

1 **UNITED STATES COURT OF APPEALS**

2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term, 2018

6
7 (Argued: December 12, 2018 Decided: April 4, 2019)

8
9 Docket No. 17-1896-cr

10
11

12 UNITED STATES OF AMERICA,

13
14 *Appellee,*

15
16 – v. –

17
18 TYRONE WILSON, AKA BISCUIT, AKA YOUNG BRICKY, JOSEPH GARCIA,
19 AKA JO JO, MUSA MARSHALL, AKA SLIM, CRYSTAL LEWIS, AKA EBB,
20 VERDREEA OLMSTEAD, AKA AUNTIE, JOSEPH RANDOLPH, AKA RIZZLE,
21 JOSEPH VALENTIN, AKA J., TYHE WALKER, AKA G.I.B., AKA GUY IN THE
22 BUSHES, ALGENIS CARABELLO, AKA HIGH-HENNY, JORGE MEJIA, AKA
23 MOOSE, AKA MUSSOLINI, RONALD HERRON, AKA RA, AKA RA DIGGS,
24 AKA RA DIGGA, AKA RAHEEM,

25
26 *Defendants,*

27
28 SHONDELL WALKER, AKA M-DOT,

29
30 *Defendant-Appellant.*

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32

33 Before: JACOBS, CALABRESI, *Circuit Judges*, RAKOFF, *District Judge*.*

34
*Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York,
sitting by designation.

1 Appeal from the judgment of the United States District Court for the Eastern
2 District of New York (Garaufis, J.) sentencing Defendant Walker to 360 months in
3 prison and five years of supervised release for a single count of conspiring to
4 distribute at least 200 grams of crack cocaine in violation of 21 U.S.C. § 846.
5 Walker pled guilty in October 2011 pursuant to a plea agreement in return for an
6 estimated sentence of 108 to 135 months in prison. The District Court, at the
7 Government's request, then postponed Walker's sentencing hearing while a trial
8 proceeded against Walker's co-defendant. After that trial concluded, Walker's
9 sentencing hearing was held in May 2017. At the hearing, the Government asked
10 for a significant sentence increase based in part on information that arose during
11 the co-defendant's trial but which the Government knew about at the time it
12 negotiated Walker's plea agreement. The District Court accepted the
13 Government's new estimate and sentenced Walker to 360 months in prison. We
14 now vacate Walker's sentence. We hold that the Government breached Walker's
15 plea agreement when the Government, based on information that it knew at the
16 time of the plea, sought a substantially higher sentence than that estimated in
17 Walker's plea agreement. Accordingly, we VACATE Walker's sentence and
18 REMAND the case to a different district court judge for resentencing under
19 Walker's plea agreement.

21
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24 *for Defendant-Appellant*.

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28 the Eastern District of New York, Amy Busa,
29 Samuel Nitze, David Lizmi, Assistant United
30 States Attorneys, *on the brief*), Brooklyn, NY, *for*
31 *Appellee*.

1 GUIDO CALABRESI, *Circuit Judge*:

2 This case presents the question of whether the Government breaches a plea
3 agreement when it agrees to an estimated sentence—known as a “*Pimentel*
4 estimate”—in a defendant’s plea bargain, then advocates for a substantially
5 higher sentence at the defendant’s sentencing hearing on the basis of information
6 known to the Government at the time of the agreement.

7 We have previously held that allegations of breached plea agreements
8 depend on what “the reasonable understanding and expectations of the
9 defendant [were] as to the sentence for which he had bargained.” *Paradiso v.*
10 *United States*, 689 F.2d 28, 31 (2d Cir. 1982) (per curiam). Here, Defendant-
11 Appellant Shondell Walker agreed to a *Pimentel* estimate of 108-135 months’
12 imprisonment when he pled guilty in 2011, and the Government agreed that it
13 would not deviate from this estimate in the absence of new information.
14 Walker’s sentencing hearing was then delayed for six years, in substantial part
15 due to the Government’s request that sentencing be postponed while a trial
16 proceeded against a co-defendant. At the end of this trial, the Government
17 sought several sentencing enhancements based on information that became
18 evident during trial but which the Government knew about at the time it

1 negotiated Walker's plea deal. Ultimately, the Government argued that Walker
2 ought to be sentenced to 360 months to life in prison.

3 We hold that, under these circumstances, Walker could not have
4 reasonably expected that the Government would change its position in such a
5 manner when he consented to the *Pimentel* estimate in his plea bargain, and
6 therefore that the Government breached the plea agreement. Accordingly, we
7 VACATE Walker's sentence and REMAND for resentencing under the original
8 plea agreement.

9 BACKGROUND

10 On October 5, 2010, pursuant to a surveillance operation conducted by the
11 New York Police Department ("NYPD") and the Drug Enforcement Agency
12 ("DEA"), defendant Shondell Walker and two others were arrested during a
13 traffic stop.

