IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3719

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT A. HAVERSAT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

Department of Justice
Antitrust Division - Rm. 3224
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3680

OF COUNSEL:

ROBERT W. WILDER
GREGORY E. NEPPL

Attorneys
Department of Justice
Antitrust Division
Washington, D.C. 20530

SUMMARY OF THE CASE

Appellant Robert Haversat pleaded nolo contendere to an indictment charging a conspiracy in restraint of trade in violation of the Sherman Act, 15 U.S.C. 1. The government appealed the district court's decision to depart downward from the applicable Sentencing Guideline range and Haversat filed a cross-appeal. This Court concluded that a downward departure was not justified and remanded for resentencing. However, it also affirmed, among other things, the district court's finding on acceptance of responsibility. United States v. Haversat, 22 F.3d 790 (8th Cir. 1994). Haversat was thereafter resentenced. He now seeks appellate review of his new sentence contending that the district court erred in refusing to reopen the issue of acceptance of responsibility.

STATEMENT REGARDING ORAL ARGUMENT

For the reasons set forth below, we believe that the decision of the district court can be summarily affirmed, and that oral argument is not necessary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER MATERIALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3719

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

ROBERT A. HAVERSAT,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

PRELIMINARY STATEMENT

This appeal is from a judgment order entered by Judge Clyde S. Cahill, of the United States District Court for the Eastern District of Missouri. App. 12-15.[1] The district court had jurisdiction pursuant to 18 U.S.C. 3231 and 15 U.S.C. 1. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742(a). The docket sheet indicates that judgment was entered October 26, 1994; a notice of appeal was filed by appellant on November 7, 1994. App. 10.[2]

---

[1] "App." refers to the appendix filed in this Court by appellant. "Gov.Add." refers to the addendum attached to this brief. "Pre.Rpt." refers to Haversat's presentence report. "H.Tr." refers to the sentencing transcript of the initial 1993 Haversat sentencing.

[2] The 1987 Sentencing Guidelines apply since the offense continued after November 1, 1987, the effective date of the Guidelines. The parties agreed that the 1987 version should be used.

(continued...)

STATEMENT OF ISSUES

Whether the district court, on remand of this case for resentencing, properly refused to reconsider a finding that had been appealed to and affirmed by this Court, with directions that the district court's finding at the initial sentencing "will control on remand." United States v. Cornelius, 968 F.2d 703 (8th Cir. 1992); United States v. Prestemon, 953 F.2d 1089 (8th Cir. 1992); Bethea v. Levi Strauss and Co., 916 F.2d 453 (8th Cir. 1990).

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, DISPOSITION

A one-count indictment filed May 22, 1990, charged appellant Robert A. Haversat ("Haversat"), as well as four other individuals and four corporations with conspiring to fix prices, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. App. 2; 22 F.3d at 793. Haversat pleaded nolo contendere to the indictment on August 20, 1992. App. 8.[3] Judge Cahill departed from the Sentencing Guidelines, and sentenced him on April 1, 1993, to pay a fine of $250,000. App. 9. The United States

---

(...continued)
References in the brief are to the October 1987 edition of the Guidelines Manual, unless otherwise noted.

[3] His company, McKinney Products Company ("McKinney") pleaded nolo in May 1991, and his successor at McKinney, David Gibson, pleaded nolo in August 1992. Codefendant Richard G. Martin of codefendant company The Stanley Works ("Stanley") pleaded not guilty and was acquitted after a jury trial. Pre.Rpt. 1. The remaining codefendants pleaded guilty or nolo.

appealed Haversat's sentence, as well as the sentence of codefendant David Gibson ("Gibson"). Haversat and Gibson filed cross-appeals.

This Court held that none of the reasons provided by the district court supported the downward departure in sentencing Haversat and remanded the case for resentencing. 22 F.3d at 796, 798-799. In rejecting Haversat's cross appeal, the Court, among other things, affirmed the district court's finding on acceptance of responsibility. On remand, the district court resentenced Haversat to four months' imprisonment, to be followed by 12 months' supervised release, of which the first four months are to be served under home detention. App. 13-14, 94-100.[4] The court noted that the fine and special assessment had already been paid, and therefore no additional fine or assessment was necessary. App. 13, 96. Subsequently, by order of November 7, 1994, the court stayed the sentence pending appeal. App. 10, 18-20. Haversat also filed his notice of appeal on November 7, 1994. App. 10, 16-17.

