04-3643-cr

To Be Argued By:
JOHN A. DANAHER III

==

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3643-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

SUSAN GODDING,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

==

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

JOHN A. DANAHER III
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues Presented for Review vii

Argument 2

I. The Downward Departure Is Not Supported by the Record in This Case 2

A. Standard of Review 2

B. The Record Does Not Support Any Grounds for Downward Departure in this Case 4

1. Extraordinary Family Circumstances 4

2. Mental and Emotional Health 7

3. Lesser Harms 9

4. Acceptance of Responsibility 10

5. The Defendant’s Health 11

6. Combination of Circumstances 13

II. The Defendant’s Offense Level Was Properly Enhanced by Two Levels for Abuse of Trust 14

A. Relevant Facts 14

B. Governing Law and Standard Of Review . . . 16

C. Discussion 16

1. The Defendant Failed To File a Cross-Appeal 16

2. The District Court Correctly Imposed an Enhancement for Abuse of Trust 18

Conclusion 22

Certificate of Service

Certification per F.R.A.P. 32(a)(7)(C)

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

Apprendi v. New Jersey,
120 S. Ct. 2348 (2000) 19

Blakely v. Washington,
124 S. Ct. 2531 (2004) 3-4, 18

Burgo v. Gen. Dynamics Corp.,
122 F.3d 140 (2d Cir. 1997) 17

Finkielstain v. Seidel,
857 F.2d 893 (2d Cir. 1988) 17

Rangolan v. County of Nassau,
370 F.3d 239 (2d Cir. 2004) 17

Texport Oil Co. v. M/V Amolyntos,
11 F.3d 361 (2d Cir. 1993) 17

United States v. Allen,
201 F.3d 163 (2d Cir. 2000) (per curiam) 20

United States v. Altman,
48 F.3d 96 (2d Cir. 1995) 12

United States v. Barrett,
178 F.3d 643 (2d Cir. 1999) 20

United States v. Broderson,
67 F.3d 452 (2d Cir. 1995) 13

United States v. Carpenter,
320 F.3d 334 (2d Cir. 2003) 11

United States v. Cornielle,
171 F.3d 748 (2d Cir. 1999) 11, 13

United States v. Craven,
239 F.3d 91 (1st Cir. 2001) 17

United States v. Hill,
915 F.2d 502 (9th Cir. 1990) 20

United States v. Hirsch,
239 F.3d (2d Cir. 2001) 20

United States v. Huerta,
371 F.3d 88 (2d Cir. 2004) 3, 16

United States v. Laljie,
184 F.3d 180 (2d Cir. 1999) 20

United States v. Martinez,
207 F.3d 133 (2d Cir. 2000) 12

United States v. Middleton,
325 F.3d 386 (2d Cir. 2003) (per curiam) 11

United States v. Mincey,
380 F.3d 102 (2d Cir. 2004) (per curiam),
petition for cert. filed, No. 04-7282 (Nov. 5, 2004)
. . . . 3, 18

United States v. Neal,
93 F.3d 219 (6th Cir. 1996) *17*

United States v. Ntshona,
156 F.3d 318 (2d Cir. 1998) 13

United States v. Rioux,
97 F.3d 648 (2d Cir. 1996) 6-7, 13

United States v. Simmons,
343 F.3d 72 (2d Cir. 2003) 2

United States v. Vasquez,
389 F.3d 65 (2d Cir. 2004) 16

United States v. Ventrilla,
233 F.3d 166 (2d Cir. 2000) (per curiam). 8

United States v. Walker,
191 F.3d 326 (2d Cir. 1999) 7

STATUTES

18 U.S.C. § 3742(e) 2, 4, 7

RULES

Fed. R. App. P. 4(b)(1)(A) 16-17

SENTENCING GUIDELINES

U.S.S.G. § 3B1.3 15

U.S.S.G. § 5H1.11 6

U.S.S.G. § 5K2.11 10

U.S.S.G. § 5K2.13 . . . . 8, 9

OTHER AUTHORITIES

15A C. Wright, A. Miller and E. Cooper,
Federal Practice and Procedure § 3904,
at 228 (2d ed. 1992) 17

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in departing downward seven levels from a Sentencing Guideline range of 24 to 30 months to one day of imprisonment and five years of supervised release on the grounds of mental and emotional condition, extraordinary family circumstances, extraordinary acceptance of responsibility, lesser harms, and a combination of all of the foregoing factors.