14 That same day, the Government filed a criminal complaint against Walker
15 in the United States District Court for the Eastern District of New York. The
16 complaint stated that "[f]or the past several years, the NYPD and the DEA have
17 been investigating a violent criminal organization based in the Gowanus Houses,
18 a public housing development in the Boerum Hill section of Brooklyn." Compl. ¶
19 2. "For the better part of the last three years, these defendants have controlled the

1 distribution of crack cocaine and heroin in the Gowanus Houses.” *Id.* ¶ 2.

2 “During the course of this investigation, law enforcement has, among other
3 things, made numerous undercover purchases of crack cocaine directly from
4 members of this crew.” *Id.* ¶ 3. “In addition, . . . NYPD has executed various
5 search warrants and arrested various individuals associated with this
6 organization. These search warrants . . . have resulted in the seizure of . . .
7 substantial quantities of crack cocaine” *Id.* ¶ 4.

8 The complaint explained that Walker was “regularly involved in the
9 distribution of crack cocaine in the Gowanus Houses for an individual identified
10 as Ronald Herron, who was the leader of this criminal organization.” *Id.* ¶ 6
11 (capitalization and footnotes removed). Walker “worked with this organization
12 and served as one of Herron’s primary security guards and enforcers.” *Id.* ¶ 7.
13 For instance, Walker would “regularly accompany Herron to narcotics
14 transactions and carry firearms for Herron.” *Id.* ¶ 7. “Walker would also help to
15 protect Herron’s narcotics territory . . . by, for example, robbing or attacking rival
16 narcotics traffickers.” *Id.* ¶ 7. And one cooperating witness “stated that he and
17 Walker participated in a shooting against a rival narcotics trafficker.” *Id.* ¶ 7.
18 Moreover, Walker had previously been arrested in association with this criminal

1 organization when he was discovered in an apartment where the NYPD also
2 found heroine and crack cocaine. *Id.* ¶ 5.

3 Walker and eleven other co-defendants were eventually charged in a
4 multi-count indictment for participation in the Gowanus Houses drug
5 conspiracy.

6 On October 6, 2011, Walker pled guilty—pursuant to a plea agreement
7 with the Government—to a single count of conspiring to distribute at least 200
8 grams of crack cocaine in violation of 21 U.S.C. § 846. In turn, the Government
9 “estimate[d] [Walker’s] likely adjusted offense level under the Guidelines to be
10 level [29], which is predicated on the following Guidelines calculation:” (1) a base
11 offense level of 30 points derived from the 200 grams of crack cocaine
12 distribution, *see* U.S.S.G. §§ 2D1.1(a)(5), (c)(5); (2) a 2-point enhancement for
13 possession of a weapon based on a firearm recovered from the vehicle during
14 Walker’s arrest, *see id.* § 2D1.1(b)(1); and (3) a 3-point reduction for acceptance of
15 responsibility, *see id.* §§ 3E1.1(a), (b). App. 90-91. This resulted in an estimated
16 Guidelines sentence of 108-135 months.

17 The plea agreement also stated, in relevant part:

- 18 3. The Guidelines estimate set forth . . . is not binding on the Office, the
19 Probation Department or the Court. If the Guidelines offense level

1 advocated by the Office, or determined by the Probation
2 Department or the Court, is, for any reason, including an error in the
3 estimate, different from the estimate, the defendant will not be
4 entitled to withdraw the plea and the government will not be
5 deemed to have breached this agreement.

6 . . .

7
8 5. The Office agrees that . . . based upon information now known to the
9 Office, it will . . .

10 b. take no position concerning where within the Guidelines range
11 determined by the Court the sentence should fall; and

12 c. make no motion for an upward departure under the Sentencing
13 Guidelines.

14
15 If information relevant to sentencing, as determined by the Office,
16 becomes known to the Office after the date of this agreement, the Office
17 will not be bound by paragraphs 5(b) and 5(c).

18
19 App. 91-93.

20 The Probation Department subsequently prepared a Pre-Sentence Report
21 ("PSR") for Walker on January 3, 2012, in which it agreed with the Government's
22 estimated Guidelines sentence. According to the PSR, Walker worked as an
23 "enforcer" for the conspiracy and "carried a firearm as part of his role in the
24 organization in order to protect himself, the drug proceeds, and the locations on
25 the block where the crack cocaine was sold." PSR ¶ 11. The PSR also reported
26 that, "[p]er the Government, Walker is responsible for distributing 200 grams of
27 crack cocaine during the course of the conspiracy between 2007 and 2010," *id.* —

1 although the Government “conservatively estimates that Herron’s organization
2 distributed in excess of 1 kilogram of crack cocaine,” *id.* ¶ 6. The PSR also noted
3 that, “[b]ased on the instant investigation, post-arrest statements, as well as
4 intelligence provided by confidential informants, agents determined that . . .
5 [Herron’s] enforcers[] are responsible for the entire amount of narcotics and
6 firearms involved in this conspiracy, as they were aware of the full scope of this
7 jointly undertaken criminal activity, and the actions of others were reasonably
8 foreseeable to them.” *Id.* ¶ 10.

