CRIMINAL LAW — PLEA AGREEMENTS — THIRD CIRCUIT HOLDS THAT GOVERNMENT APPEALS OF ALLEGED PLEA AGREEMENT BREACHES BY DEFENDANTS ARE REVIEWED DE NOVO. — *United States v. Williams*, 510 F.3d 416 (3d Cir. 2007).

Plea agreements are unquestionably crucial to the justice system.[1] In a recent year, nearly eighty-six percent of all charged federal offenses were resolved by guilty pleas, and over 72,000 federal defendants pled either guilty or nolo contendere.[2] To promote justice and maintain legitimacy, courts must preserve the fairness of the plea bargain system. Systematic protection of defendants in this context, where the government has much greater bargaining power and defendants relinquish numerous constitutional rights, is thus imperative. The Third Circuit has previously recognized this principle, breaking with some of its sister circuits by adopting a de novo, as opposed to a clear error, standard[3] for reviewing defendants' appeals of government breaches of plea agreements — even when defendants fail to properly preserve the objection in the district court[4] and other circuits would thus find the issue waived.[5] Recently, in *United States v. Williams*,[6] the Third Circuit held that the de novo standard should also be applied to government appeals of defendants' alleged breaches of plea agreements, even when the government has not properly preserved the objection in the court below.[7] In declining to find waiver by the government, the Third Circuit ignored the substantially different policy implications surrounding alleged breaches of plea agreements by defendants as compared to those by the government, and set a standard that will hinder judicial efficiency, accuracy, and fairness.

Oyton Williams was arrested for drug and gun possession in April 2004 and in March 2005 acceded to a written plea agreement whereby he would plead guilty to one count of possession of cocaine with intent to distribute, and the government would forgo bringing additional

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[1] *See* Santobello v. New York, 404 U.S. 257, 260 (1971) ("'[P]lea bargaining[]' is an essential component of the administration of justice."); *id.* at 261.

[2] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 62 tbl.4.2 (2006), *available at* http://www.ojp.gov/bjs/pub/pdf/cfjs04.pdf.

[3] De novo review is independent and plenary. *See* Salve Regina Coll. v. Russell, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable."). Clear error review is deferential such that a reviewing court reverses only if it "is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). The Third Circuit uses the terms "clear error" and "plain error" interchangeably. *See* United States v. Rivera, 357 F.3d 290, 294 n.3 (3d Cir. 2004).

[4] *See, e.g.*, United States v. Moscahlaidis, 868 F.2d 1357, 1360 (3d Cir. 1989).

[5] *See infra* notes 40–41 and accompanying text.

[6] 510 F.3d 416 (3d Cir. 2007).

[7] *Id.* at 424.

charges.[8] The parties stipulated to the appropriate "total [Sentencing] Guidelines offense level,"[9] and agreed that "neither party w[ould] argue for the imposition of a sentence outside the Guidelines range that results from the agreed total Guidelines offense level"[10] or "for any upward or downward departure" not set forth in the agreement.[11]

Williams pled guilty on April 13, 2005.[12] At sentencing, the district court granted Williams's motion to downgrade his criminal history category,[13] concluding that the issue was "not addressed in a plea agreement," and thus was properly open to argument.[14] The court then "recognized that Williams was 'seeking other downward departures,' and acknowledged that the plea agreement" might be implicated.[15] Defense counsel pointed out that under *United States v. Booker*,[16] courts must analyze reasonableness and may depart from sentencing guidelines regardless of parties' stipulations in plea agreements.[17] The court agreed and "invited and allowed the [defendant's departure] argument,"[18] subsequently exercising its discretion under the Federal Sentencing Guidelines[19] to sentence Williams to 120 months' imprisonment.[20] The government noted its objection to the sentence, but failed to specifically object that the plea agreement had been violated, or request that it be set aside.[21]

The Third Circuit vacated and remanded for resentencing. Writing for the panel, Judge Sloviter[22] observed that the appropriate standard of review for evaluating an alleged breach of a sentencing agreement by the defendant, and the appropriate remedy for such a breach, were issues of first impression in the circuit.[23] Judge Sloviter then noted the Third Circuit's prior decision to apply de novo review in evaluating whether the *government* had breached a plea agreement.[24]

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[8] *Id.* at 418.

[9] Joint Appendix at 30, *Williams* (No. 05-4153), *quoted in Williams*, 510 F.3d at 419 (emphasis omitted).

