

05-4016-cr
United States v. Griffin

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Argued: December 19, 2006 Decided: December 20, 2007
5 Errata Filed: January 22, 2008)
6 Docket No. 05-4016-cr

7 -----
8 UNITED STATES OF AMERICA,

9 Appellee,

10 - v -

11 MICHAEL J. GRIFFIN,

12 Defendant-Appellant.
13 -----

14 Before: POOLER, SACK, and WESLEY, Circuit Judges.

15 The defendant-appellant, Michael Griffin, pleaded
16 guilty, pursuant to a plea agreement, in the United States
17 District Court for the Western District of New York (Charles J.
18 Siragusa, Judge), to one count of possession of child pornography
19 in violation of 18 U.S.C. § 2252A(a)(5)(B), after unlawfully
20 downloading pornographic images to his computer using a peer-to-
21 peer file-sharing program. The defendant appeals from the
22 portion of the judgment of conviction sentencing him principally
23 to 120 months' imprisonment, arguing, inter alia, that the
24 government breached the parties' plea agreement by advocating
25 against an acceptance of responsibility adjustment.

1 Remanded for resentencing by another judge. Judge
2 Wesley dissents in a separate opinion.

3 BRUCE R. BRYAN, Syracuse, NY, for
4 Defendant-Appellant.

5 TIFFANY H. LEE, Assistant United States
6 Attorney (Terrance P. Flynn, United
7 States Attorney for the Western District
8 of New York, of counsel), Rochester, NY,
9 for Appellee.

10 SACK, Circuit Judge:

11 While there are aspects of this case that may implicate
12 complicated and difficult issues at the unhappy intersection of
13 computer technology and child pornography, we need not, and
14 therefore do not, address them. The resolution of this appeal
15 hinges on the narrow question of whether the government adhered
16 to the terms of the plea agreement between it and the defendant
17 during sentencing proceedings. Because we conclude that the
18 government breached the plea agreement, we vacate the sentence
19 and remand for resentencing by another district judge.

20 **BACKGROUND**

21 On November 23, 2004, the defendant pleaded guilty
22 pursuant to a written plea agreement to one count of possession
23 of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).
24 By pleading guilty, he admitted that he "knowingly possessed
25 material that contained images of child pornography . . . [that]
26 had been . . . transported in interstate . . . commerce by any
27 means, including by computer" Plea Agreement of Michael
28 J. Griffin, dated November 23, 2004, in the United States

1 District Court for the Western District of New York, at ¶ 6 (the
2 "Plea Agreement").

3 This prosecution arose out of an FBI investigation
4 involving the defendant's use of a peer-to-peer file sharing
5 program called KaZaA (sometimes spelled "kazaa"). Broadly
6 speaking, KaZaA is a computer program, downloaded to a computer,
7 that allows the computer's user to share and obtain, via the
8 Internet, many types of digital files, including photographs and
9 video recordings. The program enables the user to create and
10 maintain a "shared folder" ("KaZaA Shared Folder") on his or her
11 computer's hard drive which, when enabled, allows other users to
12 download files located in that KaZaA Shared Folder onto their own
13 computer's hard drive. A KaZaA user can enable a feature in the
14 program called "sharing disabled" which prevents other KaZaA
15 users from downloading any file from the original user's
16 computer, even if the file is located in the latter's KaZaA
17 Shared Folder. While the "sharing disabled" feature is enabled
18 on a KaZaA user's computer, however, he or she cannot download
19 files from other KaZaA users.¹

¹ See also United States v. Sewell, 457 F.3d 841, 842 (8th Cir. 2006) (describing how KaZaA works and noting that after an individual "downloads" a file from another user's shared folder, "[t]he downloaded file will automatically be placed in the user's [KaZaA] Shared Folder to be searched and downloaded by other users unless the local user disables this feature"). See generally Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1158-59 (9th Cir. 2004) (describing mechanics of peer-to-peer file sharing software), vacated and remanded, 545 U.S. 913 (2005).

1 In the plea agreement, Griffin admitted that in October
2 2003, he had opened approximately ten child pornography images
3 acquired using KaZaA and had deleted six of the images, but that
4 at least four of the images remained on his computer's hard
5 drive. He further acknowledged that he moved two of these images
6 into the "My Documents" folder on his hard drive, and that one of
7 these images depicted a minor under the age of twelve years old.
8 During the plea colloquy before the district court, the
9 government explained that it had not given, and would not give,
10 the defendant a copy of his computer's hard drive, which it had
11 confiscated in accordance with its policy of treating hard drives
12 containing child pornography as contraband, but that the
13 defendant and his representatives could view the images in the
14 government's offices.

15 The plea agreement left unresolved a variety of
16 disputes between the government and Griffin concerning the
17 application of the United States Sentencing Guidelines, including
18 the proper determination of the defendant's adjusted offense
19 level and the application of several possible enhancements. In
20 order to address these disputes, the district court held an
21 evidentiary hearing that took the better part of four days during
22 June and July 2005. The hearing included testimony from several
23 computer forensic experts on behalf of the government and one on
24 behalf of the defendant. Testimony at these hearings focused on
25 the contents of the defendant's computer hard drives, the initial
26 FBI report produced after the defendant first was interviewed

1 following a search of his home and seizure of his computers, and
2 the operation of KaZaA.