9 After several delays, Walker’s sentencing hearing was scheduled for
10 September 10, 2013.

11 On the day of the hearing, the District Court—at the Government’s
12 request, and over defense counsel’s objection—postponed Walker’s sentencing
13 until after the trial of Walker’s co-defendant, Ronald Herron. *See United States v.*
14 *Herron*, Docket No. 1:10-cr-00615-NGG-2. At Herron’s trial, several witnesses
15 testified about Walker’s role in the drug conspiracy: one stated that Walker had
16 said Herron had given Walker “a gun, so he could protect himself,” Trial Tr.
17 2925, June 16, 2014; another testified that Walker served as “muscle” for Herron,
18 Trial Tr. 1724, June 3, 2014; three witnesses said that Walker threatened people to

1 keep them from selling drugs on Herron's turf; and one witness testified that
2 Walker "car[ried a] gun" for Herron, which Walker twice "flashed" in front of
3 the witness, Trial Tr. 2706-14, June 10, 2014. Witnesses also testified that, at the
4 time of Walker's participation in the conspiracy, the organization regularly sold
5 substantial amounts of cocaine.

6 Walker himself also testified at Herron's trial as a witness for Herron.
7 Walker claimed that he sold drugs only to support himself; denied Herron's
8 involvement in the conspiracy; and stated that Herron was "a positive role
9 model." Trial Tr. 3762-3780, June 23, 2014.

10 After the *Herron* trial ended, on October 19, 2016, the Government
11 submitted a second sentencing memorandum to the District Court advocating for
12 a "revised" Guidelines sentence for Walker based on allegedly new information
13 that surfaced during Herron's trial. App. 68, 72, 78. Specifically, the Government
14 asserted (1) that the trial testimony established that "a reasonable estimate of the
15 narcotics attributable to [Walker] would be no less than one kilogram of crack-
16 cocaine, which would result in a base-offense level increase to level 32" from 30,
17 *id.* at 80 (citing U.S.S.G. § 2D1.1(c)(4)); (2) that Walker "undoubtedly 'used
18 violence, made a credible threat to use violence, or directed the use of violence'

1 in the commission of the offense, which would result in a two-level upward
2 adjustment of his Guidelines,” App. 80 (quoting U.S.S.G. § 2D1.1(b)(2)); and (3)
3 that “given Walker’s role as an enforcer in Herron’s organization, a two-level
4 upward adjustment, pursuant to [U.S.S.G. §] 3B1.1 is appropriate,” App. 80. In
5 addition, the Government argued that Walker’s perjurious testimony at Herron’s
6 trial warranted a 2-point enhancement for obstruction of justice. App. 78-79
7 (citing U.S.S.G. § 3C1.1).¹ On this basis, the Government concluded that a
8 Guidelines sentence of 360 months to life in prison was appropriate.

9 Roughly contemporaneously, Walker’s counsel submitted a second
10 sentencing memorandum objecting to the “drastic modification of the original
11 advisory sentencing guidelines” and requesting a *Fatico* hearing. *Id.* 62.²

¹ The Government also asked that Walker’s reduction for acceptance of responsibility be removed and that the enhancement contained in the plea agreement for possession of a dangerous weapon be preserved.

² Walker’s counsel submitted his second sentencing memorandum on June 14, 2016, in response to an amended PSR that the Probation Department submitted following Herron’s trial and in anticipation of a similar submission by the Government. The Probation Department had, in its amended PSR, recommended that Walker’s Guidelines sentence be increased following the events at Herron’s trial. In Walker’s counsel’s second sentencing memorandum, counsel objected to the Probation Department’s increase from the sentence originally agreed to in his plea agreement, saying that he was “confident” that the Government would similarly advocate for an increased sentence, and arguing that such an increase would also be improper. App. 65. The Government then submitted its second sentencing memorandum on October 19, 2016, arguing for an even higher sentence than that recommended by the Probation Department. Walker’s counsel then submitted three supplements to his second sentencing memorandum on April 18, April 24, and May 24, 2017, while maintaining the original substance of his second

1 Walker's sentencing hearing was finally held on May 30, 2017—six years
2 after he had originally pled guilty. At the hearing, defense counsel objected to
3 each of the Government's additional sentencing enhancements and requested
4 that Walker be sentenced according to the "original guideline range." *Id.* at 116.
5 The Government acknowledged that it had originally advocated for a lesser
6 Guidelines sentence, but explained that "when the plea agreement, the initial
7 plea agreement, was first negotiated in the case, it was a number of years ago."
8 *Id.* at 103. The Government argued that "over the course of [its] investigation, up
9 and through [Herron's] trial, [it] learned loads more information" that justified a
10 new Guidelines sentence. *Id.* The Government further maintained that it was
11 required to "prove a disputed fact relevant to sentencing by a preponderance of
12 the evidence" only, and that "given the quantity of evidence adduced at the
13 trial," it was "totally appropriate for the Court to rely on that [evidence] in
14 making the findings necessary to justify the enhancements." *Id.* at 110.
15 The District Court agreed that "there [wa]s [a] preponderance of the
16 evidence to" support the Guidelines sentence adopted by the Government. *Id.* at

sentencing memorandum. It seems clear from this timeline that Walker's counsel's objections covered the Government's additions.