---

[4] The court initially imposed a sentence of community confinement, expressing doubts about its ability to impose home detention under the relevant edition of the Guidelines. App. 95-99. After the court changed its mind, the government objected to home detention (App. 104), correctly noting that a sentence of home detention is not available as part of a "split sentence" under the applicable 1987 Guidelines. See U.S.S.G. §5C2.1(d)(2). Nevertheless, the government has not cross-appealed on this point, in the interest of speeding final resolution of sentencing in this case.

II. STATEMENT OF THE FACTS

This Court described the conspiracy in its earlier opinion in this case (22 F.3d at 792-793). Briefly, in 1986, Haversat, who was then president of McKinney, attended two meetings with representatives of competing architectural hinge manufacturers at which a conspiracy to fix prices was organized.[5] The conspiracy continued into 1988 and "[e]ach of the participating companies made millions of dollars during the operation of the conspiracy." 22 F.3d at 793.

A. The 1993 Sentencing

1. Relevant Guidelines Calculations. The base level for price-fixing violations under 15 U.S.C. §1 is nine. U.S.S.G. §2R1.1(a). In this case, this amount was increased by two levels, because the volume of commerce attributable to McKinney, and thus to Haversat, was more than $15 million. 22 F.3d at 793; see U.S.S.G. §2R1.1(b)(2). The probation officer did not recommend an adjustment for acceptance of responsibility, noting that at the time of his plea, Haversat "minimized his role in the offense" and failed clearly to "demonstrate[] a recognition and affirmative acceptance of personal responsibility for [his] criminal conduct." Pre.Rpt. 5 & Rpt.Addendum p.2.

---

[5] Architectural hinges are door hinges used in buildings where heavy pedestrian traffic is expected, such as schools and office buildings. The hinges are sturdier than those used in private home construction. Pre.Rpt. 2. The companies involved in the conspiracy were McKinney, Stanley, the Hager Hinge Company (Hager), and Lawrence Brothers (Lawrence Bros.).

Haversat's probation officer found no ground for departure from the Guidelines range, and declined to recommend departure for charitable acts or community ties, citing the limitations of U.S.S.G. §§5H1.5, 1.6, 1.11, p.s. Pre.Rpt. 15 and Rpt.Addendum p.2. Accordingly, the final offense level was eleven.

Under the Guidelines, the applicable term of imprisonment for level eleven is 8 to 14 months (U.S.S.G. Ch.5, Pt.A), with a "split sentence" available as an option to the sentencing court (see U.S.S.G. §5C2.1(d)(2)). A split sentence under the 1987 Guidelines permits a term of supervised release under community confinement, provided at least half of the minimum term (in this case, four months) is satisfied by imprisonment (ibid.).

2. The 1993 Sentencing Hearing and Judgment. In a series of hearings extending over about 10 days, Judge Cahill sentenced the individual and corporate defendants who pleaded guilty or nolo in this case. He treated the sentencings as a group, attempting to achieve a hierarchy of punishment, based on culpability. Gov.Add. 3. He was candid about his dislike of the Guidelines, and what he viewed as their "bean counting" approach. H.Tr. 27, 28, 31-32; 22 F.3d at 798. Accordingly, he departed downward from the applicable Sentencing Guideline range, citing, inter alia, assistance to the courts and U.S.S.G. §5K2.0. H.Tr. 30-34; Gov.Add. 7. However, before doing so, the court explicitly denied Haversat's request for a reduction in his offense level for acceptance of responsibility. The court stated: "In the case yesterday, I denied the acceptance of

responsibility bonus to Mr. Gibson, and I do so in this case too." Gov.Add. 1-2; see also Gov.Add. 6 (judgment order adopting Haversat presentence report, which denied departure for acceptance of responsibility).