3 The district court adopted the recommendation of the
4 Probation Office and the government as to the calculation of the
5 Guidelines sentence. It is undisputed that the defendant's base
6 offense level was fifteen. Based on the defendant's use of
7 KaZaA, the district court then applied a cross-reference for
8 "trafficking," which added two levels, United States Sentencing
9 Guidelines Manual ("U.S.S.G.") § 2G2.2(c)(1), and increased the
10 offense level by an additional five levels for distribution with
11 the expectation of receipt of a thing of value, but not pecuniary
12 value, id. § 2G2.2(b)(2)(B). The district court also applied
13 three more two-level enhancements -- for the use of a computer,
14 id. § 2G2.2(b)(5), possession of a photograph of a minor under
15 the age of twelve, id. § 2G2.2(b)(1), and possessing more than 10
16 but fewer than 150 images, id. § 2G2.2(b)(6)(A) -- and a four-
17 level enhancement for possession of photographs that included
18 sadistic or masochistic conduct, id. § 2G2.2(b)(3). This
19 resulted in an adjusted total offense level of thirty-two.

20 The defendant had no previous criminal record, so his
21 criminal history fell within category I. The applicable advisory
22 Guidelines range was therefore 121 to 151 months. The district
23 court sentenced Griffin to the statutory maximum sentence of ten
24 years' (120 months') imprisonment. The district court also
25 imposed a life term of supervised release, which included
26 requirements that the defendant register as a sex offender in

1 whichever state in which he lives and that he be subject to
2 searches of his person or property for the duration of the term
3 of supervised release.

4 Acceptance of Responsibility

5 In the plea agreement, the government agreed "not to
6 oppose the recommendation that the Court apply the two (2) level
7 downward adjustment of Guidelines §3E1.1(a) (acceptance of
8 responsibility) and further agree[d] to move the Court to apply
9 the additional one (1) level downward adjustment of Guidelines
10 §3E1.1(b)." Plea Agreement, at ¶12. However, the agreement
11 also permitted the government to "respond at sentencing to any
12 statements made by the defendant or on the defendant's behalf
13 that are inconsistent with the information and evidence available
14 to the government." Id. at ¶18b.

15 Prior to sentencing, the defendant submitted his
16 objections to the initial Presentence Investigation Report
17 ("PSR"), which outlined Griffin's sentencing arguments, including
18 his objections to many of the Guidelines enhancements discussed
19 above. See Defendant's Response to Presentence Investigation
20 Report, dated March 24, 2005 ("Def's March 24 Response"). Of
21 particular note, Griffin argued that the feature of his KaZaA
22 program that disabled its file-sharing capability remained active
23 nearly all of the time, which counseled against applying a cross-
24 reference for trafficking and a further enhancement for
25 distribution. Id. at 3. He further contended that he was an

1 inadvertent child-pornography user because the PSR identified
2 only eight of more than 4,500 images on his computer as depicting
3 minors. Id. Griffin also asserted that there was no proof that
4 he knowingly possessed a particularly lewd and notorious video
5 that prompted the application of a four-level enhancement for
6 sadistic or masochistic conduct. Id. at 4-5. The apparent
7 overarching objective of the defendant's objections was to narrow
8 the conduct underlying sentencing to that which Griffin had
9 admitted in the plea agreement.

10 In a letter to the district court following the receipt
11 of the defendant's objections to the PSR, the government wrote:

12 [T]he government is troubled by some of the
13 defendant's objections which seem to raise
14 questions regarding whether the defendant has
15 truly accepted responsibility
16 However, the defendant did timely notify
17 authorities of his intention to enter into a
18 guilty plea, thereby permitting the
19 government to avoid preparing for trial and
20 permitting the government and the court to
21 allocate their resources efficiently.

22 If the Court finds that the defendant is
23 entitled for [sic] the two-level downward
24 adjustment pursuant to Guidelines §3E1.1(a)
25 for clearly demonstrating acceptance of
26 responsibility, the government submits that
27 the defendant, based on his actions in
28 promptly entering a guilty plea, would be
29 entitled to the further one-level decrease
30 pursuant to § 3E1.1(b).

31 Statement of the Government with Respect to Sentencing Factors
32 and Motion Pursuant to U.S.S.G. § 3E1.1(b), dated March 31, 2005,
33 at 1-2 ("Gov't March 31 Statement").

1 The government elaborated on its views in its
2 subsequent sentencing brief. There it said that it found
3 "troubling . . . the fact that the defendant is now attempting to
4 distance himself from the other images and movies found in his
5 possession." Government's Response to Defendant's Response to
6 the Presentence Report, dated Apr. 15, 2005, at 20 ("Gov't April
7 15 Response"). The defendant's conduct therefore "le[d] the
8 government to question whether the defendant has truly accepted
9 responsibility." Id. at 21. The government brief also
10 synthesized cases and commentary related to acceptance of
11 responsibility, noting that "while a guilty plea combined with
12 truthful statements about the defendant's offense and other
13 relevant conduct is 'significant evidence' of acceptance of
14 responsibility, 'it can be outweighed by conduct that is
15 inconsistent with acceptance of responsibility.'" Id. at 21-22
16 (quoting United States v. Ortiz, 218 F.3d 107, 108 (2d Cir. 2000)
17 (per curiam)). The government concluded:

18 It is unclear whether the defendant's
19 objections to the inclusion of all the
20 relevant conduct rises to the level of
21 outweighing his acceptance of responsibility.
22 Suffice it to say that the defendant's
23 objections to the relevant conduct raises
24 [sic] questions on the issue of acceptance.