1 130. The Court then sentenced Walker to 360 months' imprisonment and five
2 years of supervised release. Walker now appeals his sentence.

3 4 DISCUSSION

5 Walker appeals on two primary grounds. First, he asserts that the
6 Government breached his plea agreement by advocating for a higher sentence at
7 his sentencing hearing than it had agreed to when he pled. Second, Walker
8 argues that postponement of his sentencing hearing for four years while the
9 Government pursued a trial against his co-defendant violated his Fifth
10 Amendment right to a speedy sentencing. *See United States v. Ray*, 578 F.3d 184
11 (2d Cir. 2009). Because we find that the Government breached Walker's plea
12 agreement, and vacate the sentence and remand for resentencing on that basis,
13 we do not reach the alleged Fifth Amendment speedy sentencing violation.³

14 I

15 "We review interpretations of plea agreements *de novo* and in accordance
16 with principles of contract law." *United States v. Riera*, 298 F.3d 128, 133 (2d Cir.
17 2002). "Moreover, because plea bargains require defendants to waive

³ Since Walker, in his Fifth Amendment argument, seeks only the same relief that we are granting him for the Government's breach of the plea agreement, we need not and do not consider the merits of his Fifth Amendment claim.

1 fundamental constitutional rights, prosecutors are held to meticulous standards
2 of performance.” *United States v. Vaval*, 404 F.3d 144, 152-53 (2d Cir. 2005). “[W]e
3 construe plea agreements strictly against the government and do not ‘hesitate to
4 scrutinize the government’s conduct to ensure that it comports with the highest
5 standard of fairness.’” *Id.* at 152 (quoting *United States v. Lawlor*, 168 F.3d 633, 637
6 (2d Cir. 1999)).

7 The Government argues that we should review this claim for plain error
8 because Walker failed to object before the District Court on the specific grounds
9 that the Government “breached” the plea agreement. But if a defendant objects at
10 a sentencing hearing in a manner “which fairly alerts the court and opposing
11 counsel to the nature of the claim,” the objection is “sufficient to preserve [the]
12 argument on appeal,” even if the defendant fails to “raise a specific rationale for
13 the objection.” *United States v. Huggins*, 844 F.3d 118, 121 n.3 (2d Cir. 2016)
14 (quoting *United States v. Sprei*, 145 F.3d 528, 533 (2d Cir. 1998)).

15 Walker objected multiple times to the Government’s change in position.
16 Walker also made clear that he was objecting to the “drastic modification of the
17 original advisory sentencing guidelines,” App. 62, and that he ought to be
18 sentenced according to the “original guideline range” contained in his plea

1 agreement, *id.* at 116. Moreover, the Government itself acknowledged, both in its
2 second sentencing memorandum and during Walker's sentencing hearing, that it
3 was changing its position from the Guidelines sentence estimated in Walker's
4 plea agreement. But it argued that such a change was justified because of
5 allegedly new information that it developed against Walker in the course of
6 Herron's trial.

7 Under the circumstances, it is obvious that Walker's objections, as
8 evidenced by the Government's arguments in response, "w[ere] sufficient to
9 apprise the court and opposing counsel of the nature of [Walker's] claims"
10 regarding the impropriety of the Government's change in position. *Sprei*, 145
11 F.3d at 533 (internal quotation marks omitted). Therefore, we review the
12 argument that the Government breached Walker's plea agreement for harmless
13 error. *See United States v. Robinson*, 634 F. App'x 47, 49 n.1 (2d Cir. 2016).

14 II

15 Walker argues on appeal that the Government breached his plea
16 agreement because it (1) advocated for a higher sentence at his sentencing
17 hearing than it had agreed to in his plea agreement, and did so (2) based on
18 information that the Government had in its possession at the time the plea was
19 negotiated. Specifically, Walker contends that the evidence the Government used

1 to support its post-plea base offense level increase, use-of-violence enhancement,
2 and aggravating-role enhancement—*i.e.*, that Herron’s organization distributed
3 at least 1 kilogram of crack cocaine, that Walker used violence as part of his role
4 in the drug conspiracy, and that Walker worked as an “enforcer” for Herron—
5 was information that the Government had at the time the plea bargain was
6 struck. Walker contends that the Government’s later use of this evidence to
7 justify a revised Guidelines sentence violated the “estimate[]” contained in the
8 plea agreement. App. 90.

