No. 18-_____

IN THE

Supreme Court of the United States

MICHAEL J. PERSICO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Petitioner's sentence, which would have been deemed substantively unreasonable in the absence of the district court's factual findings, violate the Sixth Amendment jury trial right and the Due Process Clause of the Fifth Amendment?

2. Does the judicial obligation to hold the government to promises made in consideration of a guilty plea require courts to construe plea agreements according to the contractual maxim that a specific term favors a general one?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Michael J. Persico was Defendant-Appellant in the Court of Appeals. The United States of America was Appellee.

Petitioner was indicted with James C. Bombino, Alicia DiMichele, Edward Garofalo Jr., Francis Guerra, Theodore N. Persico Jr., Thomas Petrizzo, Anthony Preza, Louis Romeo and Michael D. Sciaretta.

Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Persico respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The Court of Appeals disposed of Mr. Persico's appeal by summary order, reported at 732 F. App'x 44 (2d Cir. 2018) and reproduced in the Appendix here at 1a-10a. The appeals court's unreported denial of Mr.

Persico's petition for rehearing and rehearing en banc is reproduced in the Appendix here at 11a-12a.

SUPREME COURT JURISDICTION

The Court of Appeals denied Mr. Persico's timely petition for rehearing and rehearing en banc on July 11, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides that "[n]o person shall … be deprived of … liberty … without due process of law…."

The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury…."

STATEMENT OF THE CASE

An indictment charged Persico with various offenses, including conspiracy, racketeering, loansharking, extortion and murder. Following several rounds of plea negotiations, Persico accepted the government's offer to dismiss the indictment in exchange for his guilty plea to a conspiracy involving a single extortionate loan. In accordance with the parties' agreement, Persico allocuted to "arrang[ing] for someone to extend [a] $100,000 loan to a trucking company run by [two named individuals] at a usurious interest rate." C.A. App. A141. The prosecutor added that the rate of interest on the loan exceeded "45 percent per year" and "at the time that the loan was

made, the [aforementioned individuals] believed that Mr. Persico and his coconspirators had a reputation for the use of extortionate means to collect extensions of credit." *Id.* at A142. After confirming that the government was satisfied, the district court accepted the guilty plea. *Id.* at A146.

The central element of Persico's plea agreement was an estimate of the Guidelines range applicable to Persico's offense. Under the agreement, the parties forecasted that the sentencing court would calculate an "adjusted [Guidelines] offense level" of 21, corresponding to a Guidelines range of 37-46 months. *Id.* at A111. While the agreement acknowledged that "imposition of a [Guidelines] sentence ... [was] not mandatory," the government foreswore "a motion for an upward departure" and promised to recommend a sentence "within the Guidelines range determined by the [c]ourt" and to "take no position" regarding where within that Guidelines range defendant's sentence should fall. *Id.* at A110, A116; Pet. App. 3a. The agreement included a standard provision permitting the U.S. Attorney's Office to "advise the [c]ourt and the Probation Department of information relevant to sentencing, including criminal activity engaged in by the defendant." C.A. App. A110.

The Probation Department confirmed the accuracy of the parties' Guidelines stipulation in its Presentence Report. The Report, however, also contained a bombshell: it noted that the prosecution "maintained" that it could "prove" Persico's involvement in "several [] significant crimes," including "[two] murders," by "a preponderance of the evidence."

Id. at A200. The Report went on to observe that, while this "conduct" did not alter Persico's Guidelines range, it warranted an upward departure "per Guideline 5k2.0." ECF No. 788 at 3.

Persico objected to the new allegations and filed the first of two motions to withdraw his guilty plea. He charged, *inter alia*, that by injecting "extrinsic [murder] allegations" into the Presentence Report, the government had effectively circumvented the plea agreement's moratorium on "sentencing advocacy." ECF No. 788 at 1; ECF No. 788 at 4 (characterizing the government's claim that "[it could] carry its burden of proof" on murders as "functional[ly]" equivalent to "requesting" a "top-of-range sentence or an upward departure").