25 Id. at 22.²

² The government also noted that it did not object to the defendant's arguments that the disputed Guidelines enhancements did not apply and was well aware of the defendant's intent to disagree on these points. Gov't April 15 Response, at 20.

1 The district court thereafter made the following
2 determination:

3 While the Government, for purposes of the
4 plea, agreed not to oppose a recommendation
5 that I reduce your offense level by a total
6 of three for acceptance of responsibility, I
7 have found otherwise. The Government has not
8 taken any position on that and they have not
9 opposed it. On its own, based on the posture
10 of this case and finding of facts, the Court
11 has denied that.

12 Sent'g Hr'g Tr., July 14, 2005, at 29.

13 The defendant now challenges his sentence on several
14 grounds: (1) The government's refusal to provide to him a copy of
15 the confiscated computer hard drives constitutes a violation of
16 Rule 16 of the Federal Rules of Criminal Procedure and Brady v.
17 Maryland, 373 U.S. 83 (1963); (2) the district court's
18 determination that he trafficked and distributed child
19 pornography through his use of KaZaA; (3) the district court's
20 denial of a downward adjustment for acceptance of responsibility;
21 (4) the government's alleged breach of the plea agreement by
22 encouraging the district court to deny an adjustment for
23 acceptance of responsibility; (5) the propriety of the term and
24 provisions of his supervised release; and (6) an alleged
25 violation of the Constitution's Ex Post Facto Clause. Because we
26 conclude that the government breached the plea agreement, which,
27 in this case, requires remand for resentencing de novo, we
28 decline to address the defendant's other arguments.

29 **DISCUSSION**

30 I. Breach of the Plea Agreement

1 A. Legal Standard and Standard of Review

2 We review interpretations of plea agreements de novo
3 and in accordance with principles of contract law. United States
4 v. Riera, 298 F.3d 128, 133 (2d Cir. 2002) (citing United States
5 v. Padilla, 186 F.3d 136, 139 (2d Cir. 1999)). "To determine
6 whether a plea agreement has been breached, we 'look[] to the
7 reasonable understanding of the parties as to the terms of the
8 agreement.'" Id. (quoting United States v. Colon, 220 F.3d 48, 51
9 (2d Cir. 2000)). "Because the government ordinarily has certain
10 awesome advantages in bargaining power, any ambiguities in the
11 agreement must be resolved in favor of the defendant." Id.
12 (citations and internal quotation marks omitted). Where plea
13 agreements are involved, the government must take particular
14 "'care in fulfilling its responsibilities.'" United States v.
15 Lawlor, 168 F.3d 633, 637 (2d Cir. 1999) (quoting United States
16 v. Brody, 808 F.2d 944, 948 (2d Cir. 1986)).³

17 Because the defendant did not argue in the district
18 court that the government breached the plea agreement, the
19 government asserts that we must review the argument for plain
20 error. We have held to the contrary that "a defendant is not

³ The statement in Lawlor is that the government must "take much greater care in fulfilling its responsibilities." Lawlor, 168 F.3d at 637 (emphasis added). The context of the statement in the opinion from which this repeated admonishment first emanated suggests that "much greater" means "much greater than the government in fact exercised." See United States v. Januszewski, 777 F.2d 108 (2d Cir. 1985), cited in Brody, 808 F.2d at 948.

1 required to object to the violation of a plea agreement at the
2 sentencing hearing." Lawlor, 168 F.3d at 636 ("Lawlor's claim
3 [that the government breached the plea agreement] is not barred
4 by his failure to raise this issue with the District Court, nor
5 are we bound to apply a plain error standard of review."). The
6 defendant need not demonstrate that any error as to the
7 government's compliance with his plea agreement satisfies plain
8 error review.

9 B. The Government's Breach

10 Whether the government breaches a plea agreement by
11 making allegedly impermissible comments to the sentencing court
12 has been the subject of substantial discussion in this Circuit.
13 Our cases have not yielded a bright-line rule as to the leeway
14 the government has with respect to what it tells the court while
15 operating under such an agreement. "[The] circumstances must
16 [therefore] be carefully studied in context, and where the
17 government's commentary reasonably appears to seek to influence
18 the court in a manner incompatible with the agreement, we will
19 not hesitate to find a breach, notwithstanding formal language of
20 disclaimer." United States v. Amico, 416 F.3d 163, 167 n.2 (2d
21 Cir. 2005).

22 Amico, upon which the government exclusively relies,⁴
23 contains our most recent application of such a fact-specific

⁴ The government refers to the case as United States v. Peters. Peters was the sole appellant in the appeal. But Amico was the first named defendant in the official caption of the case, and we therefore refer to it using his name.

1 analysis. There, the defendant-appellant made several arguments
2 to support his contention that the government had breached its
3 plea agreement with him.

4 First, the defendant-appellant argued that the
5 government's statement that it "adopts the findings of the
6 revised Presentence Investigation Report" violated the plea
7 agreement insofar as this endorsement advocated, by reference,
8 the imposition of a higher sentence than that to which the
9 parties agreed. Id. at 165. Once notified of this violation,
10 however, the government filed an amended statement explaining
11 that it expressly did not advocate the additional enhancements,
12 and it reiterated that position several times thereafter. Id.
13 We noted that "a retraction of an argument advanced by the
14 government in violation of its plea agreement would [not] always
15 cure its breach," but concluded that, "upon careful examination
16 of all the circumstances, especially the mild, brief, and
17 unassertive form of the statement and its rapid retraction, . . .
18 the temporary breach was adequately cured." Id.