9 Walker concedes that his perjurious testimony on behalf of Herron is new
10 information that the Government did not have in its possession at the time it
11 negotiated his plea agreement. Walker nonetheless argues that the Government’s
12 removal of the reduction for acceptance of responsibility and application of an
13 obstruction-of-justice enhancement—both based on this perjury—also violated
14 the terms of his plea agreement. While we will find that the Government
15 breached Walker’s plea agreement when it advocated for an increased base
16 offense level, a use-of-violence enhancement, and an aggravating-role
17 enhancement, and, on that basis, vacate Walker’s sentence and remand for
18 resentencing, we take no position on whether the enhancements based on

Walker's perjury were also improper, and leave that issue to the resentencing court.

III

Whether the Government breaches a plea agreement when it later advocates for a higher sentence than that contained in the plea—based on information that the Government knew about at the time the plea was negotiated—is not an unfamiliar issue in this Circuit. *See United States v. MacPherson*, 590 F.3d 215, 218-19 (2d Cir. 2009) (per curiam); *United States v. Habbas*, 527 F.3d 266, 269-72 (2d Cir. 2008); *United States v. Palladino*, 347 F.3d 29, 32-35 (2d Cir. 2003). The issue stems from our suggestion in *United States v. Pimentel*, 932 F.2d 1029, 1034 (2d Cir. 1991), that it would be good practice for the Government to provide pleading defendants with “the likely range of sentences that their pleas will authorize under the Guidelines” (known as a “*Pimentel* estimate”) in order to reduce blindsided defendants’ claims of “unfair surprise.” But this practice has resulted in tension between, on the one hand, defendants’ “reasonable reliance” on the sentences as estimated in their plea agreements, and, on the other, the Government’s need to maintain flexibility in its sentencing decisions in the event of mistakes, oversights, or new information. *See Habbas*, 527 F.3d at 269-71.

1 As with other questions of breached plea agreements, to resolve this
2 tension, we look both to the precise terms of the plea agreements and to the
3 parties' behavior. We seek to determine what "the reasonable understanding and
4 expectations of the defendant [were] as to the sentence for which he had
5 bargained." *Paradiso*, 689 F.2d at 31. In the specific context of an alleged breached
6 *Pimentel* estimate—because a *Pimentel* estimate is no more than that, an
7 estimate—the Government does not violate a defendant's reasonable
8 expectations simply because it deviates from the estimate. A defendant's
9 reasonable expectations may be breached, however, where the Government's
10 deviation "produce[s] serious unfairness" for the defendant. *Habbas*, 527 F.3d at
11 271. This may occur if, for instance, the Government acts in bad faith (either in its
12 initial calculation of the *Pimentel* estimate or in its later change of position) or if
13 "the [G]overnment's change of position (without new justifying facts) changed
14 the defendant's exposure so dramatically as to raise doubts whether the
15 defendant could reasonably be seen to have understood the risks of the
16 agreement." *Id.*

17 Because of this focus on the defendant's reasonable expectations—"rather
18 than technical distinctions in semantics" surrounding the *Pimentel* estimate,

1 *Gammarano v. United States*, 732 F.2d 273, 276 (2d Cir. 1984)—our analysis can
2 produce divergent outcomes in cases that, at first glance, may seem similar. *See*
3 *MacPherson*, 590 F.3d at 219 (discussing the different outcomes in *Palladino* and
4 *Habbas*). In both *Palladino*, 347 F.3d at 32-33, and *Habbas*, 527 F.3d at 269-70, the
5 defendants alleged that the Government breached their plea agreements by
6 advocating for a higher sentence than that contained in their pleas. The
7 defendants’ plea agreements contained similar—though not identical—language
8 in these cases: both agreements stated that the Guidelines sentences in the pleas
9 were “estimate[s],” *Palladino*, 347 F.3d at 33; *Habbas*, 527 F.3d at 270; that these
10 estimates were “not binding” on the Government, *Palladino*, 347 F.3d at 33;
11 *Habbas*, 527 F.3d at 270; and that the defendants were not able to withdraw their
12 pleas if the Government ultimately advocated for an offense level that was
13 “different from the estimate,” *Palladino*, 347 F.3d at 33; *Habbas*, 527 F.3d at 270.
14 And in both cases, the Government justified its change in position from the
15 *Pimentel* estimate based on information that the Government knew about at the
16 time the pleas were negotiated. *Palladino*, 347 F.3d at 34; *Habbas*, 527 F.3d at 270.
17 Yet in *Palladino*, 347 F.3d at 34, we held that the Government breached the
18 plea agreement, while in *Habbas*, 527 F.3d at 270-71, we held it did not.