3. The Initial Appeal. The United States appealed Haversat's sentence, arguing that none of the grounds for departure cited by the district court were adequate. In his cross appeal, Haversat, among other things, argued that if the case were remanded for resentencing, this Court should allow the district court to "consider the applicability of the two point reduction for acceptance of responsibility." Haversat Br. in Nos. 93-2090, 93-2203 at 5 n.6; 25 n.19; 31.

The United States responded that the district court had already ruled on acceptance of responsibility, denying any reduction on that ground, and that the matter accordingly would not be open on remand. Gov.Reply Br. in Nos. 93-2090, 93-2203 (July 28, 1993) at 18-20. The government also stated that Haversat was still minimizing his involvement by suggesting that he did no more than attend two meetings. In fact, he was a founding member of the conspiracy, and, without his participation, the conspiracy would have foundered. Id. at 19 n.21.

This Court ruled that: "none of the reasons provided by the district court support the downward departure in sentencing Haversat. Accordingly, we set aside his sentence and remand for resentencing pursuant to 18 U.S.C. § 3742(f)(1)." 22 F.3d at

796. Among the reasons for departure rejected by this Court was Haversat's claim that his nolo plea and alleged assistance in settling related civil suits was a basis for departure under U.S.S.G. §5K2.0. This Court held that a nolo plea "is a factor to be considered (if at all) only in the determination of acceptance of responsibility." 22 F.3d at 794-795. Similarly, assistance in settling a related civil lawsuit "is also more properly treated as a factor to be considered in relation to acceptance of responsibility." Id. at 795. The Court suggested that these matters may also be considered under U.S.S.G. §5K1.1, upon motion by the government (substantial assistance to the government). Ibid.

In addition to concluding that none of the reasons given by the district court justified a departure from the applicable Sentencing Guideline range, this Court also rejected all of the arguments made in support of Haversat's cross appeal. This included his claim that the district court should be permitted to reconsider whether he was entitled to a two-level reduction in his offense level for "acceptance of responsibility." This Court held that the issue had already been decided by the district court: "[t]he record clearly indicates that the district court denied a reduction for acceptance of responsibility. * * * We deny the request of Haversat and Gibson to allow the district court to reexamine the acceptance of responsibility question on remand, as the district court already has denied such a reduction and its finding will control on remand." 22 F.3d 799. This

Court then affirmed the district court's decision as "not clearly erroneous" (ibid.):

> Both Haversat and Gibson pleaded nolo contendere -- a plea which does not admit responsibility. Moreover, they have continued to minimize their role in the conspiracy throughout the proceedings, even on appeal. * * * [W]e affirm the district court's finding[] on acceptance of responsibility.

B. The 1994 Sentencing

1. On remand, the government argued that, in accordance with this Court's opinion, Haversat must be resentenced at offense level 11. U.S. Memorandum and Recommendation (Aug. 19, 1994). In contrast, Haversat urged the district court to consider de novo "all of the evidence bearing on acceptance of responsibility and make a factual finding on that issue." Haversat Resentencing Memorandum (Aug. 22, 1994) at 2. Haversat asserted that "[a]s this [District] Court knows, it did not intend its statement concerning acceptance of responsibility to be a final ruling." Ibid. He urged the district court to ignore this Court's contrary holding that the issue of acceptance of responsibility had been decided by the district court, because it was "clear error." Id. at 11-12.

Haversat admitted that he had not asked the district court at the initial sentencing to consider Haversat's role in the settlement of related civil cases in determining Haversat's acceptance of responsibility. He nonetheless asked the district court on remand to determine "for the first time" whether a reduction of sentence would be appropriate on that basis. Id. at 12-13. He also claimed that evidence of codefendant's John

Lawrence's allocution showed that Haversat had expressed greater remorse than Lawrence, and accordingly was entitled to the same reduction of sentence for acceptance of responsibility that Lawrence received. Id. at 16-18. Finally, Haversat reargued his claim that he had fully acknowledge his guilt. Id. at 18-28.[6] Haversat even asked that the court reduce his offense level more than two levels claiming that his acceptance of responsibility had been "extraordinary." Id. at 28-33.