19 Second, the defendant-appellant argued that a
20 government memorandum of law, submitted in response to his
21 objections to the Presentence Investigation Report, violated the
22 plea agreement by advocating a position on an issue about which
23 the plea agreement did not permit discussion. We rejected the
24 argument, concluding: "[The defendant-appellant] opened the door
25 to this response when he attempted to characterize the criminal
26 scheme in a manner favorable to himself, minimized the importance

1 to the criminal scheme of the mortgage brokers, and claimed not
2 to have known supporting documentation accompanying the loan
3 applications was false." Id. Moreover, the government's
4 discussion of the state of the law in response to the defendant-
5 appellant's "inaccurate description of the law" was considered an
6 appropriate response that was permitted by the agreement,
7 particularly because it was surrounded by several statements to
8 the effect that the government did not intend to advocate the
9 imposition of the additional enhancement. Id. at 166.

10 Similarly, in Riera, the prosecution and the defense
11 agreed that "neither party will seek . . . a departure," and that
12 neither party will "suggest that the Court sua sponte consider
13 such a departure." 298 F.3d at 133-34. The plea agreement also
14 permitted the parties to respond to inquiries from the district
15 court in the event that the court "contemplate[d] any Guidelines
16 adjustments, departures, or calculations different from those
17 stipulated to [in the agreement]." Id. at 134 (second brackets
18 in original). The defendant asserted that the government
19 breached the agreement when it argued by letter that the district
20 court "would be well within its discretion in upwardly departing"
21 before explaining in detail why such a departure would be
22 appropriate. Id. (internal quotation marks and citation
23 omitted). We stated that the government's letter was "too close
24 in tone and substance to forbidden advocacy to have been
25 well-advised," id. at 134, and "came very close to breaching the
26 agreement," id. at 135.

1 We found no breach, however, for three reasons: First,
2 the letter was submitted in response to a solicitation by the
3 court. Id. at 134-35. Second, the plea agreement expressly
4 permitted a response to a request from the district court to set
5 forth the relevant facts and advise the court whether a departure
6 would conform to the law. Id. at 135; see also United States v.
7 Goodman, 165 F.3d 169, 172-73 (2d Cir. 1999) (finding no breach
8 where the government responded to a specific request from the
9 district court to "supply the Court with the law and the facts"
10 without advocating that such an adjustment should be imposed),
11 cert. denied, 528 U.S. 874 (1999). Third, the government "did
12 not explicitly advocate a departure" and thereafter repeatedly
13 asserted that it was responding to the court's request but was
14 not advocating an upward departure, in line with the plea
15 agreement. Id. at 135-36.

16 In United States v. Vaval, 404 F.3d 144 (2d Cir. 2005),
17 we reached the opposite conclusion. There, the defendant pleaded
18 guilty pursuant to a plea agreement to robbery of federal
19 property with a dangerous weapon. Id. at 149. According to the
20 plea agreement, the government was not permitted to "take [a]
21 position concerning where within the Guidelines range determined
22 by the Court the sentence should fall," or to "make [a] motion
23 for an upward departure," as long as no new "information relevant
24 to sentencing" was discovered subsequent to the effective date of
25 the plea agreement. Id. The plea agreement incorrectly
26 calculated the defendant's criminal history to fall within

1 category III rather than category II. Id. at 149. At
2 sentencing, the government acknowledged that the plea agreement
3 prevented the government from seeking an upward departure or
4 recommending a particular sentence within the guideline range,
5 but nonetheless stated, inter alia:

6 I find this defendant's criminal history
7 appalling. And the fact that he can sit here
8 today and say that he made a mistake, I find
9 completely disingenuous. Because it is a mistake
10 that he has made over and over and over again in
11 terms of robbing people at gun point and using
12 violence to commit robberies. I understand that
13 the guidelines preclude us from looking at or
14 calculating certain offenses. But certainly this
15 is not this defendant's first or second offense.

16 Id. at 150. The government, after recounting the factual basis
17 for the defendant's conviction, said: "I just ask the Court to
18 consider all of that when making the Court's decision about where
19 to sentence this defendant." Id. The government concluded:
20 "[B]ased on the information that I had at [the] time [of the plea
21 agreement,] I believed that the defendant was going to be in a
22 [CHC] category three. He is in a category two. I think,
23 technically, I could make an upward departure which I am not."
24 Id. (first brackets added).

25 The district court, which presided over the trial of
26 Vaval's co-defendants, acknowledged the defendant's objections to
27 the government's statements, but asserted that "[t]he
28 government's remarks do not change any view that the Court had of
29 this case coming out here." Id.

