gonczy, 357 F.3d 50 (1st Cir. 2004) (enclosed). The opinion illustrates something I believe you should be aware of—a much earlier example of personal overreaching and prosecutorial misconduct by United States Attorney Ortiz, dating back to when she was a line prosecutor. In the Gonczy case, as you will see, the First Circuit concluded that then Assistant United States Attorney Ortiz agreed in writing to making a recommendation at the low end of the sentencing guidelines (70 months), but violated the plea agreement by making an argument at the sentencing hearing “advocating for the imposition of a higher sentence than the agreed-upon term of 70 months.” 357 F. 3d at 53. Although the District Court “admonished” Ortiz for conduct that clearly violated her legal obligations, the Department of Justice did not review her conduct or discipline her. Instead, the Department of Justice sought to justify her conduct, which (as the First Circuit found) clearly violated First Circuit case law. The First Circuit rejected this effort and vacated the sentence based on Ortiz’s misconduct.

Unfortunately, as those of us who practice in Boston know, cases like Gonczy and Swartz are all too typical of the way United States Attorney Ortiz approaches the prosecution of cases. Under her tenure, prosecutors’ disregard of defendant’s rights, due process, and basic standards of decency have reached extraordinary proportions. I hope that you will help shine a light on this. Perhaps some good could come from Aaron Swartz’s needless and tragic death. Thank you for your consideration.

A Concerned Boston Lawyer.

cc: Senator John Cornyn  
Senator Elizabeth Warren  
Senator Ron Wyden  
Hon. Zoe Lofgren  
Hon. Alan Grayson  
Hon. Jared Polis
United States Court of Appeals, First Circuit.
UNITED STATES of America, Appellee,
v.
Donald L. GONCZY, Defendant, Appellant.

No. 02-2399.

Background: Defendant pleaded guilty in the United States District Court for the District of Massachusetts, William G. Young, J., to conspiracy to commit wire fraud and mail fraud, eight counts of mail fraud, and 23 counts of mail fraud. Defendant appealed his sentence.

Holdings: The Court of Appeals, Torruella, Circuit Judge, held that:
(1) defendant's objection before the district court to government's purported breach of plea agreement was sufficient to preserve issue for appeal, and
(2) government's statements at sentencing amounted to recommendation that defendant receive a sentence in excess of agreed-upon 70 months, in violation of plea agreement with defendant.

Vacated and remanded.

West Headnotes

Criminal Law 110 C==1031(4)

Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E) In General
110k1031 In Preliminary Proceedings
110k1031(4) k. Arraignment and Plea. Most Cited Cases

Defendant's objection before the district court to government's purported breach of plea agreement, which required government to recommend sentence at low end of Sentencing Guidelines range, was sufficient to preserve issue for appeal; after prosecutor concluded statement as to recommended sentencing range, defense counsel stated that he objected and proceeded to discuss the prosecutor's argument, and near conclusion of hearing, alerted the court that the defense did not waive any objection to the prosecutor's remarks in the context of such argument.


Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

A breach of a plea agreement is deemed a violation of that agreement by the government, not by the sentencing judge.

[3] Criminal Law 110 C==1031(4)

Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E) In General
110k1031 In Preliminary Proceedings
110k1031(4) k. Arraignment and Plea. Most Cited Cases

Criminal Law 110 C==1134.37

Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L) Scope of Inquiry
110k1134.37 k. Arraignment and Plea. Most Cited Cases
(Formerly 110k1134(3))

If a proper objection is brought before the district court, breaches of plea agreements present questions
of law for plenary review.


110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110k1031.1 In General
110k1031(4) k. Arraignment and Plea. Most Cited Cases

When a defendant does not object to the breach of the plea agreement at the sentencing hearing, the Court of Appeals reviews for plain error.