[10] *Id.* (emphasis omitted).

[11] *Id.* at 31.

[12] *Williams*, 510 F.3d at 419.

[13] *Id.* at 420. This downgrade reduced the Guidelines sentencing range from 168–210 months to 151–188 months). *Id.*

[14] *Id.* at 429 (Weis, J., dissenting) (emphasis omitted).

[15] *Id.* at 420 (majority opinion).

[16] 543 U.S. 220 (2005).

[17] *Williams*, 510 F.3d at 420.

[18] *Id.* at 430 (Weis, J., dissenting).

[19] 18 U.S.C. § 3553(a) (2000 & Supp. V 2005).

[20] *Williams*, 510 F.3d at 421.

[21] *See id.*; *see also id.* at 431 (Weis., J. dissenting).

[22] Judge Sloviter was joined by Judge Smith.

[23] *Williams*, 510 F.3d at 417, 421.

[24] *Id.* at 421–22 (citing United States v. Rivera, 357 F.3d 290, 293–95 (3d Cir. 2004) (holding de novo review appropriate in spite of the defendant's failure to raise the issue below)).

Pointing to the importance of the plea bargain process to the workability of the criminal justice system, and invoking principles of contract law, Judge Sloviter emphasized the necessity of holding defendants to their plea agreements.[25] The *Williams* court thus held that government appeals would receive the same de novo review employed to evaluate defendants' appeals of plea agreement breaches.[26]

The court therefore described the essential question as "whether the alleged breaching party's 'conduct is consistent with the parties' reasonable understanding of the agreement.'"[27] Judge Sloviter asserted that the stipulations in the plea agreement "unambiguously prohibited Williams from making downward departure motions," so there was no need to construe the agreement against the government.[28] The court determined that Williams breached the plea agreement and remanded to allow the parties to specifically perform their obligations.[29]

Judge Weis dissented. He agreed with the majority that defendants should not be allowed to renege on valid and clear stipulations in plea agreements, but disagreed that Williams had violated the agreement in question.[30] Judge Weis noted that "[t]he stipulations' reference to the 'range that results from the agreed total Guidelines offense level . . . ' is ambiguous because a sentencing range is not determined solely by the offense level, but by a combination of that factor and the criminal history."[31] In light of the well-established Third Circuit principle that ambiguities in plea agreements should be construed in favor of the defendant, Judge Weis determined that Williams should not be considered in breach for arguing this point.[32] Judge Weis was also unconvinced by the government's alternative claim that Williams violated the agreement by arguing that mitigating factors should be considered, in light of the district court's invitation and permission of such arguments.[33] He noted that the government neither declared that the plea agreement had been breached nor asked that it be set aside.[34] Judge Weis concluded by highlighting the deference due to district courts' procedural rulings: "In interpreting and applying plea agreements particularly, district judges, with their knowledge of local conditions, are in a superior position to assess those agreements."[35]

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[25] *Id.* at 422–23.
[26] *Id.* at 424.
[27] *Id.* at 425 (quoting United States v. Hodge, 412 F.3d 479, 485 (3d Cir. 2005)).
[28] *Id.* at 425; *see also id.* at 423.
[29] *Id.* at 425–26, 428.
[30] *Id.* at 428 (Weis, J., dissenting).
[31] *Id.* at 429.
[32] *Id.*
[33] *Id.* at 430–32.
[34] *Id.* at 431; *see also id.* at 421 (majority opinion).
[35] *Id.* at 432 (Weis, J., dissenting).

The *Williams* court's decision to review government appeals of plea agreement breaches de novo, even when the government failed to object in the district court, adopted parity merely for parity's sake, and disregarded the court's previous rationales for applying the de novo standard to defendants' appeals. The implications of this holding for waiver of the issue by the government mirrors the court's approach to waiver by defendants — in both cases the de novo standard applies even when the issue of breach was not properly preserved. However, there are many reasons outlined in legal theory,[36] and echoed in the present majority opinion,[37] *not* to treat defendants and the government the same, but rather to be particularly protective of defendants in interpreting and enforcing plea agreements. Government breaches, in contrast to breaches by defendants, "affect[] the fairness, integrity, and public reputation of judicial proceedings."[38] Thus, allowing defendants to appeal government breaches even when defendants fail to object in the court below is justified, despite the possibility that judicial efficiency and accuracy might be compromised. However, the same is not true in reverse: the rationales for allowing de novo review of government breaches are not readily applied to appeals of defendant breaches, and thus the costs of such review outweigh the benefits.