1 We first noted that statements by the government
2 asserting that it did not intend to violate the plea agreement
3 "do not . . . insulate the government against a finding of breach
4 if in fact what was said constituted an argument about where
5 within the range to sentence appellant and/or whether to upwardly
6 depart." Id. at 153. We then concluded that the government's
7 "highly negative characterizations" of the defendant's criminal
8 history did not qualify as mere "information," and that a
9 statement that the government "technically" could make an upward
10 departure recommendation effectively qualified as such a
11 recommendation. Id. ("It is difficult to draw a principled
12 distinction between the government actually moving for an upward
13 departure and stating that it 'technically' could move for such a
14 departure and then adding arguments that would support such a
15 departure."). Furthermore, unlike the government's court-
16 solicited statements in Riera, "all relevant legal and factual
17 information had already been provided to the court, and the
18 government's statements served no purpose other than to advocate
19 that the court upwardly depart or impose a high sentence within
20 the Guidelines range." Id. at 154. As a result, we decided, the
21 government had breached the plea agreement. See also Lawlor, 168
22 F.3d at 637 (finding that the government breached the plea
23 agreement by asserting that the PSR properly determined the
24 Guidelines range where the plea agreement calculated the range
25 under a different (and lower) Guidelines range); United States v.
26 Enriquez, 42 F.3d 769, 770-71 (2d Cir. 1994) (vacating the

1 sentence based on the government's violation of the plea
2 agreement by arguing against a downward adjustment for acceptance
3 of responsibility where the plea agreement required the
4 government to "agree to a Probation Department finding that the
5 defendant is entitled to a two-level adjustment for acceptance of
6 responsibility").⁵

7 We have also strictly enforced plea agreements against
8 the government where, as here, the disputed issue concerned
9 enhancements or adjustments to a defendant's total offense level
10 rather than a specific sentence within a given Guidelines range
11 or an upward or downward departure from that range. In United
12 States v. Palladino, 347 F.3d 29 (2d Cir. 2003), the plea
13 agreement prohibited the government from moving for an upward
14 departure from the Guidelines range estimated in the agreement
15 "based on information known to [the United States Attorney's
16 Office] at this time." Id. at 33. The estimated total offense
17 level on which that range was based, however, was "not binding"
18 on the government, and the defendant was not permitted to

⁵ We have also applied this analytical framework to government breaches of plea agreements after the initial sentence has been executed. See United States v. Carbone, 739 F.2d 45, 46-47 (2d Cir. 1985) (concluding that the government breached its promise to "make no recommendation to the sentencing judge as to the sentence which Stephen Carbone may be given" when it strenuously opposed a "split sentence" requested by the defendant after the district judge announced a 30-month term of imprisonment); United States v. Corsentino, 685 F.2d 48, 51-52 (2d Cir. 1982) (finding that the government breached the plea agreement when, despite its agreement to "take no position" on the defendant's sentence, it advocated against permitting the possibility that the defendant might receive an earlier parole).

1 withdraw his plea if the government advocated for a different
2 offense level. Id. The agreement calculated the adjusted
3 offense level to be ten. Id. At sentencing, the government
4 sought a six-level enhancement based on information it conceded
5 was not new. Id. at 34. We concluded that this violated "the
6 language and the spirit" of the plea agreement, id. at 30; at
7 best, the language was ambiguous and was therefore construed
8 against the government, id. at 34.

9 In Griffin's plea agreement, the government committed
10 itself "not to oppose the recommendation that the Court apply the
11 two (2) level downward adjustment of Guidelines §3E1.1(a)
12 (acceptance of responsibility) and further agree[d] to move the
13 Court to apply the additional one (1) level downward adjustment
14 of Guidelines §3E1.1(b)." Plea Agreement, at ¶ 12. The
15 agreement also permitted the government to "respond at sentencing
16 to any statements made by the defendant or on the defendant's
17 behalf that are inconsistent with the information and evidence
18 available to the government." Plea Agreement, at ¶ 18b.⁶

19 In response to the defendant's objections to the PSR,
20 the government discussed the possible downward adjustment for

⁶ In Griffin's plea agreement, the government was permitted to "advocate for a specific sentence within the Guidelines range" and to "modify its position with respect to any sentencing recommendation or sentencing factor under the Guidelines . . . in the event that subsequent to this agreement the government receives previously unknown information regarding the recommendation or factor." Plea Agreement at ¶ 18. Neither party cites either of these provisions on this appeal, so we do not consider their relevance, if any.

1 acceptance of responsibility under U.S.S.G. § 3E1.1 in two
2 separate written submissions to the district court. It first
3 noted that "the government is troubled by some of the defendant's
4 objections which seem to raise questions regarding whether the
5 defendant has truly accepted responsibility." Gov't March 31
6 Statement, at 1. But the submission continued: "However, the
7 defendant did timely notify authorities of his intention to enter
8 a guilty plea, thereby permitting the government to avoid
9 preparing for trial and permitting the government and the court
10 to allocate their resources efficiently." Id. at 1-2. The
11 government then proceeded to recommend that the defendant receive
12 the additional one-level decrease for acceptance of
13 responsibility pursuant to U.S.S.G. § 3E1.1(b) should the
14 district court find that the defendant is entitled to the two-
15 level adjustment under U.S.S.G. § 3E1.1(a). Were this the
16 government's only communication addressing acceptance of
17 responsibility, we would have little trouble characterizing this
18 submission as containing a "few ill-advised descriptive words"
19 that fall short of breaching the plea agreement. See Riera, 298
20 F.3d at 135.