2. Whether this Court should consider the defendant's challenge to the application of a two-level enhancement for abuse of position of trust when she failed to cross-appeal on that issue, waived her right to raise a Sixth Amendment challenge to the enhancement in her guilty plea, and failed to demonstrate clear error in the application of the enhancement.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3643-cr

UNITED STATES OF AMERICA,

Appellant,

-vs-

SUSAN GODDING,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

The Government's opening brief explained, with reference to this Court's cases establishing the legal standards for downward departures, why the district court erred in granting the defendant a downward departure in this case. The defendant largely ignores the case law cited by the Government, choosing instead to spend the bulk of her brief arguing that the facts of this case supported a

departure. In other words, while the defendant recites the facts relied upon by the district court, she makes no effort to explain how those facts fit into the standards for downward departures established by this Court.

In the final part of her brief, the defendant argues that the district court erred in applying the two-level enhancement for abuse of position of trust. The defendant did not cross-appeal, however, and offers no good reason for failing to do so. For that reason alone, her argument should be rejected.

If this Court reaches the merits of her argument on the enhancement, it should affirm the district court's decision. The two-level enhancement did not violate the defendant's Sixth Amendment rights, and she waived her right to raise this issue in her plea agreement in any event. And on the merits, the record fully supports the district court's decision to enhance the defendant's offense level calculation by two levels due to her abuse of her position of trust.

ARGUMENT

I. THE DOWNWARD DEPARTURE IS NOT SUPPORTED BY THE RECORD IN THIS CASE

A. Standard of Review

Under 18 U.S.C. § 3742, this Court reviews *de novo* "whether a departure is 'justified by the facts of the case.'" *United States v. Simmons*, 343 F.3d 72, 78 (2d Cir. 2003) (quoting 18 U.S.C. § 3742(e)(3)(B)(iii)). *See also United*

States v. Huerta, 371 F.3d 88, 94 (2d Cir. 2004). Despite this unambiguous statutory command, the defendant argues that this Court should review the district court's downward departure under an abuse of discretion standard. Although the defendant cites no authority for this novel argument, she claims that the abuse of discretion standard is appropriate because the Sentencing Guidelines are unconstitutional under *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Def. Br. at 10.

This argument fails in light of this Court's recent decision in *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (per curiam), *petition for cert. filed,* No. 04-7282 (Nov. 5, 2004). In *Mincey*, this Court refused to hold the Guidelines unconstitutional based on *Blakely*. In so doing, this Court noted that the Supreme Court had expressly stated in *Blakely* that "[t]he Federal Guidelines are not before us, and we express no opinion on them." 380 F.3d at 106 (alteration in original) (quoting *Blakely*, 124 S. Ct. at 2538 n.9). Further, this Court noted that the Supreme Court is currently considering two cases that will in all likelihood resolve the applicability of *Blakely* to the Sentencing Guidelines. *Id.* (noting Supreme Court's consideration of *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105). Therefore, this Court concluded, "[u]nless and until the Supreme Court rules otherwise," the Sentencing Guidelines are not unconstitutional in this Circuit. *Mincey*, 380 F.3d at 106.

In any event, *Blakely* spoke only to the standard to be applied in the district court for factual findings that enhance a defendant's sentence -- more specifically, for factual findings that increase the statutory maximum

sentence, however that term may be described. *Blakely* did not speak to factual findings that *decrease* a defendant's sentence below a range otherwise permitted by the Sixth Amendment, nor did it speak to the level of deference that an *appellate court* must give to findings made by a sentencing judge. Accordingly, regardless of the outcome of *Booker* and *Fanfan*, the principles enunciated in *Blakely* do not have any bearing on the appropriate standard of review. In sum, there is no constitutional basis for disturbing the *de novo* standard of review for downward departures that Congress established in 18 U.S.C. § 3742(e).