The district court rejected defendant's arguments and denied the motion. The judge wrote that, while the plea agreement "unambiguously prohibit[ed sentencing] advocacy [] before the [c]ourt," it could not "reasonably be interpreted" to reach the government's interactions with the "Probation Department." C.A. App. A200.

On the same day that the court denied Persico's motion, it informed the parties that it would conduct an evidentiary hearing on the government's additional conduct allegations. ECF No. 802 at 1. Before the hearing, the government submitted a sentencing letter stating that it was prepared to prove Persico's involvement in a litany of unconvicted racketeering crimes and a "1993 murder." C.A. App. A221-A224. The government feebly maintained that its objective in trumpeting these additional conduct allegations was to

demonstrate that "a sentence below the [37-46 month] Guidelines range would be inappropriate." *Id.* at A223.

Persico again moved to withdraw his guilty plea, arguing that the government's claims – now addressed to the court rather than the Probation Department – constituted a breach of the parties' agreement. ECF No. 803 at 2-3. The court denied the motion. This time, the court wrote that the agreement did not bar the government "from . . . *all* [sentence-related] advocacy," it merely "prohibited" the government from seeking a sentence at the top of the Guidelines range or moving for an upward departure. C.A. App. A234. In the court's view, the government's letter violated neither proscription as it had been intended to preemptively "rebut" Persico's bid for "a below-Guidelines sentence." *Id.*

The evidentiary hearing consisted of two days' testimony from a single government witness. Appearing pursuant to a cooperation agreement, the witness claimed that Persico had been involved, albeit from behind the scenes, in a handful of racketeering crimes over a two decade period. The most significant of Persico's offenses, according to the cooperator, was the 1993 murder of a rival. ECF No. 868 at 3. Nearly a year after the hearing, the district court issued a written opinion announcing its finding "by more than a preponderance of the evidence" that Persico participated in the additional alleged activities. *Id.*

At Persico's sentencing, the government formally "request[ed]" a sentence "within the [G]uidelines range." Pet.App. 15a. At the same time, it dwelled on the 1993 murder and pushed the court to impose a

sentence that reflected Persico's "long" history of "racketeering" and "violence." *Id.* His complicity in "the ultimate crime," the prosecutor urged, overshadowed Persico's redeeming characteristics, which included a spotless criminal history, "legitimate business" and "successful" adult children. *Id.* (attributing Persico's lawful accomplishments to an ability to lead "some sort of double-life").

The court agreed with the government's assessment of Persico's history and characteristics. *Id.* at 16a (comparing Persico to "Dr. Jekyll and Mr. Hyde"). It went on to find that the Guideline's recommendation of 37-46 months failed to capture the fact that Persico's offense had been part of a "pattern" of "unconvicted" crimes that included "authoriz[ing]" and "facilitat[ing] a murder." *Id.* at 18a. Concluding that the "value" of "human life" outweighed Persico's various "good deeds," the court imposed a statutory maximum sentence of 60 months imprisonment. *Id.*

On appeal, Persico contended, among other things, that (a) the district court's reliance on unconvicted conduct to enhance his sentence violated the Sixth Amendment and (b) the government had breached the plea agreement when it placed the unconvicted crimes before the district court at sentencing. The Second Circuit rejected both claims.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE COURTS OF APPEALS' UNANIMOUS REFUSAL TO APPLY THE *APPRENDI* RULE TO SENTENCES THAT WOULD BE DEEMED SUBSTANTIVELY UNREASONABLE IN THE ABSENCE OF JUDICIALLY FOUND FACTS

A. Introduction

The district court offered a single explanation for Persico's 60-month sentence: it had found Persico guilty, by preponderant evidence, of "murder" and a handful of other "unconvicted crimes" that were far more serious than the banal conspiracy conviction. Pet.App. 18a. Despite the sharp 30% variance from the high-end of the applicable Guidelines, the Second Circuit affirmed the reasonableness of Persico's sentence without comment.