21 But the government addressed the issue of acceptance of
22 responsibility a second, separate time. In response to Griffin's
23 arguments, permitted by the plea agreement, see Plea Agreement,
24 at ¶¶ 8-9, that no relevant conduct was applicable to his
25 sentencing beyond that to which he pleaded guilty, the government
26 wrote that "the defendant is attempting to limit his conduct to

1 only that to which he pled guilty," which "leads the government
2 to question whether the defendant has truly accepted
3 responsibility pursuant to U.S.S.G. § 3E1.1(a)." Gov't April 15
4 Response, at 21. The government then reviewed the legal
5 framework of a downward adjustment for acceptance of
6 responsibility, concluding: "It is unclear whether the
7 defendant's objections to the inclusion of all the relevant
8 conduct rises to the level of outweighing his acceptance of
9 responsibility. Suffice it to say that the defendant's
10 objections to the relevant conduct raises [sic] questions on the
11 issue of acceptance." Id. at 22.

12 This was well beyond the pale. No discussion of an
13 acceptance of responsibility adjustment was solicited by the
14 court. Cf. Riera, 298 F.3d at 134-35. It was not an effort
15 simply to correct an inaccurate representation of relevant
16 sentencing law. See Amico, 416 F.3d at 166 ("In view of the
17 defendant's inaccurate description of the law relating to
18 aggravating role, the government was entitled to explain the law
19 concerning this adjustment without violating its agreement.").
20 Nor did the government merely provide information or evidence in
21 response to any statements by the defendant. Plea Agreement, at
22 ¶ 18b. Instead, the government, on its own initiative, warned
23 the court about what it considered to be "troubling" statements
24 by the defendant in his submission to the court in anticipation
25 of sentencing.

1 The government did nothing to retract its questionable
2 statements or otherwise ameliorate their impact. Cf. Amico, 416
3 F.3d at 165 (noting that "a retraction of an argument advanced by
4 the government in violation of its plea agreement would [not]
5 always cure its breach," but concluding that the "temporary
6 breach" of a "mild, brief, and unassertive form," combined with a
7 "rapid retraction," sufficiently cured any breach). Instead, the
8 government followed up its first statement of misgivings
9 regarding the defendant's objections with both a reiteration of
10 its doubts regarding the defendant's acceptance of responsibility
11 and an unsolicited review of law relevant to denying the
12 adjustment. See Gov't April 15 Response, at 21-22.

13 The government argues that it adhered to its promise in
14 the plea agreement throughout the sentencing hearing by
15 advocating for a sentence within a Guidelines range that included
16 the downward adjustment for acceptance of responsibility and by
17 expressly stating that it did "not advocat[e] for anything beyond
18 what's in the plea agreement." Sent'g Hrg. Tr, June 21, 2005, at
19 5, 15. These indirect references to an acceptance of
20 responsibility adjustment do not, we think, effectively retract
21 the previous statements or cure any breach.⁷ And we have

⁷ Even if we agreed that Griffin "opened the door" during the sentencing hearing by denying relevant conduct that the district court later determined to have occurred, see Amico, 416 F.3d at 165, this would not be relevant to the breach of the plea agreement, because the government's sentencing letters were submitted prior to the sentencing hearing and prior to the district court's explicit warnings to Griffin about the perilous nature of his denial of such conduct in light of the guidelines

1 determined that statements by the government asserting that it
2 did not intend to violate the plea agreement "do not . . .
3 insulate the government against a finding of breach if in fact
4 what was said constituted an argument" that violated the plea
5 agreement. Vaval, 404 F.3d at 153. "Given the government's
6 often decisive role in the sentencing context, we will not
7 hesitate to scrutinize the government's conduct to ensure that it
8 comports with the highest standard of fairness." Lawlor, 168
9 F.3d at 637.

10 This is not to say that the plea agreement required the
11 government to remain silent were the defendant to make statements
12 inconsistent with the government's understandings. It did not.
13 But the government did more than correct inconsistencies in fact
14 or law with information or evidence available to it, as permitted
15 by the plea agreement. Instead, it offered a thorough legal
16 analysis, unsolicited by the court, and concluded by noting its
17 own skepticism as to whether the defendant satisfied the
18 requirements for an adjustment for acceptance of responsibility
19 as set forth by its analysis.

20 To paraphrase our conclusion in Vaval, 404 F.3d at 153,
21 it is difficult to draw a principled distinction between the
22 government voicing outright opposition to a downward adjustment
23 for acceptance of responsibility and stating that the defendant's
24 conduct was "troubling" and "raises questions on the issue of

pertaining to acceptance of responsibility. See, e.g., Sent'g
Hr'g Tr., May 23, 2005, at 18-20.

1 acceptance." Without expressly opposing such an adjustment,
2 which would have been a more obvious and egregious breach of the
3 plea agreement, the government could have done little more to
4 attempt to persuade the court to deny an adjustment for
5 acceptance of responsibility. After the first letter directly
6 addressing the issue of acceptance of responsibility, "the
7 government's statements served no purpose other than to advocate
8 that the court" deny an adjustment for acceptance of
9 responsibility. Id. at 154.

10 That the district court disclaimed the government's
11 statements does not alter our conclusion. "Where the sentencing
12 court has sentenced in accordance with a position improperly
13 advocated, while claiming not to have been influenced by the
14 improper advocacy, a reviewing court can do no more than
15 speculate as to whether the judge was in fact influenced, even
16 unconsciously." Amico, 416 F.3d at 168. We therefore conclude
17 that although the government's mistake was a common one made in
18 the course of strongly felt and doubtlessly well-intentioned
19 advocacy, it breached the plea agreement by urging, in effect,
20 that the district court deny a downward adjustment for acceptance
21 of responsibility.