B. The Record Does Not Support Any Grounds for Downward Departure in this Case

1. Extraordinary Family Circumstances

The defendant argues that her downward departure is justified based upon the fact that she was the "responsible caretaker of her minor daughter, her older daughter, and her mother." Def. Br. at 5-8; 13-16. In addition, the defendant contends that her "critical role in the community" warrants a departure.

Beginning with her children, the defendant argues that her extraordinary family circumstances include the need to care for her adult daughter whom she identifies (in the present tense) as "an addict and alcoholic." Def. Br. at 6. She also argues that this 19-year-old daughter suffers from mental illness, and that her daughter relies on her for emotional support and guidance. *Id.* at 13-14.

The record also reflects, however, that the defendant's 19-year-old daughter attends college, JA at 76, and lives in her own apartment, JA at 82. The Government is unaware of any authority that would support the proposition that the emotional needs of a daughter who has reached the age of majority, who does not live at home, and who attends college, constitute "extraordinary family circumstances" sufficient to support a downward departure.

With respect to her younger daughter, the defendant argues that she is the only one who can care for the girl and asserts that her husband "is shown to have emotional problems." Def. Br. at 14. The defendant quotes the district court's findings regarding her husband, but these findings were based solely on the self-serving statements of the defendant or on the statements of others who lacked medical credentials to diagnose any mental health issues in the defendant's husband. The Government offered, on the other hand, an opinion by a mental health professional, Dr. Edith P. Heath, who concluded "I am certain David Godding is capable and willing to do whatever it takes to be an effective parent to his daughter." SJA at 66. There is nothing in the record that responds to the conclusions offered by Dr. Heath. On the contrary, the conclusions by Dr. Heath make it clear that there is an alternative caretaker for the defendant's six-year-old daughter.

The defendant relies, as well, on her relationship with her mother. As explained in the Government's opening brief, the defendant's relationship with her mother failed

to support a departure for extraordinary family circumstances.[1] Govt. Br. at 27.

Finally, the defendant contends, based on *United States v. Rioux*, 97 F.3d 648 (2d Cir. 1996), that she is entitled to a departure because she "plays a critical role in her community through volunteer and other efforts." Def. Br. at 16. In *Rioux*, this Court recognized that "civic, charitable, and public service and similar prior 'good works are not ordinarily relevant' in determining whether the defendant should receive a downward departure." 97 F.3d at 663 (quoting U.S.S.G. § 5H1.11). The *Rioux* Court noted that many of that defendant's public acts of charity were "not worthy of commendation" but also acknowledged that the defendant had participated to a large degree in legitimate fund raising efforts. In particular, the Court recognized the money that Rioux had raised for the Kidney Foundation. *Id.*

Rioux does not help the defendant, however. In that case, the downward departure was based not only on the defendant's public works but also on the defendant's significant medical condition that required regular monitoring, medication, and surgery. Here, by contrast,

---

[1] Although this appeal turns on the facts as they existed at the time of sentencing on May 24, 2004, if this Court remands for re-sentencing, any departure for extraordinary family circumstances would be based solely on the defendant's role with respect to her children because the defendant's mother died on June 23, 2004. On November 30, 2004, the Government filed a motion in the district court to supplement the record with the defendant's mother's death certificate.

the defendant has no similarly debilitating ailments. In addition, the community efforts that are set forth in the supplemental sealed joint appendix are hardly extraordinary. *See* SSJA 1, 2 and 18. Here, as in *Rioux*, many of the defendant's "public acts of charity" are not so extraordinary as to warrant a downward departure.[2] Finally, *Rioux* was decided under the deferential abuse of discretion standard and accordingly, this Court found that a departure based *in part* on significant public works was not an abuse of discretion. 97 F.3d at 663. Because 18 U.S.C. § 3742(e) now requires the application of *de novo* review, such deference is not warranted in this case.