1 In *Palladino*, the prosecutor who negotiated the plea agreement provided
2 the defendant with a *Pimentel* estimate that excluded a potentially applicable six-
3 point sentencing enhancement. 347 F.3d at 31. Then, when “a new Assistant
4 United States Attorney [took] over the case and adopted a different view of the
5 matter,” the Government sought to apply the sentencing enhancement using
6 evidence that the Government knew about at the time the plea was negotiated.
7 *Id.* at 34. The plea agreement specifically stated that the Government’s *Pimentel*
8 estimate was “based on information known to [the Government] at [the time of
9 the plea],” *id.* at 33 (emphasis omitted), and that the Government would “make
10 no motion for an upward departure” nor take a position “concerning where
11 within the Guidelines range” the sentence should fall, *id.* Given “the[se]
12 circumstances,” we held that the “defendant had a reasonable expectation that
13 the Government would not press the Court for an enhanced offense level in the
14 absence of new information.” *Id.* at 34; *see also Habbas*, 527 F.3d at 272 n.1 (“The
15 problem in *Palladino* was . . . the combination of the passages of the plea
16 agreement conferring assurance that the government would not advocate for a
17 sentence higher than the estimate, with the aura of unfair dealing that underlay
18 the government’s change of position.”).

1 In *Habbas*, we held that the defendant had no such reasonable expectation.
2 In that case, the Government, “under the pressures of preparing a *Pimentel*
3 estimate after the defendant indicated readiness to plead,” simply neglected to
4 “notice the possible applicability of [a four-level sentencing enhancement].” 527
5 F.3d at 271. When notified by the Probation Department of its oversight, the
6 Government promptly sought to include the enhancement. *Id.* at 270. The *Habbas*
7 defendant’s plea agreement included language that the Government “reserve[d]
8 the right to argue for a sentence beyond that called for by the Guidelines,” and
9 “clearly stated that the range set forth was merely a non-binding estimate, and
10 warned in several different ways that the government was likely to advocate for
11 a higher sentence.” *Id.* The agreement did not, in contrast with *Palladino*, contain
12 the clause, “based on information known to the Government at the time” —or
13 indeed any language indicating that the Government would not advocate for a
14 higher sentence later. *Id.* at 272 n.1. Moreover, the proposed sentencing
15 enhancement ultimately made no difference to the defendant’s overall sentence.
16 *Id.* at 271. Under those circumstances, we concluded that the Government did not
17 “violate[] the ‘spirit’” of the defendant’s plea agreement when it later advocated
18 for a higher sentence. *Id.* at 272 (quoting *Palladino*, 347 F.3d at 30); *see also*

1 *MacPherson*, 590 F.3d at 219 (holding that it was not plain error for the
2 Government to advocate for a higher sentence than the *Pimentel* estimate when it
3 was clear from the language of the plea agreement and the defendant's plea
4 colloquy that the defendant understood that his *Pimentel* estimate was subject to
5 change).

6 IV

7 Given this framework, we find that Walker's reasonable expectations were
8 violated here. First, as in *Palladino* (and unlike in *Habbas*), Walker's plea
9 agreement contained language indicating that the Government would, "based
10 upon information now known to the Office," "make no motion for an upward
11 departure," and it would change its position only if new information "bec[ame]
12 known to the [Government] after the date of th[e plea] agreement." App. 92-93.
13 The agreement also lacked any language like that in *Habbas* explicitly
14 "reserv[ing] the right" of the Government "to argue for a sentence beyond that
15 called for by the Guidelines." 527 F.3d at 270. "It was thus logical for [Walker] to
16 believe that the [*Pimentel*] estimate, and the Government's stance at the
17 sentencing hearing, would not be altered in the absence of new information."
18 *Palladino*, 347 F.3d at 34.

1 Second, and significantly, the Government’s change in position came
2 about in a manner that Walker could not have reasonably expected when he
3 consented to the *Pimentel* estimate, and therefore produced “serious unfairness”
4 for Walker. *Habbas*, 527 F.3d at 271. Walker’s sentencing hearing was
5 unexpectedly delayed for four years while the Government put his co-defendant
6 on trial. Then, the Government attempted to increase Walker’s sentence on the
7 basis of information that, although also established at the trial, had been well-
8 known to the Government at the time it negotiated Walker’s plea. Finally, the
9 Government advocated for a sentence increase that changed Walker’s “exposure
10 so dramatically” that we may well question whether he “could reasonably be
11 seen to have understood the risks of the agreement.” *Id.* Walker may well have
12 been on notice that his *Pimentel* estimate was subject to change, but he could not
13 have been on notice about this particular degree and kind of change.⁴

⁴ For two cases that illuminate what is meant by a defendant’s “reasonable expectations,” compare *United States v. Riera*, 298 F.3d 128, 133-36 (2d Cir. 2002) (Government did not violate defendant’s reasonable expectations when it agreed in the plea bargain not to seek an upward departure, but then, in response to a specific request by the district court, explained that the district court would be “well within its discretion in upwardly departing,” although the Government repeatedly cautioned it was not advocating for such a departure), with *Vaval*, 404 F.3d at 152-54 (Government breached defendant’s reasonable expectations when it agreed not to advocate for an upward departure or a specific Guidelines sentence, then “volunteered highly negative characterizations of [the defendant’s] criminal history” and strongly suggested that the district court ought to adopt a higher criminal history category than that contained in the plea).