22 C. The Dissent

23 Judge Wesley does not dispute that the government was
24 forbidden by the plea agreement from making the statements in its
25 April 15 communication to the district court. And he agrees that
26 "the government[, therefore,] breached [the plea agreement]

1 before the sentencing hearing" took place. Dissent at [7].
2 Neither does he assert that there is, nor can we find, anything
3 in the plea agreement that (1) renders it a breach for the
4 defendant to make a false statement, confirm that he previously
5 made one, or to correct one, or (2) expunges or renders harmless
6 the government's previous breach in the event of any such action
7 by or on behalf of the defendant. See id. at [9]. Indeed, the
8 plea agreement explicitly anticipates the possibility of such
9 untruthfulness by reserving for the government the right to
10 "respond at sentencing to any statements made by the defendant or
11 on the defendant's behalf that are inconsistent with the
12 information and evidence available to the government." Plea
13 Agreement at ¶ 18.⁸

14 Embracing, instead, an argument that the government
15 never made, the dissent is focused on the fact that at the time
16 of the plea hearing -- several months after the government's
17 breach -- "the defendant did not continue to maintain his
18 [previous] denial," dissent at [7], in response to the PSR, as to
19 "knowledge [by him] of the BabyJ video." Id. at [3]. Griffin
20 "recant[ed], showing that his earlier denials had been
21 untruthful." Id. at [8]. The dissent would hold that this
22 concession of misstatements by the defendant excuses the

⁸ This is not to suggest that the defendant was free to lie with impunity. He was, of course, subject to sanction for testifying falsely, obstructing justice, or perhaps otherwise for proffering untruthful information in this context.

1 government from having failed previously to "strict[ly] compl[y]"
2 with the agreement. Id. at [10]. We do not see how. We know of
3 no authority for the proposition that a defendant's concession of
4 previous misstatements during sentencing excuses the government
5 from its previous noncompliance with the plea agreement, nor any
6 theory upon which we think such a proposition could reasonably be
7 based.

8 This is not a case where the government sought to
9 renounce a plea agreement because the defendant had breached it.
10 See United States v. Cruz-Mercado, 360 F.3d 30, 39 (1st Cir.
11 2004) (cited by the dissent, at [9]). The government flatly and
12 materially breached the plea agreement by advocating against an
13 acceptance of responsibility adjustment. Only now does the
14 dissenter search the record to find a misstatement by the
15 defendant on the basis of which he would have the court bestow a
16 pardon on the government for its breach. Especially having
17 carefully reviewed our oft-repeated dictum that "courts construe
18 plea agreements strictly against the Government . . . for a
19 variety of reasons, including the fact that the Government is
20 usually the party that drafts the agreement, and the fact that
21 the Government ordinarily has certain awesome advantages in
22 bargaining power," United States v. Ready, 82 F.3d 551 (2d Cir.
23 1996), we conclude to the contrary that the government was, and
24 remained, bound by its plea agreement and responsible for its
25 material breach thereof.

1 D. Remedy

2 The appropriate remedy for a breach of a plea agreement
3 is "either to permit the plea to be withdrawn or to order
4 specific performance of the agreement." Lawlor, 168 F.3d at 638
5 (citation omitted). The defendant seeks only specific
6 performance here. We therefore vacate the sentence and remand
7 for resentencing.

8 In doing so, we must remand to a different district
9 judge. Id. Although in most other contexts we resist such a
10 course of action, we have concluded that it is appropriate where
11 a plea agreement is concerned; "the government's breach of its
12 commitment is difficult to erase if the case remains before the
13 same judge, because the judge's decision . . . was based on his
14 assessment of the facts." Id. (quoting Enriquez, 42 F.3d at
15 772). It is an understatement to observe, in light of the
16 transcript of the proceedings in the district court, that this
17 "disqualification results not from any inappropriate action on
18 [the judge's] part, but by reason of the government's failure to
19 adhere to its contractual obligation." Id. (internal citation
20 omitted). But "the government-rung bell cannot be unrung."
21 Riera, 298 F.3d at 134. If the district court were again to deny
22 acceptance of responsibility, even if such an action is
23 warranted, there is no way to be certain that the government's
24 breach had no effect on that determination. Treating this course
25 of action as a prophylactic rule ensures that the appearance of

1 justice will not be compromised, see United States v. Kaba, 480
2 F.3d 152, 159 (2d Cir. 2007), and, of course, encourages
3 punctilious respect for similar agreements in the future.

4 We therefore remand to a different judge reluctantly.
5 The district court proceeded with what we view as extraordinary
6 diligence. The hearings it held were unusually lengthy and
7 complex. The extent to which this exemplary effort will be
8 wasted is a matter of no small concern. We conclude nonetheless
9 that we are required to do so by our case law and the principles
10 underlying it.

11 E. Other Arguments

12 The defendant makes several additional arguments. Of
13 particular note are his assertions that the government violated
14 Federal Rule of Criminal Procedure 16 and Brady by failing to
15 turn over a copy of his hard drives, and his challenges to the
16 district court's application of sentencing enhancements for
17 trafficking and distribution based on his use of KaZaA. We often
18 address issues raised on appeal that are not central to the
19 disposition of the appeal and might ordinarily be inclined to do
20 so here. On this sentencing appeal, however, we choose to
21 exercise our discretion not to do so for several reasons.