110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

Government’s statements at sentencing amounted to recommendation that defendant receive a sentence in excess of agreed-upon term of 70 months, in violation of plea agreement with defendant under which government agreed to recommend sentence at low end of Sentencing Guideline range; prosecutor never affirmatively recommended 70-month sentence, and after summarizing facts of case, argued that defendant was the “brains behind the operation,” “ruined many lives,” including those of his children, through his fraudulent conduct, and “basically laughed in the face of law enforcement efforts.”


110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

A plea agreement is a binding promise by the government and is an inducement for the guilty plea; a failure to support that promise is a breach of the plea agreement, whether done deliberately or not.

[7] Sentencing and Punishment 350H E 244

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(C) Preliminary Proceedings in General
350Hk242 Other Discovery and Disclosure
350Hk244 k. Necessity. Most Cited Cases

The government has a duty to bring all facts relevant to sentencing to the judge’s attention.

[8] Criminal Law 110 E 273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

A defendant entering into a plea agreement with the government undertakes to waive certain fundamental constitutional rights; because of that waiver, the government is required to meet the most meticulous standards of both promise and performance.

[9] Criminal Law 110 E 273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

No magic formula exists for a prosecutor to comply with the agreed-upon sentence recommendation contained in a plea agreement, but the prosecutor’s overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse.
357 F.3d 50, 13 A.L.R. Fed. 2d 881
(Cite as: 357 F.3d 50)

*51 Benjamin D. Enting, for appellant.

Kirby A. Heller, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, Joshua Levy, Assistant United States Attorney, Carmen Ortiz, Assistant United States Attorney, and Monica S. Abrams, Attorney, Appellate Section, Criminal Division, were on brief, for appellee.

Before TORRUELLA, Circuit Judge, CYR, Senior Circuit Judge, and OBERDORFER, Senior District Judge.

FN* Of the District of Columbia, sitting by designation.

TORRUELLA, Circuit Judge.

Defendant-appellant Donald L. Gonczy ("Gonczy") appeals his sentence on the grounds that the government breached its plea agreement with him. We vacate the judgment and sentence, and remand for resentencing.

I.

Pursuant to a plea agreement with the government, Gonczy pled guilty to one count of conspiracy to commit wire and mail fraud, in violation of 18 U.S.C. § 371; eight counts of wire fraud, in violation of 18 U.S.C. § 1343; and twenty-three counts of mail fraud, in violation of 18 U.S.C. § 1341. Gonczy was part of a highly sophisticated telemarketing scheme, by which a large number of timeshare owners were induced to buy an appraisal provided by Gonczy and his companies at $400 each. All appraisals, however, were worthless, no timeshare unit having ever been inspected. The government estimated that there were roughly 38,000 victims, thus causing over $15 million in collective losses to the timeshare owners.

Under the plea agreement, the government was obligated to recommend "incarceration at the low end of the [United States Sentencing] [G]uideline[s] range calculated by the court ... ," although the agreement specified that such recommendation was not binding on the district court. Gonczy also specifically reserved the right to argue for a downward departure.

At the disposition hearing, the district court calculated the sentencing range to be between 70 and 87 months, which both parties agreed was within the appropriate range. However, after hearing arguments, the district court sentenced Gonczy to the top end of the range; viz. 84 months' imprisonment.

II.

[1][2] One issue controls the outcome of Gonczy's appeal, and that is whether the *52 government breached the plea agreement for if the statements of the Assistant United States Attorney ("AUSA") constitute a breach of the plea agreement, we will remand for resentencing. See, e.g., United States v. Riggs, 287 F.3d 221, 226 (1st Cir. 2002). An alternative remedy is to allow withdrawal of the guilty plea. Santobello, 404 U.S. at 263, 92 S.Ct. 495; United States v. Clark, 55 F.3d 9, 14-15 (1st Cir.1995). However, Gonczy has requested that the case be remanded for resentencing.