In sum, the defendant provides no reason to believe that her family circumstances are in any way "truly extraordinary." *United States v. Walker*, 191 F.3d 326, 338 (2d Cir. 1999).

2. Mental and Emotional Condition

The defendant cites no legal authority, whatsoever, in support of her claim that a downward departure is warranted on the basis of her "avoidant personality disorder" which was diagnosed by a marriage and family

---

[2] The defendant argues, in the present tense, that she "plays a critical role in her community through volunteer and other efforts." Def. Br. at 16.

The Government has also moved to supplement the record on appeal, *see* n.1, *supra*, to include records reflecting the defendant's termination from her employment, the month *after* her sentencing in this case, for falsifying company records.

therapist. Similarly, the Government is unable to find any authority that would support a downward departure for such a diagnosis.

Moreover, as this Court's cases make clear, the mere diagnosis of a mental health condition is insufficient to warrant a departure under § 5K2.13. A departure is appropriate only if the defendant suffers from a "significantly reduced mental capacity," § 5K2.13, and that diminished capacity caused the defendant's criminal conduct, *see United States v. Ventrilla*, 233 F.3d 166, 169 (2d Cir. 2000) (per curiam).

Although the defendant asserts that her avoidant personality "affected her capacity to weigh the illegality of her actions," Def. Br. at 18, no medical professional has taken that position. Indeed, Dr. Grayson, a psychiatrist, asserted that the criteria for avoidant personality disorder are not consistent with the defendant's conduct in this case. JA 147-48. In addition, he stated that even if the defendant suffered from avoidant personality disorder, the disorder would not cause a significantly reduced mental capacity and would not diminish the defendant's ability to appreciate the wrongfulness of her behavior or her ability to conform her behavior to the expectations of the law. JA 118-19, 145-48.

Similarly, although the defendant recognizes the need to establish a "causal link" between the "significantly reduced capacity" and the commission of the charged offense, *see Ventrilla*, 233 F.3d at 169, there is nothing in the record that demonstrates that link.

In her brief, the defendant relies upon the statement by the marriage and family therapist to the effect that "'the very qualities which contributed to Ms. Godding making a disastrous choice are otherwise a benefit to her family and the community.'" Def. Br. at 18. The foregoing statement, even if fully credited, does not establish that the defendant's mental condition caused her criminal conduct or even that the defendant suffered from a significantly reduced mental capacity. Further, although the defendant claims that another medical professional, Dr. Julia Grenier, "supported" the therapist's analysis, Def. Br. at 19, Dr. Grenier's opinion, in fact, makes no reference to "avoidant personality disorder." There is nothing in Dr. Grenier's report to support a finding -- a finding necessary to support a downward departure under § 5K2.13 -- that the defendant had a significantly reduced mental capacity that caused her to commit her crime.

In sum, this Court should reject the defendant's unsupported contention that an "avoidant personality disorder" created a "significantly reduced mental capacity" that caused her to embezzle from her employer over a five-year period.

3. Lesser Harms

The defendant claims that she used the "bulk" of the money she embezzled to benefit others, and that because she "used the funds in an effort to make others' lives better," she is entitled to a downward departure. Def. Br. at 20.

The defendant cites no authority to support her argument because there is none. Even if the defendant had used the bulk of the embezzled funds to help others, this type of "Robin Hood" argument should not be credited by this Court as a legitimate rationale for a downward departure under § 5K2.11. At most, such conduct might be considered as a basis for determining where, within the applicable Sentencing Guideline range, the defendant should be sentenced.

Putting aside the legal sufficiency of the defendant's argument, her claim fails on the facts as well. The defendant's own assessment of how the stolen funds were used, written after the first sentencing hearing and thus calculated to put the defendant in the best light possible, reveals that the overwhelming majority of the funds was used for the personal benefit of the defendant and her immediate family. *See* Govt. Br. at 32-33 (describing the defendant's expenditures). And while the defendant claims to have spent money on medical care for her family, she also spent large sums on investments, jewelry, clothes, vacations and other luxury items for her family. Thus, even if the defendant spent the "bulk" of the money on others, those expenditures on vacations and other items hardly qualify as necessary to avoid a "perceived greater harm," § 5K2.11.