Criminal defendants are uniquely vulnerable in the plea bargain context, and therefore many circuits have established protective rules requiring careful scrutiny of plea agreements and construal of ambiguities against the government.[39] Three circuits, including the Third, have taken a further step to protect pleading defendants: they have held that defendants do not waive their right to appeal claims of government breach by neglecting to object to the breach in the district court, and thus review such claims de novo.[40] Other circuits consider such unpreserved issues waived, and review them for clear error.[41]

The Third Circuit has articulated compelling reasons to preserve defendants' breach claims, which other circuits have raised as well. For example, the Third Circuit has noted that "the defendant, by en-

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[36] *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. SUPPLEMENT 717 (2006); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

[37] *See Williams*, 510 F.3d at 422.

[38] United States v. Goldfaden, 959 F.2d 1324, 1328 (5th Cir. 1992).

[39] *See, e.g.*, *Williams*, 510 F.3d at 422; United States v. McCoy, 508 F.3d 74, 78 (1st Cir. 2007); United States v. Oladimeji, 463 F.3d 152, 157 (2d Cir. 2006); United States v. Somner, 127 F.3d 405, 408 (5th Cir. 1997).

[40] *See* United States v. Peterson, 225 F.3d 1167, 1170 (10th Cir. 2000); United States v. Lawlor, 168 F.3d 633, 636 (2d Cir. 1999); United States v. Moscahlaidis, 868 F.2d 1357, 1360 (3d Cir. 1989).

[41] *See, e.g.*, *In re* Sealed Case, 356 F.3d 313, 316–17 (D.C. Cir. 2004) (listing cases from courts that apply a clear error standard).

tering into the plea, surrenders a number of h[is] constitutional rights,"[42] and the government has "tremendous bargaining power."[43] Furthermore, plea agreements bind the defendant to a particular outcome (a conviction) while the prosecution merely agrees to *recommend* a result (here, a sentencing range) to the judge, who can deviate from that suggestion.[44] In addition to factors related to the defendant's unique position, a "[b]reach of a plea agreement by a prosecutor [] strikes at public confidence in the fair administration of justice and, in turn, the integrity of our criminal justice system."[45] These considerations indicate the heightened necessity of holding the government to its agreements with defendants, whose freedom and, in capital cases, lives are at stake.[46]

None of these defendant-specific rationales, however, applied to the present case — a failure by the *government* to properly object to a defendant's alleged breach of a plea agreement. Although defendants surely should not be permitted to benefit from plea bargains while evading their costs,[47] clear error review is sufficient to prevent such an outcome. Additionally, a breach by a defendant does not threaten the integrity of the criminal justice system in at all the same way as a breach by the government. Although it smacks of injustice to revoke a defendant's opportunity to appeal potentially improper actions by the government because the defendant's lawyer failed to properly object, the same public perception does not inhere in finding waiver by the government. This is particularly so when many defendants are represented by court-appointed counsel who notoriously have few resources and are frequently overworked and undercompensated, whereas the

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[42] United States v. Rivera, 357 F.3d 290, 294 (3d Cir. 2004) (alteration in original) (quoting United States v. Nolan-Cooper, 155 F.3d 221, 236 (3d Cir. 1998)); *see also* McCarthy v. United States, 394 U.S. 459, 466 (1969) ("A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.").

[43] *Rivera*, 357 F.3d at 295 (quoting United States v. Baird, 218 F.3d 221, 229 (3d Cir. 2000)); *see also Williams*, 510 F.3d at 422; United States v. Queensborough, 227 F.3d 149, 156 (3d Cir. 2000); United States v. Padilla, 186 F.3d 136, 140 (2d Cir. 1999) ("[T]he Government is usually the party that drafts the agreement, and . . . has certain awesome advantages in bargaining power." (quoting United States v. Ready, 82 F.3d 551, 559 (2d Cir. 1996))).

[44] *See* Scott & Stuntz, *supra* note 36, at 1953–57. Professors Robert Scott and William Stuntz note that "the agreement is curiously one-sided: the defendant's plea is ordinarily binding, while the prosecutor's words constitute mere advice that the court can accept or ignore as it wishes." *Id.* at 1954. Thus, "defendants' ability to rely on government promises is much lower than in comparable private settings." *Id.* at 1953.

