

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of September, two thousand and four.

PRESENT:

JOSÉ A. CABRANES  
CHESTER J. STRAUB  
RICHARD C. WESLEY,  
*Circuit Judges.*

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UNITED STATES OF AMERICA,

*Appellee,*

v.

No. 03-1615

EMAEYEK EKANEM,

*Defendant-Appellant.*

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**APPEARING FOR APPELLANT:**

YUANCHUNG LEE, The Legal Aid Society, New York, NY.

**APPEARING FOR APPELLEE:**

GLEN G. MCGORTY, Assistant United States Attorney (Jonathan S. Abernethy, Celeste L. Koeleveld, Assistant United States Attorneys, *of counsel*; David N. Kelley, United States Attorney for the Southern District of New York, *on the brief*), United States Attorney's Office for the

Southern District of New York, New York,  
NY.

Appeal from a judgment by the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*).

**UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the District Court be and it hereby is **AFFIRMED**.

Defendant Emaeyek Ekanem appeals from a judgment of conviction and sentence entered on October 10, 2003, bringing challenges to certain sentencing determinations imposed by the District Court and to the order that defendant make restitution to the Government. We affirm the judgment and address here all of defendant's challenges, with the exception of the restitution issue, which, as a matter of first impression in this Circuit, we address in a separate opinion issued today.

Defendant was convicted upon a guilty plea of one count of embezzlement of federal funds, in violation of 18 U.S.C. § 641,<sup>1</sup> and one count of intentional misapplication of the same funds, in violation of 18 U.S.C. § 666.<sup>2</sup> Defendant pleaded guilty on the second day of

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<sup>1</sup> 18 U.S.C. § 641 provides:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

<sup>2</sup> 18 U.S.C. § 666 provides:

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at \$5,000 or more, and

trial, and he admitted to misusing federal funds in the amount of \$85,000.

For purposes of calculating defendant's sentence, the Court set the base offense level at 4. *See* U.S.S.G. § 2B1.1(a) (1998). The Court then made the following adjustments: (1) a 9-level increase for loss amount between \$120,000 and \$200,000, *see id.* § 2B1.1(b)(1)(J); (2) a 2-level increase for more than minimal planning, *see id.* § 2B1.1(b)(4)(A); (3) a 2-level increase for abuse of a position of trust, *see id.* § 3B1.3; and (4) a 2-level decrease for acceptance of responsibility, *see id.* § 3E1.1(a). These adjustments resulted in a total offense level of 15 and a sentencing range of 18 to 24 months. The District Court sentenced defendant principally to 18 months' imprisonment on each count to run concurrently and ordered defendant to make restitution to the Government in the amount of \$85,000.

On appeal, defendant challenges the following sentencing determinations made by the District Court: (1) the 9-level increase for a loss amount in excess of \$120,000, contending that \$85,000 is the appropriate figure; (2) the 2-level increase for abuse of a position of trust; and (3) the 2-, rather than 3-, level decrease for acceptance of responsibility.

For substantially the reasons stated by the District Court at defendant's sentencing proceeding, we conclude that the District Court properly (1) granted the 9-level increase based on a loss amount in excess of \$120,000; (2) granted the 2-level increase based on defendant's abuse of a position of trust; and (3) denied defendant's request for an additional 1-level decrease for acceptance of responsibility.<sup>3</sup> Accordingly, and for the reasons stated in the accompanying opinion, the judgment of the District Court is hereby **AFFIRMED**.

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(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of \$5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

<sup>3</sup> In accordance with *United States v. Mincey*, Nos. 03-1419, 03-1520, \_\_\_ F.3d \_\_\_, 2004 WL 1794717 (2d Cir. Aug. 12, 2004), we reject defendant's Sixth Amendment challenge under *Blakely v. Washington*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531 (June 24, 2004), to the judicial fact-finding underlying the enhancements.

As stated in the accompanying opinion, the mandate in this case will be held pending the Supreme Court's decision in *United States v. Booker*, No. 04-104, 2004 WL 1713654 (U.S. cert. granted Aug. 2, 2004) (mem.), and *United States v. Fanfan*, No. 04-105, 2004 WL 1713655 (U.S. cert. granted Aug. 2, 2004) (mem.). Should any party believe there is a special need for the District Court to exercise jurisdiction prior to the Supreme Court's decision, it may file a motion seeking issuance of the mandate in whole or in part. Although any petition for rehearing should be filed in the normal course pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the court will not reconsider those portions of its opinion that address the defendant's sentence until after the Supreme Court's decision in *Booker* and *Fanfan*. In that regard, the parties will have until 14 days following the Supreme Court's decision to file supplemental petitions for rehearing in light of *Booker* and *Fanfan*.

FOR THE COURT,  
Roseann B. MacKechnie, Clerk of Court

By \_\_\_\_\_