4. Acceptance of Responsibility

The defendant claims that she is entitled to a departure for "extraordinary acceptance of responsibility" based on her payment of partial restitution and her cooperation with the investigation. Def. Br. at 21-23. As explained in the

Government's opening brief, however, at this time the defendant has repaid less than one-third of the amount she embezzled, and her cooperation arose only *after* her crime was committed. Gov. Br. at 28-31. These facts are legally insufficient to support a conclusion that the defendant exhibited an "extraordinary acceptance of responsibility." *See, e.g.*, *United States v. Carpenter*, 320 F.3d 334, 343 (2d Cir. 2003); *United States v. Middleton*, 325 F.3d 386, 389 (2d Cir. 2003) (per curiam).

The defendant also asserts that she is entitled to a departure for her significant post-conviction rehabilitation. Def. Br. at 21-22. The defendant never asked the district court for a departure on these grounds, and thus the district court's citation of the defendant's rehabilitation as a rationale for the departure is completely unfounded. And while the defendant cites her ongoing therapy and attendance at church, these facts hardly suggest that the defendant's rehabilitation is "extraordinary." *See United States v. Cornielle*, 171 F.3d 748, 754 (2d Cir. 1999) ("The efforts made that may entitle defendant to a downward departure [for rehabilitation] must be shown to be extraordinary. . . .").

5. Mental and Physical Health

The defendant asserts, for the first time on appeal, that a downward departure is necessary for her mental and physical health. Def. Br. at 23. In the district court, the defendant never asked for a departure based on her physical health, and therefore there is no evidence in the record to support such a departure. Although the PSR notes that the defendant has high blood pressure, it also

notes that this condition is controlled by medication, SJA 13 (PSR ¶ 60), and the defendant does not argue that she is entitled to a departure based on this condition. Thus, the district court's suggestion that the defendant's physical health supports a downward departure is completely unfounded. *See* JA 90.

The district court's statement that the defendant's need for mental health treatment supports a departure is similarly unfounded. *See* JA 90, 311. Again, the defendant never argued for a departure based on the need to secure proper mental health treatment, and thus the record does not support a departure on these grounds. While one doctor opined that it would be helpful for the defendant to continue her therapy, *see* SJA 58, there was no evidence that this care could not be provided by the Bureau of Prisons. *Cf. United States v. Altman*, 48 F.3d 96, 104 (2d Cir. 1995) (departure for health reasons was unwarranted where there was no finding that the Bureau of Prisons could not monitor the defendant's health problem); *United States v. Martinez*, 207 F.3d 133, 139 (2d Cir. 2000) (rejecting district court's reliance on the defendant's health problems as a factor to support an aberrant behavior departure because there was no record evidence that the defendant's health condition could not be cared for within the prison system).

In the absence of any record evidence to support a departure based on the defendant's physical and mental health, a departure on these grounds cannot be sustained.

6. Combination of Circumstances

Finally, the defendant relies upon the "combination of circumstances" argument to support the downward departure. But as this Court has made clear, a departure based on a combination of factors should be reserved for "extraordinary" cases. *United States v. Rioux*, 97 F.3d at 648, 663 (2d Cir. 1996). And as described more completely in the Government's opening brief, there is nothing extraordinary about this case. The defendant embezzled hundreds of thousands of dollars from her employer, spent the money on commodities and luxuries for herself and her family, suffers from some mental health issues that do not affect her ability to function in society or comprehend her actions, and provides care and support to her daughters.