[45] *Rivera*, 357 F.3d at 294 (alterations in original) (quoting Dunn v. Colleran, 247 F.3d 450, 462 (3d Cir. 2001)) (internal quotation mark omitted).

[46] *See* Boykin v. Alabama, 395 U.S. 238, 243–44 (1969) ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable . . . .").

[47] *Williams*, 510 F.3d at 422 (quoting United States v. Bernard, 373 F.3d 339, 345 (3d Cir. 2004)).

government enjoys far greater resources.[48] Moreover, the prosecutor generally drafts the plea agreement, and it is thus more understandable for a defendant, who is less familiar with its terms and implications, to be given leeway in appealing even if he is unable to recognize and object to a breach immediately; the government, by contrast, has no such excuse for failure to object promptly. Finally, the prosecution does not give up any constitutional rights in a plea agreement, so the government has less at stake requiring protection.

Although Judge Sloviter was correct that failure to enforce plea agreements against breaching defendants would disrupt the plea bargain process, her opinion described a parade of horribles depicting the deleterious effects of allowing defendants to breach plea agreements with impunity[49] even though no one — neither the defendant nor the dissent — was advocating for such a result. Were courts to find that the government waived the issue of the defendant's breach by not properly objecting below — and thus subject such appeals to clear error rather than de novo review — appellate panels could still remedy cases in which the government neglected to object but the breach was so apparent and egregious that the district courts' failure to address it was clearly erroneous.

The thrust of the majority's argument, that the de novo standard should apply because parity is the appropriate default in contract-like situations,[50] undervalued the exceptional circumstances of criminal defendants. The court failed to mention the relevant principle set forth in *United States v. Moscahlaidis*,[51] in which the Third Circuit deviated from the typical clear error standard by extending de novo review to defendants' appeals of prosecutorial breaches of plea agreements. The *Moscahlaidis* court noted that in analyzing plea agreements, "[c]ourts should consider not only contract principles but also ensure that the plea bargaining process is 'attended by safeguards to insure the defendant [receives] what is reasonably due in the circumstances.'"[52] Thus, the question the *Williams* court faced was not a standard matter of contract doctrine interpretation, as the majority

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[48] *See* Scott & Stuntz, *supra* note 36, at 1958–59; Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 230–31 (2004) (noting that prosecutors typically "earn higher salaries" than public defenders, "fare better . . . when it comes to workload," and "have greater access to investigators and experts," and that these factors "combine to produce an overall gap in spending between the prosecution and defense functions").

[49] *Williams*, 510 F.3d at 422–43.

[50] *See id.* at 422 ("Because a plea agreement is a bargained-for exchange, contract principles would counsel that we reach the same conclusion when a defendant breaches a plea agreement as we would reach if the government breached.").

[51] 868 F.2d 1357 (3d Cir. 1989).

[52] *Id.* at 1361 (alteration in original) (quoting Santobello v. New York, 404 U.S. 257, 262 (1971)).

implied. Instead, there are many reasons to approach these situations very differently, and in fact, "plea bargains are *not* enforced according to standard, garden-variety contract principles of offer and acceptance."[53] The peculiar position of the criminal defendant in the plea bargain context "argues for a more generous mistake or excuse rule in plea bargaining (on the defendant's side) than in ordinary contract cases."[54]

Looking to the Constitution helps clarify that, in the context of criminal procedure, parity has not been the relevant measure of how rights should be distributed. In fact, numerous rights guaranteed to defendants are denied to the government, such as the Sixth Amendment rights to confrontation,[55] a speedy trial, and trial by jury, as well as the Fifth Amendment protection against double jeopardy, which prevents the government from appealing acquittals even as defendants may appeal their convictions. Courts of appeals, including the Third Circuit, have previously adopted this understanding in the plea bargain context. In a case similar to *Williams*, the First Circuit noted that when determining the proper remedy for defendant breaches of a plea agreement, mirroring the remedy given when the government does so would be inappropriate since the parties are in such different positions: "Because [the same] concerns do not abound when the defendant breaches an agreement, the reasoning in these cases is inapposite."[56] Likewise, the reasoning for applying de novo review to defendants' appeals of government breaches, even after a failure to object in the court below, is entirely different from, and inapplicable to, similar appeals lodged by the government. In fact, the Third Circuit has previously seen fit to provide more protection to defendants who claim the *prosecution* has breached a plea agreement than to those who claim that the *district court* is the source of the breach, suggesting that the court is attuned to the heightened concerns created by prosecutorial breach specifically.[57]

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[53] Scott & Stuntz, *supra* note 36, at 1953 (citing Mabry v. Johnson, 467 U.S. 504 (1984)); *id.* (citing FED. R. CRIM. P. 11(e)) (noting that prosecutors may not guarantee sentences).