1 Despite these problems with Walker’s ultimate sentence, the Government
2 argues that it did not breach Walker’s plea agreement for two reasons.

3 First, the Government maintains that Walker’s sentence enhancements
4 were based on “new” information, and therefore that it was not bound under the
5 terms of the plea agreement to the original *Pimentel* estimate. Appellee’s Br. 51.

6 But—as shown by a straightforward comparison of (a) the October 2010 criminal
7 complaint and the January 2012 PSR with (b) the evidence produced at Herron’s
8 trial and enumerated in the Government’s October 2016 sentencing
9 memorandum—the information the Government used to justify the increased
10 base offense level, use-of-violence enhancement, and aggravating-role
11 enhancement was in no way new.

12 1. In its 2016 sentencing memorandum, the Government argued that a
13 two-point base offense level increase was justified based on witness
14 testimony at Herron’s trial that “a reasonable estimate of the narcotics
15 attributable to [Walker] would be no less than one kilogram of crack-
16 cocaine.” App. 80. But the 2012 PSR said that the Government, at that
17 time, already “conservatively estimate[d] that Herron’s organization
18 distributed in excess of 1 kilogram of crack cocaine.” PSR ¶ 6. The PSR
19 also reported that law enforcement agents had concluded that
20 “enforcers” (as Walker was labeled) “[we]re responsible for the entire
21 amount of narcotics . . . involved in this conspiracy.” *Id.* ¶ 10. And the
22 2010 criminal complaint indicated that Walker was “regularly involved
23 in the distribution of crack cocaine in the Gowanus Houses,” Compl. ¶
24 6; that the execution of various search warrants resulted in the seizure

1 of “substantial quantities of crack cocaine” from Herron’s organization,
2 *id.* ¶ 4; and that Walker himself had already been arrested pursuant to
3 such a search warrant, *id.* ¶ 5.
4

- 5 2. In its 2016 sentencing memorandum, the Government contended that a
6 use-of-violence enhancement was appropriate because of witness
7 testimony at Herron’s trial that Walker carried a gun and threatened
8 people that they could not sell drugs on Herron’s turf. But the 2010
9 criminal complaint makes clear that the Government knew then that
10 Walker “served as one of Herron’s primary security guards and
11 enforcers”; that he “would thus regularly accompany Herron to
12 narcotics transactions and carry firearms for Herron”; that he “would
13 also help to protect Herron’s narcotics territory from rival narcotics
14 traffickers and also help to extend Herron’s narcotics territory by, for
15 example, robbing or attacking rival narcotics traffickers”; and that he
16 even “participated in a shooting against a rival narcotics trafficker.”
17 Compl. ¶ 7. Moreover, the 2012 PSR also described Walker as “an
18 enforcer” who “carried a firearm as part of his role in the organization
19 in order to protect himself, the drug proceeds, and the locations on the
20 block where the crack cocaine was sold.” PSR ¶ 11.
21

- 22 3. In its 2016 sentencing memorandum, the Government asserted that a
23 two-point aggravating-role enhancement was appropriate “given
24 Walker’s role as an enforcer in Herron’s organization.” App. 80. But
25 again, both the 2010 criminal complaint and the 2012 PSR specifically
26 characterized Walker as an “enforcer.” Compl. ¶ 7; PSR ¶ 11.
27

28 There is little daylight between the information that the Government
29 adduced in Walker’s 2016 sentencing memorandum and that contained in the
30 criminal complaint and the 2012 PSR. And the Government essentially admits as

1 much, conceding in its brief on appeal that while it may have had similar
2 information on Walker earlier, it was not “actionable” at the time the
3 Government drafted Walker’s plea agreement. Appellee’s Br. 53. Actionable or
4 not, the Government knew about Walker’s activities and, based on that, made
5 the conscious choice to exclude certain enhancements from Walker’s plea
6 agreement.⁵ Having made that determination, and bargained on that basis with
7 Walker in return for his guilty plea, the Government yielded much of its freedom
8 to incorporate those enhancements later. *See Palladino*, 347 F.3d at 34; *Santobello v.*
9 *New York*, 404 U.S. 257, 262 (1971) (“[W]hen a plea rests in any significant degree
10 on a promise or agreement of the prosecutor, so that it can be said to be part of
11 the inducement or consideration, such promise must be fulfilled.”).

12 Second, the Government argues that it did not breach Walker’s plea
13 agreement because, contrary to Walker’s assertions, the Government did not act

⁵ Indeed, the consciousness of the Government’s choice is demonstrated by its treatment of the Section 2D1.1(b)(1) enhancement for possession of a weapon, which (unlike the other enhancements at issue here) the Government chose to include in Walker’s original plea agreement. The Government now explains to us that the Section 2D1.1(b)(1) enhancement was based on similarly non-actionable information, and that at the time of the plea, Walker had a “credible argument” that it should not have applied. Appellee’s Br. 53 n.8. Yet the Government chose to incorporate the Section 2D1.1(b)(1) enhancement in Walker’s *Pimentel* estimate anyway—and, *a fortiori*, to exclude others. It is precisely that calculation that Walker consented to in his *Pimentel* estimate and that he could reasonably expect would be upheld by the Government.