2. At the 1994 sentencing hearing, the district court rejected Haversat's invitation to reconsider its earlier denial of a two-level reduction of Haversat's offense level based on his alleged acceptance of responsibility. The court confirmed that it had "denied the acceptance of responsibility earlier" (App. 77), thereby rejecting Haversat's persistent argument that the matter had not been settled at the first sentencing. The district court noted that, "left to [its] own devices, [it] would have reconsidered this matter." Ibid. However, it concluded it would not reconsider acceptance of responsibility on resentencing, in view of this Court's "explicit" direction that "you may not consider that, we've accepted it, we think you've ruled correctly, and you may not go back and reconsider it again." App. 77-78; see also App. 89, 93-94, 101. The court

[6] The government filed a response (United States' Response to Sentencing Memorandum of Robert Haversat, filed Sept. 26, 1994) pointing out that this Court had affirmed the district court's ruling on acceptance of responsibility and had directed that the issue would not be open on remand. It also argued that the evidence cited by Haversat as "new" was, in fact, available to the district court at the initial sentencing.

indicated that it had considered United States v. Rosnow, 9 F.3d 728, 730 (8th Cir. 1993), cert. denied, 115 S. Ct. 120 (1994), cited by Haversat as permitting reconsideration on remand of sentencing issues affirmed on appeal. The court concluded that, while Haversat's argument "has some reasoning behind it," the Rosnow decision does not "answer[] the question completely." App. 78. Accordingly, Haversat's offense level was 11 (App. 94) and the split sentence imposed by the court was within the Guidelines range.[7]

ARGUMENT

THE DISTRICT COURT CORRECTLY REFUSED TO RECONSIDER THE ISSUE OF ACCEPTANCE OF RESPONSIBILITY

Haversat complains that the district court followed the mandate of this Court and declined his invitation to exceed the scope of the remand. The district court, however, correctly understood the scope of its authority on remand.[8]

1. A district court does not have inherent power to resentence a defendant at any time. Rather, a district court can resentence a defendant only if ordered to do so by a court of appeals, or if authorized to do so by a statute or rule such as Fed. R. Crim. P. 35. See, e.g., United States v. Pimentel, 34 F.3d 799, 800 (9th Cir. 1994), petition for cert. filed, (U.S.

---

[7] As previously indicated (see n.4, supra), for purposes of this appeal, we are not challenging the home detention portion of the split sentence.

[8] Whether the district court properly applied the mandate is a question of law, subject to plenary review. Kilbarr Corp. v. Business Systems, Inc., 990 F.2d 83, 87 (3d Cir. 1993).

Nov. 28, 1994)(No. 94-7106); United States v. Lewis, 862 F.2d 748, 750 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989). Rule 35, as amended in 1987 as part of the Sentencing Reform Act of 1987, allows correction of sentence in only three situations. Only one of these, addressed by Rule 35(a), is relevant here.[9] That Rule directs a district court to "correct," on remand, "a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable."

In this case, the judgment of the district court was reversed because this Court concluded that a downward departure was not justified. However, this Court affirmed the district court's refusal to reduce Haversat's offense level for acceptance of responsibility. Accordingly, Rule 35 required the district court to correct Haversat's sentence by resentencing without regard to the impermissible grounds for departure. But once that correction was made, Rule 35 provided no authority for a broad-ranging reconsideration of the legal portions of the sentence. See Pimentel, 34 F.3d at 800; United States v. Gomez-Padilla, 972 F.2d 284, 285-286 (9th Cir. 1992); United States v. Apple, 962 F.2d 335, 336-337 (4th Cir. 1992).

---

[9] Rule 35 also allows reduction of sentence, on motion of the government, to reflect subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, and correction (within 7 days) of a sentence that was imposed as a result of arithmetical, technical, or other clear error.