FN1 Gonczy argued that there were two issues on appeal: whether the plea agreement was breached, and whether the district judge erred in sentencing Gonczy. A breach of a plea agreement is deemed a violation of that agreement by the government, not by the sentencing judge. See generally Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

[3][4] If a proper objection is brought before the district court, breaches of plea agreements present questions of law for plenary review. United States v. Canada, 960 F.2d 263, 269 (1st Cir.1992). When a defendant does not object to the breach of the plea agreement at the sentencing hearing, this court reviews for plain error. Riggs, 287 F.3d at 224.

The government argues that Gonczy's counsel did not properly object because he neither stated the reason for his objection when the alleged breach occurred, nor did he request the plea be withdrawn, or ask the district court for the remedy of specific performance. The government further argues that, even if counsel effectively objected, the district court did not address the issue of the breach and Gonczy therefore waived his objections. We see it differently.

The government's argument fails not only because Gonczy's counsel did object, but because the record shows that the district court was aware of both the objection and the underlying reasons. We have held that an objection is sufficiently raised as long as it...
brings the purported breach of the plea agreement to the
district court's attention. See, e.g., United States v.
Giraud-Piñeiro, 269 F.3d 23, 25 (1st Cir.2001) (holding
defendant failed to object because he had "knowledge of the conduct that purportedly
amounts to a breach[,] but nevertheless fail[ed] to
bring it to the attention of the district court"). The
government does not cite any authority to support its
argument that counsel is required to present a more
specific objection. In the present case, when the
AUSA concluded her statement as to the sentencing
range, Gonczy's counsel stated:

Your Honor, I object to the government character-
izing that what should proceed in this [c]ourt at a
minimum represents the guidelines when the gov-
ernment has entered into a plea agreement in which
they have agreed to recommend the bottom of the
guidelines in connection with that plea agreement.
Counsel's statement tends to undermine the very
agreement that the government has entered into.

So, your Honor, with all the flourish that we heard
concerning this case just now, I think the [c]ourt is
well aware of the facts of this case and all of those
facts which were presented by counsel are merged
into the government's conclusions that what should
be done in this case is a sentence of 70 months.

Gonczy's counsel's purpose and reasons are clear
both from the phrase "I object" and the subsequent
discussion of the prosecutor's argument before the
district court. More to the point, near the conclusion of
the hearing, Gonczy's counsel alerted the district court
that "[t]he defense does not waive any objection to
[the AUSA's] remarks at 53 in the context of this
argument." The district judge specifically noted, after
sentencing Gonczy, that the "objection is not only
appropriate but [counsel is] wise to maintain it." Therefore, we consider Gonczy's objection to have
been sufficiently raised, and thus accord Gonczy's
appeal plenary review.

III.

[5] Gonczy argues that the AUSA violated the
plea agreement when she argued for a sentence in
excess of the agreed-upon recommendation of 70
months. The government disagrees, alleging that the
prosecutor did recommend 70 months. It argues that
the prosecutor's statements were merely anticipating
Gonczy's motion for a downward departure.

[6] A plea agreement is a binding promise by the
government and is an inducement for the guilty plea; a
failure to support that promise is a breach of the plea
agreement, whether done deliberately or not. See
495, 30 L.Ed.2d 427 (1971); see also United States v.
Saxena, 229 F.3d 1, 6-8 (1st Cir.2000), United States
v. Kurkculer, 918 F.2d 295, 302 (1st Cir.1990).

[7] At the sentencing hearing, the AUSA's re-
marks began with the statement that "in line with the
plea the government would be recommending 70
months imprisonment..." The AUSA then reviewed
the facts of the offense, as required at a sentencing
hearing. The government's review of the facts of the
case and of Gonczy's character cannot constitute a
breach of the plea agreement as they were relevant to
the court's imposition of sentence; no limitation can be
placed, by agreement or otherwise, on this informa-
tion. See Saxena, 229 F.3d at 6 (noting that under
18 U.S.C. § 3661 no limitation is permitted on the type
of character information a district court may receive
for consideration in imposing sentence). The gov-
ernment has a duty to bring all facts relevant to sen-
tencing to the judge's attention. See id. This duty co-
exists with the government's duty to abide by a plea
agreement.