1 in bad faith. But we need not find that the Government acted in bad faith in
2 order to hold that Walker's reasonable expectations were violated. Of course, it is
3 "obvious[ly] importan[t]" for the Government to act in good faith when it
4 negotiates a plea agreement, and evidence to the contrary is a strong indicator
5 that the Government violated a defendant's reasonable expectations. *Habbas*, 527
6 F.3d at 272. But bad faith is not the only factor relevant to an inquiry into
7 whether the Government breaches an agreement by deviating from a *Pimentel*
8 estimate. "[T]he number of significant variables potentially in play in such an
9 inquiry is enormous." *Id.* In this case, all the variables lead us readily to conclude
10 that Walker's ultimate sentence did not fall within the range of what he
11 reasonably could have expected given the *Pimentel* estimate contained in his plea
12 agreement and the circumstances under which the Government's estimate
13 changed. Those circumstances on their own produced "serious unfairness" for
14 Walker, *id.* at 271, and, therefore, we need not reach Walker's allegations that the
15 Government did, indeed, act in bad faith.

16 V

17 The Government further argues that, even if it did breach Walker's plea
18 agreement, Walker cannot show that he suffered any harm from the breach. That
19 argument lacks merit. There is no doubt that the District Court relied on the

Government's improperly "revised" Guidelines sentence calculation in imposing Walker's ultimate sentence. And the Supreme Court has instructed that "the [district] court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016). "Indeed, in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder. Absent unusual circumstances, he will not be required to show more." *Id.* We therefore conclude that the Government's breach of Walker's plea agreement was harmful error which requires correction.

VI

"In general, the remedy for a breached plea agreement is either to permit the plea to be withdrawn or to order specific performance of the agreement." *Vaval*, 404 F.3d at 154 (internal quotation marks and brackets omitted) (quoting *United States v. Brody*, 808 F.2d 944, 947 (2d Cir. 1986)). "[T]he choice between the remedies of resentencing or plea withdrawal 'is generally a discretionary one guided by the circumstances of each case.'" *Vaval*, 404 F.3d at 156 (quoting *Palladino*, 347 F.3d at 34). In cases where specific performance is the appropriate remedy, we typically remand the case for resentencing before a different district

1 judge because “[t]he effect of the government’s breach of its commitment is
2 difficult to erase” and “it is likely that the same judge would reach the same
3 result as he reached before.” *United States v. Enriquez*, 42 F.3d 769, 772 (2d Cir.
4 1994). But “where resentencing before another district judge would not cure the
5 taint caused by a government breach . . . we have held that plea withdrawal was
6 the appropriate remedy.” *Vaval*, 404 F.3d at 156 (internal quotation marks,
7 alterations, and citation omitted).

8 In this case, we believe that the appropriate remedy is to order specific
9 performance of the agreement. In *Palladino*, another case of a breached *Pimentel*
10 estimate, we concluded that plea withdrawal was the correct remedy because the
11 agreement itself was “hopelessly tainted by the introduction of new evidence
12 known to the Government at the time of the plea.” 347 F.3d at 35. The same is
13 true here. But as we recognized in *Palladino*, the result of such a withdrawal
14 could be “a conviction on remand that carries a longer sentence than that initially
15 imposed.” *Id.* If a new plea agreement cannot be negotiated, Walker could be
16 tried and convicted, and the sentencing judge could elect to impose a sentence
17 higher than that estimated in Walker’s plea agreement. Given that risk, and the
18 fact that Walker specifically requested resentencing as opposed to withdrawal of

1 his plea agreement on appeal, we think it appropriate to order specific
2 performance of Walker's plea agreement.

3 CONCLUSION

4 For the foregoing reasons, we **VACATE** the judgment and **REMAND** to
5 the District Court for resentencing. We do not doubt Judge Garaufis' capacity to
6 resentence Walker appropriately. But given our holding on the appropriate
7 remedy in the event of a Government breach in *Enriquez* and in all of the plea
8 agreement violation cases we have found,⁶ we deem it appropriate to have the
9 resentencing be before a different district judge.

⁶ See, e.g., *Vaval*, 404 F.3d at 156; *United States v. Griffin*, 510 F.3d 354, 369 (2d Cir. 2007); *United States v. Lawlor*, 168 F.3d 633, 638 (2d Cir. 1999); *United States v. Gaviria*, 49 F.3d 89, 92 (2d Cir. 1995); *United States v. Carbone*, 739 F.2d 45, 48 (2d Cir. 1984); *United States v. Corsentino*, 685 F.2d 48, 52 (2d Cir. 1982).