[54] *Id.* at 1959. *See generally* Daniel Frome Kaplan, Comment, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains*, 52 U. CHI. L. REV. 751 (1985) (concluding that, in light of due process concerns, the appropriate mode of interpreting plea bargains begins, but does not end, with the application of contract-law principles).

[55] This right is derogated by the Fifth Amendment right against self-incrimination. *See* U.S. CONST. amend. V.

[56] United States v. Bradstreet, 207 F.3d 76, 81 n.3 (1st Cir. 2000) (noting that only defendants give up constitutional rights in plea agreements), *superseded on other grounds by* U.S. SENTENCING GUIDELINES MANUAL § 5K2.19 (2000).

[57] *Compare* United States v. Thornton, 306 F.3d 1355, 1357 (3d Cir. 2002) (applying plain error review to a defendant's claim that the district court violated the plea agreement, where defendant failed to object at trial), *with* United States v. Rivera, 357 F.3d 290, 293–94 (3d Cir. 2004) (explicitly declining to apply the *Thornton* standard, and holding that when a defendant "claimed breach

In addition to the dearth of persuasive reasons to extend this protection to the government, grounds of fairness, efficiency, and accuracy recommend that the Third Circuit decline to extend the de novo standard to government appeals when the government fails to object in the district court. The government's failure precludes defendants from presenting evidence to counter the charge of breach, leaving them disadvantaged on appeal. As the Ninth Circuit has recognized, "[i]t would be unfair to surprise litigants on appeal by final decision of an issue on which they had no opportunity to introduce evidence,"[58] and doing so is particularly egregious when the government is "sandbagging" criminal defendants. Furthermore, judicial efficiency principles counsel that time and resources are saved when lawyers object to problems in a timely manner, as opposed to when appellate courts are required to reexamine issues that trial judges are generally better suited to evaluate.[59] As other courts of appeals have clarified, a district court is best positioned to accurately assess such matters: "[A]n alleged breach of the plea agreement is precisely the type of claim that a district court is best situated to resolve" because it is "fact-specific."[60] The issue "is not generally one which the passage of time may illuminate, but rather is the sort of claim which . . . [is] recognize[d] immediately and should be . . . raise[d] when the alleged breach can still be repaired."[61] Thus, accuracy is likely to be promoted by requiring the government to object in the district court.

Although the Third Circuit has presented compelling reasons to allow defendants to appeal government breaches of plea agreements even when they fail to properly preserve the issue, these rationales do not extend to appeals by the government. Since the founding of this country, the unique situation of defendants has been acknowledged, and with it, the corresponding idea that protections granted to defendants should not necessarily be extended to the government as well. In requiring, in the name of parity, the same waiver evaluation and standard of review for appeals by the government as by defendants, the Third Circuit has ignored this fundamental principle and increased the risk of unfairness, inefficiency, and inaccuracy.

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of the plea agreement by the prosecution" rather than the district court, de novo review was appropriate even though the defendant failed to object below).

[58] United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir. 1991) (quoting United States v. Whitten, 706 F.2d 1000, 1012 (9th Cir. 1983)); *see also* Hormel v. Helvering, 312 U.S. 552, 556 (1941) (describing it as "essential" that litigants "not be surprised on appeal" in this manner).

[59] *See Williams*, 510 F.3d at 432 (Weis, J., dissenting). In *Williams*, as in other breach cases, the alleged "violation would have been easily [address]ed if the . . . attorney had timely raised the question of the breach of the plea agreement through an objection at the sentencing hearing." United States v. Pryor, 957 F.2d 478, 482 (7th Cir. 1992).

[60] *Flores-Payon*, 942 F.2d at 560.

[61] *Id.*; *cf.* Wainwright v. Sykes, 433 U.S. 72, 88 (1977).