Nor did this Court's mandate provide authority for the district court to revisit the issue of acceptance of responsibility. Indeed it expressly precluded such reconsideration. It is a fundamental legal principle that a district court on remand may not reconsider issues presented to and decided by the appellate court. See generally, Charles A. Wright et al., 18 Federal Practice and Procedure §4478, at 792-794 (1981) (the principle "that inferior tribunals are bound to honor the mandate of superior courts within a single judicial system" is "so straight-forward as to present few interesting problems"). "On remand, a district court is bound to obey strictly an appellate mandate. * * * If there are no explicit or implicit instructions to hold further proceedings, a district court has no authority to re-examine an issue settled by a higher court." Bethea v. Levi Strauss and Co., 916 F.2d 453, 456 (8th Cir. 1990)(citations omitted); see also Houghton v. McDonnell Douglas Corp., 627 F.2d 858, 864-865 (8th Cir. 1980). This doctrine, under which on remand "all issues the appellate court decides become the law of the case"[10] has the effect of "protecting the settled expectations of parties, ensuring

[10] The term "law of the case" is also used to describe an entirely distinct principle: "the desire of a single court to adhere to its own prior rulings without need for repeated reconsideration." Wright, §4478, at 788. The decision to abide by the law of the case in that context is discretionary, and factors such as the availability of new evidence or the need to correct clear error or prevent manifest injustice are relevant to a court's decision to depart from its own earlier ruling. Id. at 788-792. Appellant erroneously relies on a number of cases that discuss law of the case in this context (e.g., D.Br. 15).

uniformity of decisions, and promoting judicial efficiency." Bethea, 916 F.2d at 456-457. It is "necessary to the operation of a hierarchical judicial system." Mirchandani v. United States, 836 F.2d 1223, 1225 (9th Cir. 1988).

This "mandate rule" (Wright, §4478 at 793) applies to sentences in criminal cases, requiring the sentencing court on remand to follow the specific terms and limitations imposed by the mandate, whatever they may be. United States v. Cornelius, 968 F.2d 703, 705 (8th Cir. 1992). For example, where remand has been made to consider a single sentencing issue, the district court may not address other sentencing issues. Pimentel, 34 F.3d at 800 (remand limited to reconsidering claim of extraordinary family circumstances; district court properly refused to reconsider grouping of offenses). And where a remand is for resentencing within the applicable Guidelines range, the district court is correct in refusing to consider additional grounds for departure. United States v. Prestemon, 953 F.2d 1089, 1090 (8th Cir. 1992).

The mandate rule also prevents the district court from reconsidering any of its previous decisions that have been ruled on by the court of appeals, even in the absence of explicit directions to the district court. United States v. Minicone, 26 F.3d 297, 300 (2d Cir.)(district court correctly held it was barred, on remand, by law of case from basing reduction of sentence on minor role and victim characteristics, because those grounds were rejected on earlier appeal), cert. denied, 115 S.

Ct. 344 (1994); Cornelius, 968 F.2d at 706 (district court correctly refused to consider new evidence, on remand, on an issue (career offender status) as to which court of appeals had affirmed district court's finding on first appeal); United States v. Uccio, 940 F.2d 753, 757 (2d Cir. 1991).

In this case, this Court decided the "acceptance of responsibility" issue, affirming the district court's finding, and, under the mandate rule, foreclosing further proceedings on remand.[11] Cornelius, 968 F.2d at 706. Further, it explicitly addressed the issue of reconsideration in its opinion, stating with extreme clarity (22 F.3d at 799):

> We deny the request of Haversat and Gibson to allow the district court to reexamine the acceptance of responsibility question on remand, as the district court already has denied such a reduction and its finding will control on remand.

This explicit mandate, as the district court correctly understood, removed the issue of acceptance of responsibility from its further consideration. See United States v. Prestemon, 953 F.2d at 1090.

2. Haversat's reliance on United States v. Rosnow, 9 F.3d 728, 730 (8th Cir. 1993), cert. denied, 115 S. Ct. 120 (1994), is misplaced. In Rosnow, the court noted that it had previously affirmed the district court's denial of acceptance of responsibility. Id. at 730. It then stated that "the law-of-

---

[11] Appellant continues to suggest, despite this Court's holding to the contrary, that the district court did not reach this issue at the first sentencing. D.Br. 19. However, the district court, on remand, confirmed this Court's reading of its intentions, stating that it had "denied the acceptance of responsibility earlier." App. 77.

the-case doctrine barred the district court from revisiting the question of acceptance of responsibility, unless defendants produced substantially different evidence or demonstrated that the prior decision was clearly erroneous and involved a manifest injustice." Id. Since defendants had not presented any new evidence on remand, this Court held that the district court had correctly refused to reconsider the acceptance of responsibility issue. Id.