This Court's cases upholding "combination of circumstances" departures confirm that a departure on those grounds is truly reserved for extraordinary cases. *See, e.g.*, *United States v. Broderson*, 67 F.3d 452, 458-59 (2d Cir. 1995) (finding departure was not abuse of discretion for defendant who technically committed fraud, but whose intent was different from the typical fraud defendant, and whose fraud resulted in no loss to the victim; holding that departure was "close" case and suggesting district court reconsider the departure because the case was being remanded on other grounds), *abrogated on other grounds by United States v. Ntshona,* 156 F.3d 318 (2d Cir. 1998); *Cornielle*, 171 F.3d at 754 (upholding "limited" departure in light of the four-year delay in prosecuting the defendant and the defendant's extraordinary rehabilitation after his crime, including

significant volunteer work, stable employment and residence, glowing work evaluations, and attendance at college); *Rioux*, 97 F.3d at 663 (upholding departure under abuse of discretion standard for defendant who had significant medical problems that required monitoring, medication and surgery, and who participated in significant fund raising efforts for charities).

II. THE DEFENDANT'S OFFENSE LEVEL WAS PROPERLY ENHANCED BY TWO LEVELS FOR ABUSE OF TRUST

A. Relevant Facts

The defendant carried out much of the bank fraud scheme by making unauthorized withdrawals from customers' accounts without creating withdrawal slips. SJA at 4 (PSR ¶ 9). The defendant carried out this scheme using the authority she held both as a bank teller and as a customer service representative. Moreover, the defendant worked privately as a bookkeeper for Mrs. Janet Morgan, who was also a customer of National Iron Bank ("NIB"). On occasion, the defendant wrote checks against accounts that Mrs. Morgan held at other banks and used them to purchase bank checks from NIB, which the defendant then converted to her personal use. *Id.* (PSR ¶ 7). The defendant acknowledged, to the probation officer, that she had the authority to write checks against those accounts. *Id.*

The defendant embezzled approximately $154,000 from Mrs. Morgan using this scheme. *Id.* The victim wrote to the district court outlining her relationship with

the defendant. JA 254-56.[3] As is set forth in the victim's letter, she viewed the defendant as a "friend, bookkeeper, and teller" in her bank. The victim emphasized the personal friendship that the defendant built up with Mrs. Morgan. The victim stated to the court, "Over the years I gave Mrs. Godding more responsibility, keeping track of my medical insurance and writing the payroll checks. I reviewed the bank statements in terms of checking the deposits and withdrawals and checks written." JA 253.

The NIB, through its Executive Vice President, provided the court with a description of the defendant's duties. JA 136. That statement notes that the NIB is a small bank, which resulted in all employees having many responsibilities. The bank's Vice President stated that the defendant, due to her experience, "served as Ass[istant] Manager and as Manager when needed. She held keys to the building and the code for the alarm system. In addition, she had access to the combinations for the main vault, ATM and night depository." *Id.*

The district court concluded that a two-level enhancement pursuant to United States Sentencing Guidelines Section 3B1.3 was appropriate in that the defendant had abused a position of trust both with regard to the NIB and also due to her private employment with Mrs. Janet Morgan. JA 21, 53. The court recognized that the embezzlement both from Mrs. Morgan and from the NIB were intertwined. *Id.*; *see also* JA 42-53.

---

[3] Mrs. Morgan's handwritten letter also appears in the Joint Appendix as a typed document. JA 253.

B. Standard of Review

This Court reviews the facts underlying the district court's decision to impose a sentencing enhancement for clear error, and gives "due deference" to the district court's application of the guidelines to the facts. *United States v. Huerta*, 371 F.3d 88, 91 (2d Cir. 2004). Where, as here, the defendant's challenge to the district court's application of the guidelines is primarily an issue of fact, the "due deference" standard mandates that this Court review that decision using the "clearly erroneous" standard. *United States v. Vasquez*, 389 F.3d 65, 67 (2d Cir. 2004).