22 First, subsequent to the sentencing proceedings below,
23 Congress passed a law that requires that "any property or
24 material that constitutes child pornography . . . shall remain in
25 the care, custody, and control of either the Government or the

1 court." Adam Walsh Child Protection and Safety Act of 2006, Pub.
2 L. No. 109-248, 120 Stat. 629, 631 (codified at 18 U.S.C.
3 § 3509(m)(1) (2006)). This law appears to track closely the
4 government's former policy in that it prohibits the government
5 from providing a copy of any "property or material that
6 constitutes child pornography" to a defendant, notwithstanding
7 the requirements of Rule 16 of the Federal Rules of Criminal
8 Procedure. Id. § 3509(m)(2)(A). A defendant or his or her
9 expert may only examine the property at a government facility.
10 Id. § 3509(m)(2)(B). Interpretations of this provision have
11 begun to percolate through the district courts but, to the best
12 of our knowledge, no Court of Appeals has yet addressed it. See
13 generally Adam Liptak, Locking Up the Crucial Evidence and
14 Crippling the Defense, N.Y. Times, Apr. 9, 2007, at A10. In
15 light of this change in the law subsequent to Griffin's sentence
16 on an issue he raises before us for the first time on appeal, we
17 think it better for the district court to address his arguments
18 under Rule 16 and Brady and to await possible further
19 developments in the law in this regard before addressing it if
20 indeed we eventually must in this case.⁹

21 Second, despite the lengthy sentencing hearing directed
22 primarily at understanding the use, function, and operation of

⁹ Because we do not address the Rule 16 argument, we need not determine, on the present record and at this point, whether Griffin requested a copy of the hard drive prior to sentencing as required.

1 KaZaA, we find the record to be, through no apparent fault of the
2 court, confused and difficult to follow. The court repeatedly
3 expressed its frustration in this regard. See, e.g., Sent'g Hr'g
4 Tr., June 21, 2005, at 75 ("To the Government, I think you're
5 making this way [too] confusing"); Sent'g Hr'g Tr., July
6 13, 2005, at 22 ("In this case, because of issues that have
7 arisen at the fault of the Prosecution and law enforcement,
8 frankly, this is now the fourth day of this hearing. What
9 boggles my mind, I've rarely heard an agent testify as [an FBI]
10 agent did on the stand. He changed a report without indicating
11 it was an amended report."); Id. at 33 ("This is what the case is
12 all about, KaZaA. I can't believe in the FBI somebody doesn't
13 know about KaZaA. It doesn't have to be a live witness [i]f I
14 had an affidavit from somebody explaining to me how KaZaA
15 works"). Moreover, on remand, the defendant or his
16 expert witness may be afforded an opportunity to inspect the
17 computer hard drives in an effort to complete the record, which
18 may be of benefit to what at least seem on the surface to present
19 complicated technical issues. We think our review of this
20 argument, should we be required to conduct one, would benefit
21 from further exposition and clarification in the district court.

22 Finally, when remanding for a retrial on the merits, we
23 do, of course, often decide issues that are not strictly before
24 us when they are likely to arise again in the course of the
25 retrial. See, e.g., United States v. Shellef, 2007 WL ----, *?,

1 2007 U.S. App. LEXIS 25974, *52 (2d Cir. Nov. 8, 2007)
2 (addressing various issues "because they [were] likely to arise
3 again on remand and retrial . . . even though their resolution
4 [was] not strictly necessary in order to decide th[e] appeal.");
5 United States v. Amico, 486 F.3d 764, 767 (2d Cir. 2007)
6 (vacating the conviction and addressing "only those issues
7 calling for guidance on remand"); United States v. Quattrone, 441
8 F.3d 153, 182 (2d Cir. 2006) (addressing evidentiary rulings on
9 appeal where conviction was vacated and remanded for retrial
10 based on a flawed jury instruction). Deciding them may save the
11 investment of the substantial judicial resources -- as well as
12 those of counsel and members of another jury -- that might be
13 required by yet another remand should we eventually decide those
14 additional issues contrary to the view of the district court.
15 Yet another complete retrial might well follow. The resources
16 expended, however, tend to be considerably less where, as here,
17 the remand is confined to resentencing and subsequent additional
18 sentencing hearings rather than a subsequent retrial on the
19 merits. Cf. United States v. Leung, 40 F.3d 577, 586 n.2 (2d
20 Cir. 1994) ("Our slightly greater willingness, when there are
21 extenuating circumstances, to entertain sentencing objections
22 that were not presented to the District Court may reflect the
23 different impact on the judicial system engendered by vacating a
24 sentence in comparison with reversing a conviction. Unlike trial
25 errors, whose correction requires a new trial that a timely

1 objection might have obviated, correcting sentencing errors
2 usually demands only a brief resentencing procedure.") (citing
3 United States v. Baez, 944 F.2d 88, 90 n.1 (2d Cir. 1991)).

4 The remaining subsidiary arguments are also best left
5 for the district court to address in the first instance.

6 **CONCLUSION**

7 The case is remanded to the district court with the
8 direction that it be assigned to a different district judge for
9 the court to vacate the current sentence and impose sentence de
10 novo.