Since no new evidence concerning acceptance of responsibility had been presented to the district court on remand, the Court in Rosnow was not required to determine if its prior mandate permitted the district court to reconsider that issue. Indeed, nothing in that opinion even suggests that the Court was changing the long-established rule that a "sentencing court must * * * adhere to any limitations imposed on its function at resentencing by the appellate court" (Cornelius, 968 F.2d at 705) and may not even consider new evidence with respect to findings that an appellate court has already affirmed. Id. at 706 (district court not free "to consider new evidence relating" to previously affirmed finding). See also Bethea, 916 F.2d at 456-457 (district court has no authority to re-examine an issue settled by a higher court).

Moreover, in this case, this Court's prior mandate could not be any clearer. Not only did the Court expressly affirm the district court's finding on acceptance of responsibility, it also told the district court that this "finding will control on

remand." 22 F.3d at 799. No similar command was given to the district court in Rosnow when that case was remanded for resentencing. United States v. Rosnow, 977 F.2d 399, 412 (8th Cir. 1992), cert. denied, 113 S. Ct. 1596 (1993). Accordingly, nothing in this Court's subsequent Rosnow decision authorized the district court in this case to ignore the limitations imposed on it by this Court's mandate.

3. Even if the district court had been authorized to revisit the issue of acceptance of responsibility, there was no reason for it to do so. Appellant's claims of substantial new evidence that was not available at the first sentencing are wrong.[12]

a. Haversat contends that "new law" concerning acceptance of responsibility was created by this Court's prior decision and that the Court intended to allow the district court on remand to apply that new law. D.Br. 17-18. In particular, he argues that the decision on the initial appeal announced for the first time that "assistance to the courts should be considered under the acceptance of responsibility guideline." D.Br. 17. Haversat candidly admits that he never asked the district court, at the first sentencing, to reduce his sentence on the ground that Haversat's nolo plea and role in civil settlements were evidence of acceptance of responsibility. D.Br. 19-20.

---

[12] Appellant does not ask this Court to review these matters itself. D.Br. 24. For the reasons discussed, in any event, there is no ground for this Court to change its view that appellant was not entitled to a reduction in his offense level for acceptance of responsibility.

Haversat's claim is based on a false premise. This Court's decision on the first appeal did not break new legal ground. Indeed, the 1987 notes to the Sentencing Guidelines stated that "[a] guilty plea may provide some evidence of the defendant's acceptance of responsibility." U.S.S.G. §3E1.1, comment. (n.3). And in United States v. Garlich, 951 F.2d 161, 163-164 (8th Cir. 1991) (cited at 22 F.3d at 794-795), a case decided several years prior to the first appeal in this case, this Court stated that "the entry of a guilty plea before trial is a factor considered in determining whether a defendant deserves an acceptance-of-responsibility reduction." See also, United States v. Knight, 905 F.2d 189, 192 (8th Cir. 1990).[13]

Haversat, in short, is merely attempting to raise new arguments for the first time on remand that were fully available to him at the first sentencing hearing and on the first appeal. Whether he failed to make these arguments for tactical or other reasons, they have now been waived. See United States v. Montoya, 979 F.2d 136, 138 (8th Cir. 1992)(even an argument raised on first sentencing and on resentencing is waived on second appeal if not raised on first appeal); United States v. Fiallo-Jacome, 874 F.2d 1479, 1481-1482 (11th Cir. 1989); Baumer

[13] Further, as this Court noted, 22 F.3d at 795, settlement of related civil suits is "somewhat similar" to voluntary assistance to authorities in the recovery of fruits and instrumentalities of the offense, another matter that the Guidelines expressly take into account under acceptance of responsibility. U.S.S.G. 3E1.1, comment. (n.1(e)). In any event, we doubt that the civil settlement in this case was evidence of acceptance of responsibility. See United States v. Bennett, 37 F.3d 687, 697-698 (1st Cir. 1994).