C. Discussion

1. The Defendant Failed To File a Cross-Appeal

Federal Rule of Appellate Procedure 4(b)(1)(A)(ii) provides that if the Government files a timely notice of appeal, a defendant may file a notice of cross-appeal within 10 days after the date when the government's notice was filed. In this case, although the defendant asks this Court to alter the judgment in her favor, she acknowledges that she did not file the required notice of appeal. Def. Br. at 27 n.16. According to the defendant, she did not file a notice of appeal because "there was no incentive to do so." *Id.*

The Federal Rules of Appellate Procedure provide just such an incentive, however. The Court of Appeals for the First Circuit has held that "a criminal defendant, *qua*

appellee, may not seek a reduction in his sentence without having filed a cross-appeal," and that such a failure to file is jurisdictional. *United States v. Craven*, 239 F.3d 91, 97 (1st Cir. 2001) (declining to consider defendant's *Apprendi*-based argument where he filed no cross-appeal to government's appeal of downward departure); *see also United States v. Neal,* 93 F.3d 219, 224 (6th Cir. 1996) (declining to consider defendant's challenge to denial of motion for acquittal, where he filed no cross-appeal to government's appeal from dismissal of indictment). In the civil context, this Court has held that the failure to file a cross-appeal does not deprive this Court of jurisdiction, but the "'[e]xercise of the power [to disregard the failure to cross-appeal] has been rare, . . . requiring a showing of exceptional circumstances.'" *Rangolan v. County of Nassau*, 370 F.3d 239, 254 (2d Cir. 2004) (alterations and omission in original) (quoting 15A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3904, at 228 (2d ed. 1992)).

In any event, even if Rule 4(b)(1)(A)(ii) may be disregarded in extraordinary circumstances, *see Finkielstain v. Seidel*, 857 F.2d 893, 895 (2d Cir. 1988); *Texport Oil Co. v. M/V Amolyntos*, 11 F.3d 361, 366 (2d Cir. 1993) *overruled on other grounds by Wilton v. Steven Falls Co.,* 515 U.S. 277 (1995), the defendant offers no reason to disregard that rule in this case. *See Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 145 (2d Cir. 1997) (refusing to disregard rule requiring cross-appeal where the plaintiff offered no justification for disregarding the rule). Although the defendant claims she had no incentive to file a cross-appeal, such an incentive clearly arose once the Government filed its appeal to challenge her sentence.

2. The District Court's Imposition of an Enhancement for Abuse of Trust Was Not Clearly Erroneous

In the event that this Court chooses to disregard the defendant's failure to file a notice of cross-appeal, the Court should nonetheless conclude that the district court correctly applied the two-level enhancement for abuse of position of trust.

The defendant argues, first, that the application of the two-level enhancement violated the Sixth Amendment under *Blakely v. Washington*, 124 S. Ct. 2531 (2004). But as described *supra* at 3, this Court has already held that *Blakely* and the Sixth Amendment do not require that every enhancement fact be pleaded and proved to a jury beyond a reasonable doubt. *United States v. Mincey*, 380 F.3d 102, 106 (2d Cir. 2004) (per curiam), *petition for cert. filed,* No. 04-7282 (Nov. 5, 2004). The Supreme Court will address this issue squarely when it decides *Booker* and *Fanfan*, which were argued on October 4, 2004. This Court, therefore, in accordance with its August 6, 2004, memorandum, can withhold the mandate in this case until after the Supreme Court's decision in the *Booker/Fanfan* cases.

Even assuming *arguendo*, however, that *Blakely* is held to apply to this case, the defendant's claim still fails because the defendant unequivocally waived any right in her plea agreement to pursue such a challenge. The agreement contains a section entitled, "Waiver of Right to Challenge Absence of Jury Findings re Facts Used to Increase Sentence":

> The defendant understands that she may be able to argue under *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), that she had the right to have a grand jury and a trial jury make certain findings of facts that could, in turn, determine whether the Court could apply any mandatory minimum sentence prescribed by statute or any sentence within a range permitted by a higher statutory maximum sentence resulting from a finding of such facts. The defendant knowingly and voluntarily waives her right to have or have had such facts submitted for findings by a grand jury or trial jury.