[8] We are mindful, however, that a defendant
entering into a plea agreement with the government
undertakes to waive certain fundamental constitu-
tional rights; because of that waiver, the government is
required to meet "the most meticulous standards of
both promise and performance." Riggins, 287 F.3d at
224 (citations omitted); see also Santobello, 404 U.S.
at 261, 92 S.Ct. 495. In this case, the substance of the
prosecutor's argument at the sentencing hearing can
only be understood to have emphasized Gonczy's
wrongdoing and his leadership role in the offense,
averting for the imposition of a higher sentence
than the agreed-upon term of 70 months. After sum-
marizing the facts of the case, she argued to the district
court as follows:

I would submit, your Honor, that the defendant
was the brains behind this operation ... that he set up
these appraisal companies that obtained the moneys
from innocent victims that exist in this case....

Your Honor, the defendant through his conduct

ruined many lives. He set up this elaborate operation that involved numerous, numerous individuals. He ruined the lives of his own children. Although they willingly and voluntarily participated in this scheme, he is the one that brought them and involved them in this through his own promises.

This was also, I want to inform the Court, this was a very blatant fraud. Despite being aware of law enforcement investigations locally initially that were *54 conducted by the Florida Department of Law Enforcement, the defendant basically laughed in the face of law enforcement efforts and even upon becoming aware of federal law enforcement efforts through the investigation that we were conducting and the numerous searches that we conducted throughout the country, continued to operate this scheme to defraud and continued to operate it after he left to go to St. Marten [sic] and fled there. And I would submit, your Honor, that this scheme did not come to a halt despite our investigation, despite our searches and seizures, until Mr. Gonczy himself was finally arrested in January of 2001 and then extradited back to this country from St. Marten [sic].

The district court chided the AUSA for being repetitive and effectively ended her argument. The prosecutor then concluded, stating that “the defendant at a minimum deserves what the guidelines provide for and those are his just deserts [sic].”

We have found in similar circumstances that an AUSA violated a plea agreement when she “never ... affirmatively recommended a 36-month sentence and her comments seemed to undercut such a recommendation.” *Canada*, 960 F.2d at 268. In *Canada*, we found that while the AUSA’s comments “stopped short of explicitly repudiating the agreement, *Santobello* prohibits not only explicit repudiation of the government’s assurances, but must in the interests of fairness be read to forbid end-runs around them.” *Id.* at 269 (citations and quotation marks omitted).

[9] The government argues that this appeal is distinguishable from *Canada* because the AUSA in fact recommended 70 months. No magic formula exists for a prosecutor to comply with the agreed-upon sentence recommendation, but the prosecutor’s “overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse.” *Id.* at 268; see also *Savona*, 229 F.3d at 6

("satisfying this obligation [under the plea agreement] requires more than lip service on a prosecutor's part."). The initial recommendation in Gonczy's case was undercut, if not eviscerated, by the AUSA's substantive argument to the district court.

The government's argument that the prosecutor was merely anticipating the request for a downward departure is unavailing. The district court in the sentencing hearing clearly designated the first part of the hearing for the sentence recommendation and the second part for the issue of downward departure. Moreover, the downward departure related to Gonczy's medical condition. Nowhere in the initial argument related to sentencing was that condition mentioned.

We agree with the district court that "no fair reading of [the prosecutor's] argument to the [c]ourt would lead an impartial observer to think that [she] thought 70 months was an adequate sentence." The district judge admonished the prosecutor, saying that "if you plea bargain out a case at 70 months then the entire argument should be devoted to a sentence of 70 months." While paying lip service to a term of 70 months' imprisonment, the AUSA substantively argued for a sentence at the higher end of the guidelines. In doing so, the government violated the plea agreement it entered into with Gonczy.

IV.

For the foregoing reasons, we vacate the judgment and sentence and remand for resentencing.

Vacated and Remanded.

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