

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THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER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 10th day of September, two thousand four.

PRESENT: HON. DENNIS JACOBS,
HON. ROSEMARY S. POOLER,
HON. SONIA SOTOMAYOR,
Circuit Judges.

- - - - -X

UNITED STATES,

Appellant,

-v.-

03-1781

KEVIN GREEN

Defendant-Appellee.

- - - - -X

APPEARING FOR APPELLANT: Peter Katz, Assistant
U.S. Attorney, E.D.N.Y.
(Roslynn R. Mauskopf,
U.S. Attorney and Susan
Corkery, Assistant U.S.
Attorney, on the brief)

APPEARING FOR APPELLEE:

Yuanchung Lee, Legal Aid
Society, New York, NY

Appeal from the United States District Court for the Eastern District of New York (Korman, C.J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the judgment of the district court is **VACATED** and the case is **REMANDED**.

The United States appeals from a judgment of the United States District Court for the Eastern District of New York (Korman, C.J.), entered on November 25, 2003, granting the defendant a downward departure from the Sentencing Guidelines range stipulated in his plea agreement. It is assumed that the parties are familiar with the facts, the procedural context, and the specification of appellate issues.

We are unable to determine confidently on the present record whether the circumstances of this case lie outside the heartland of the Sentencing Guidelines, chiefly because we are unable to determine the nature or extent of the defendant's lost pension funds. Since under United States v. Kostakis, 364 F.3d 45 (2d Cir. 2004), our review of downward sentencing departures is de novo, we vacate the sentence and remand for the district court to make factual findings that reflect the extent and nature of the pension loss and to re-sentence the defendant on a basis that the district court believes properly reflects those findings.

The Clerk of Court is to direct any further appeal of this sentence to this panel.

For the reasons set forth above, the judgment of the district court is hereby **VACATED** and the case is **REMANDED**.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:

Lucille Carr, Deputy Clerk