JA 9-10. With this language, the defendant waived her right to challenge judicial findings of fact that might increase her sentence. Because the defendant was not facing any mandatory minimum sentences or statutory maximum sentences, the only judicial factfinding that she waived would have been through the Sentencing Guidelines. Because the waiver is the result of a bargained-for disposition of all the charges against the defendant, the Government should be entitled to enforcement of its terms.

In the alternative, this Court should affirm on the merits because the district court's application of a two-level enhancement for abuse of position of trust was not clearly erroneous. The defendant argues that the two-level enhancement was inappropriate because she was merely a teller without a position of trust and that, with regard to Mrs. Morgan, the defendant merely kept track of Mrs. Morgan's accounts. Further, the defendant contends that

"the bank's negligence" facilitated her conduct. Def. Br. at 26.

An "abuse of trust" enhancement is appropriate if the defendant's position provides the freedom to commit a "'difficult-to-detect wrong.'" *United States v. Barrett*, 178 F.3d 643, 646, 647 (2d Cir. 1999) (quoting *United States v. Hill*, 915 F.2d 502, 506 (9th Cir. 1990)); *see United States v. Laljie*, 184 F.3d 180, 194 (2d Cir. 1999). An enhancement for abuse of trust is proper when the defendant's position involved discretionary authority and the victim entrusts the defendant with that discretion. *United States v. Hirsch*, 239 F.3d 221, 227 (2d Cir. 2001).

This Court has made clear that an employee need not have "a fancy title or be a single 'big shot' in an organization to qualify for an enhancement for abuse of a position of trust." *United States v. Allen*, 201 F.3d 163, 166 (2d Cir. 2000) (per curiam). Rather, if a defendant possesses broad responsibilities which are used to pilfer funds and to falsify records, the enhancement will properly apply. *Id.* at 167. This Court, in *Allen*, distinguished such a situation from that of an ordinary bank teller "who was subject to penny-for-penny accounting at the end of each day." *Id.* This Court also flatly rejected the claim that a victim's negligence can relieve a defendant of an "abuse of trust" enhancement. *Id.*[4]

The broad responsibilities entrusted to the defendant, in the very small bank that she victimized, justified the

[4] There is no evidence that the NIB was negligent in any respect. The evidence, instead, is to the contrary. JA 207-08.

"abuse of trust" enhancement. JA 136. Similarly, the manner in which the defendant intertwined her responsibilities for Mrs. Morgan with her position at the bank, in order to defraud Mrs. Morgan of more than $150,000, was a course of conduct that was possible because of the deep personal trust invested in the defendant by Mrs. Morgan. JA 253-564. The district court correctly concluded that the defendant's conduct relative to Mrs. Morgan also justified the "abuse of trust" enhancement.

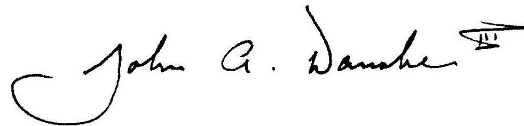
CONCLUSION

For the reasons stated in the Government's opening brief and in this brief, this Court should vacate the district court's judgment and sentence, and remand this case for re-sentencing within the applicable Sentencing Guideline range of 24 to 30 months, without a downward departure for any of the bases discussed in any of the briefs filed in this matter.

Dated: December 9, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

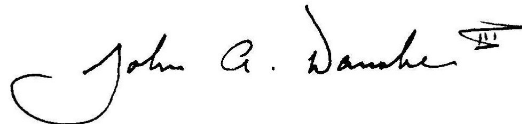


JOHN A. DANAHER III
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY (OF COUNSEL)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing reply brief complies with the 7,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the reply brief is calculated by the word processing program to contain approximately 5,110 words, exclusive of the Table of Contents, Table of Authorities and this Certification.



JOHN A. DANAHER III
ASSISTANT U.S. ATTORNEY

ADDENDUM

Fed. R. App. P. 4(b)(1)(A)

(b) **Appeal in a Criminal Case.**

(1) **Time for Filing a Notice of Appeal.**

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.