

■ UTAH

Deal for U.S. inmate sours, raising questions

Should U.S. deals be honored across districts?

By Leonard Post

STAFF REPORTER

WHEN A COLORADO U.S. attorney cut a deal with an unrepresented Utah prisoner who was serving his time in the Rocky Mountain State, he expected the U.S. attorney's office in Utah to honor it and that the prisoner likely would be set free. He was wrong.

And when the 66-year-old inmate got a lawyer who asked a Utah judge to force the Utah prosecutor's hand, the judge refused. The judge said that although Colorado Assistant U.S. Attorney George Gill and inmate Roger Crobarger had entered into a binding contract, Gill could not bind the U.S. attorney in Utah without his consent. *U.S. v. Crobarger*, No. 2:95-Cr-119 (D. Utah).

The case reopens a legal controversy that has never been settled: Should federal agreements between prosecutors and defendants (or prisoners) be honored across district and state lines?

"We are one government," asserted Crobarger's attorney, Walter Bugden of Salt Lake City's Bugden & Isaacson. "This is not a nation of individual fiefdoms. Our citizens ought to be able to rely on what a government official tells them they can and will do."

Richard Mckelvie, the assistant U.S.

attorney in Utah who had prosecuted Crobarger, disagrees. "I think you would call up the attorney who prosecuted the cases and ask him before you make any promises," he said.

Bugden appealed the ruling to the 10th U.S. Circuit Court of Appeals.

No appellate court has ruled on similar facts, but in the context of federal plea agreements, the 4th and 2d circuits are split on whom an agreement binds. The 2d Circuit has ruled that an agreement binds only the district in which it is made—not even the entire state. *U.S. v. Russo*, 801 F.2d 624 (1986). But the 4th Circuit has said that the honor of the entire federal government is at stake when a deal is made. *U.S. v. Harvey*, 791 F.2d 294 (1986).

Not going along

In 1996, Crobarger pleaded guilty in Utah to drug and money laundering counts and was sentenced to 20 years in prison. In 1997, he was convicted for threatening a witness in the drug case. Crobarger was sent to Colorado to do his time, where he helped break up a prison drug ring.

It took three years to resolve the prison drug-ring sting case. Gill offered



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to have a motion to modify Crobarger's sentence to time served filed in Utah in exchange for Crobarger's future testimony should it be needed if the case unraveled. The only caveat was that a judge would have to agree to the reduction. Gill had made similar deals in Colorado that Oregon and Missouri federal prosecutors had later agreed to be bound by.

When Mckelvie was approached, he told Gill that the decision rested with a steering committee, and that he doubted it would go along with such a drastic sentence reduction. But he also said that based on his experience, his office would allow him to file the motion without a recommendation.

He was wrong. Breaking the promise made by their Colorado colleague, attorneys on the screening committee in the Utah U.S. attorney's office refused to file a motion to modify Crobarger's sentence.

After Paul Warner, the U.S. attorney for Utah, personally denied an administrative appeal of the screening committee's decision, the inmate filed a motion to compel in Utah. U.S. District Judge J. Thomas Greene denied Crobarger relief. Mckelvie defended his office's decision. If they say they want time served,

he said, "once we file the motion, we have no control on what the judge does. We weren't going to allow that."

Gill, who now works for a telecommunications company, could not be reached for comment.

John Zwerling, an Alexandria, Va., solo practitioner, represented a client in 1993 whose Virginia federal plea agreement in exchange for testimony was honored in federal jurisdictions in several other states, but not in the Eastern District of Michigan. A suit to enforce the deal was filed in the D.C. Circuit and resulted in a favorable settlement. *Jarvis v. DOJ*, No. 1:93-cv-02303. Since then, every plea agreement Zwerling has seen has included language that it does not bind any other district but the one in which it was made.

"That's their protection that they aren't cutting off another U.S. attorney's investigation without them knowing about it," Zwerling said. He added that there's a process that entails the signing off of a senior official in the Criminal Division of the Justice Department when a defendant wants to bind a jurisdiction or an agency that won't agree on its own.

But Crobarger wouldn't have had any way of knowing that, he said. "If they made the deal, they should honor it, even if they weren't supposed to make it, as long as they had the apparent authority. The government's honor is more important in the long run than one guy getting a benefit he shouldn't have." ■

■ 11TH CIRCUIT

Court's secrecy at center

