

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 12 2014

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 13-30354

Plaintiff - Appellee,

D.C. No. 1:13-cr-00115-BLW

v.

MEMORANDUM*

SAMANTHA JO TACKITT,

Defendant - Appellant.

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, Chief Judge, Presiding

Submitted December 5, 2014**

Before: HAWKINS, McKEOWN, and FRIEDLAND, Circuit Judges.

Samantha Jo Tackitt appeals from the district court's judgment and challenges the 151-month sentence imposed following her guilty-plea conviction for conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a) and 846. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand for

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

resentencing.

The government concedes that Assistant United States Attorney Christian Nafzger breached the parties' plea agreement by using Tackitt's immunized admissions about her criminal conduct at sentencing.¹ The parties dispute what standard of review applies and whether Tackitt was prejudiced by the breach. We conclude that remand is warranted even under plain error review because there is a reasonable probability that the court's choice of a high-end sentence was influenced by the immunized admissions. *See United States v. Whitney*, 673 F.3d 965, 972-74 (9th Cir. 2012) (finding plain error where the government's use of immunized admissions was an implicit argument for a harsher sentence and, therefore, likely "influenced the court's overall view of the appropriate sentence"). Accordingly, we vacate and remand for resentencing. *See id.* at 976. We remand to a different judge as required by our circuit law "although in doing so we intend no criticism of the district judge . . . and none should be inferred." *Id.* (internal quotations omitted).

VACATED and REMANDED for resentencing.

¹ *See Berger v. United States*, 295 U.S. 78, 88 (1935).