v. United States, 685 F.2d 1318, 1321 (11th Cir. 1982)(on remand, party cannot adduce as "new evidence" matters that were available at first trial).[14]

b. Haversat also argues that there is "new" evidence that, as CEO of Essex Industries, Inc. (the parent of McKinney), he "took on the responsibility of ensuring that Lawrence Brothers' share of the civil settlement was paid." D.Br. 26; App. 37. But this evidence is not new; he took these actions prior to sentencing. App. 38. Further, his company, not he, made the financial commitment. App. 38. We fail to see how his company's decision to commit its funds reflects on Haversat's "recognition and affirmative acceptance of personal responsibility." U.S.S.G. §3E1.1(a) (emphasis added). Moreover, this financial commitment was not in the nature of restitution (compare U.S.S.G. 3E1.1,

---

[14] As we explained in our briefs on the first appeal (see Gov.Add. 9-10), Haversat's and Gibson's claims of assistance to the administration of justice are inflated. The district court held that John Lawrence was "the first of the individual defendants to enter a plea of nolo contendere, which was the wedge that broke the log jam for the other defendants." Gov.Add. 14. And Hager was in fact the first to cooperate. Haversat does not claim that he deserves credit for arranging the pleas of the other defendants, but only for his own nolo plea in a large and complicated case. We do not see any logic in rewarding a defendant for participating in a large and damaging conspiracy, simply because the extended conspiracy will require more judicial resources to adjudicate.

As to whether the McKinney civil settlement shows that Haversat assumed responsibility for his criminal acts, we note that the settlements were forced on the defendants by the court, which refused to accept nolo pleas until all of the civil cases were settled. App. 75-76. In addition, it cannot be assumed that Haversat was instrumental in the McKinney settlement, since he was one of many officials in the corporate hierarchy at the time of the settlement. See Gov.Add. 11-12.

comment. (n.1(b)), but simply a loan to "fund[] part of Lawrence's share of the settlement," to be repaid in kind. App. 38, 87, 88. In short, this presentencing corporate loan does not constitute new evidence of Haversat's acceptance of personal responsibility.

c. Haversat claims that a previously sealed affidavit, provided to the probation officer in November 1992 by co-defendant John Lawrence, shows that Haversat expressed his guilt more fully than Lawrence. Haversat argues that he therefore should have received the two-point reduction in sentence for acceptance of responsibility that Lawrence received (Gov.Add. 13). D.Br. 26-27. But while the Lawrence affidavit may have become available to Haversat after Haversat's initial sentencing in April 1993, the Lawrence affidavit (as well as Lawrence's comments at his March 23, 1993 sentencing) was available to the court at the time of Haversat's April 1993 sentencing. Indeed, Judge Cahill stated that he was considering all the defendants' sentences as a group, and was attempting to assign an order of culpability. See supra, at 5. Accordingly, the Lawrence affidavit does not constitute new evidence not available to the district court at the initial sentencing.

d. Finally, Haversat claims that his presentencing report failed to take into account his statements at his initial 1993 sentencing and, accordingly, its recommendation was unsound. D.Br. 27. But presentencing reports by their nature do not include matters occurring at sentencing. Judge Cahill received

the probation officer's report and heard Haversat's allocution at the 1993 sentencing. Appellant's claim of acceptance of responsibility has been heard and rejected.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

Department of Justice
Antitrust Division - Rm. 3224
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3680

OF COUNSEL:

ROBERT W. WILDER
GREGORY E. NEPPL

Attorneys
Department of Justice
Antitrust Division
Washington, D.C. 20530

JANUARY 1995.

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 1995, I caused copies of the foregoing BRIEF FOR APPELLEE UNITED STATES OF AMERICA to be served by Federal Express mail upon:

Paul R. Grand, Esq.
Linda A. Lacewell, Esq.
Morvillo, Abramowitz, Grand,
Iason & Silberberg, P.C.
565 Fifth Avenue
New York, New York 10017

_____

MARION L. JETTON
Attorney
Department of Justice
Antitrust Division
Washington, D.C. 20530
(202) 514-6380