Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender ND Cal Date: Monday, Feb. 29, 2015
Re: *United States v. Hernandez-Castro*, (9th Cir. Feb. 25, 2015): **Breach**: Disappointing decision holds that government did not breach plea when it didn't "recommend" stipulated departure -- appellate waiver thus survived

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Players: Decision by visiting Sr. Eighth Circuit Judge Melloy, joined by Judges Ikuta and Hurwitz.

Facts: Hernandez-Castro pleaded guilty to conspiracy with intent to distribute heroin. *Id.* at *1. In the plea agreement, the government "stipulate[d] and agree[d]" to a four level fast track departure. *Id.* at *1. At sentencing, the district court only departed down two levels for fast track. Neither party objected. *Id.* Despite a plea agreement with an appellate waiver, Ms. Hernandez-Castro appealed.

Issue(s): "Hernandez-Castro . . . argues the government breach her plea agreement, thereby invalidating her appeal waiver." *Id.* at *1. "Hernandez-Castro argues that the government breach her plea agreement by objecting when the district court granted only a two-level departure for fast track (rather than the four-level departure in the agreement." *Id.* at *2.

"A handshake is as good as a thirty-page contract, eh, Mr. Harrison?"

Held: "*Camarillo-Tello* is distinguishable because today we review for plain error. Unlike the plea agreement in *Camarillo-Tello*, Hernandez-Castro's plea agreement does not indicate the government 'will recommend' the four-level departure for fast track. Rather, paragraph eight of her plea agreement provides 'the parties stipulate and agree that the following guideline calculations are appropriate for the charge for which the defendant is pleading guilty.' That language is sufficiently distinct from the language obligating government action in *Camarillo-Tello* for us to conclude no plain error occurred here." *Id.* at *2.

Of Note: The holding of *Hernandez-Castro* is that a deal that requires the government to "stipulate and agree" to a sentence does not, by necessity, also require the government to "recommend" it. When distinguishing this disappointing opinion, emphasize that this is a plain error case, and that the AUSA did ultimately support other reductions that resulted in a more-lenient sentence. *Id.* at *2. This very fact-bound sentencing entered into the Court's plain error analysis, and limits the holding that there was no breach.

How to Use: In *United States v. Camarillo-Tello*, 236 F.3d 1024 (9th Cir. 2001), the Ninth reversed an illegal reentry sentence when the agreement required the government to *recommend* a four-level downward departure -- the government breached by failing to argue for the departure in its sentencing memo and argue it at sentencing. *Id.* at *2. Judge Melloy distinguishes *Camarillo-Tello* by observing that in Hernandez-Castro's agreement the government didn't promise to *recommend* the departure, but instead promised to "*stipulate and agree*" to it. Not a whole lot of *contra proferntem* going on against the government-drafter of this contract. Remember and cite this very narrow contract interpretation in *Hernandez-Castro* in four months, when we're gunning for the plea agreement collateral attack waivers during our *Johnson* § 2255 tsunami.

For Further Reading: When district judges know their sentencing decisions are unreviewable because of appellate waivers, it affects sentencing procedures and outcomes. So argues Clinical Professor Kevin Bennardo in a very interesting article. *See* Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J. L. REFORM 347 (2015), available at: http://repository.law.umich.edu/mjlr/vol48/iss2/2 The proposed solution? Create *post-sentencing* appellate waivers, negotiated and memorialized in post-sentencing agreements. In addition to some thought-provoking proposals, this article has a useful discussion of the history of sentencing appellate waivers – a handy review as we gear up for the aforementioned *Johnson* brouhaha ahead.