There was, in fact, nothing for the appellate court to say. The Second Circuit – along with every other federal circuit – perceives no constitutional objection to upholding a sentence based on post-conviction "judicial factfinding" that it would have deemed unreasonably excessive in the absence of such factfinding. *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from certiorari denial); *see id.* (collecting circuit cases); *United States v. Medina*, 642 F. App'x 59, 62 (2d Cir. 2016), cert. denied, 137 S. Ct. 837 (2017) (rejecting challenge posited in *Jones* on the strength of circuit "precedents establish[ing] . . . that a district court may consider 'facts relevant to sentencing by a

preponderance of the evidence . . . so long as those facts do not increase the maximum statutory punishment to which a defendant is exposed.'") (quoting *United States v. Martinez*, 525 F.3d 211, 215 (2d Cir. 2008)); *United States v. Gomez*, 580 F.3d 94, 105 (2d Cir. 2009) ("A sentencing court is free to consider hearsay evidence, evidence of uncharged crimes, dropped counts of an indictment and criminal activity resulting in acquittal in determining sentence.") (quoting *United States v. Sisti*, 91 F.3d 305, 312 (2d Cir. 1996)). The sole question before the panel that heard Persico's appeal, then, was whether Persico's alleged complicity in murder and other serious crimes "supported" the "extent of the [upward] deviation" from the Guidelines. *Gall v. United States*, 552 U.S. 38, 50 (2007). The result of this inquiry was, of course, a foregone conclusion.

The far more substantial question – and one the Second Circuit did not address – is whether the Constitution forbids a "sentence[] that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea." *Rita v. United States*, 551 U.S. 338, 375 (2007) (Scalia, J., concurring). The Courts of Appeals have, in fact, "uniformly" declined to confront this important constitutional problem. *Jones*, 135 S. Ct. at 9. Ending its own "silence" on the matter, *id.*, the Court should take up Persico's "as-applied Sixth Amendment challenge" and determine whether the Fifth and Sixth Amendments prescribe "otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." *Id.*

B. The *Apprendi* Rule

Apprendi v. New Jersey struck down a "hate crime" statute authorizing sentencing judges to impose an "extended [prison] term" if they found, "by a preponderance of the evidence," that the defendant's offense aimed at "intimidat[ing]" a person or a group of people "because of race, color, gender, handicap, religion, sexual orientation or ethnicity." 530 U.S. 466, 468-69 (2000) (internal quotation marks omitted). The Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

Four years later, *Blakely v. Washington*, 542 U.S. 296 (2004), extended *Apprendi*'s rule to a state "determinate sentencing scheme [that was] similar to the Federal Sentencing Guidelines." *United States v. Booker*, 543 U.S. 220, 231-32 (2005). The state scheme required sentences to land within an offense-specific "standard range" unless a judge-found "aggravating factor[]" justified the imposition of an "exceptional sentence." *Blakely*, 542 U.S. at 299-300. An exceptional sentence could not exceed the offense of conviction's statutory maximum. The scheme nevertheless failed to pass constitutional muster. Sealing the fate of the mandatory Guidelines regime, the Court held that the "statutory maximum" for *Apprendi* purposes was "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (emphasis in original). Under the state's sentencing

scheme, the relevant maximum was, then, the top of the so-called "standard range." *Id.* at 303-04.

The rule set down in *Apprendi* and extended in *Blakely* aimed at conforming sentencing practices to a set of constitutional imperatives: the "'Due Process Clause of the Fifth Amendment'" and the Sixth Amendment's "'notice and jury trial guarantees.'" *Apprendi*, 530 U.S. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)). These protections "undisputedly entitle[d] a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Id.* at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). The Court recognized that these guarantees were meaningless unless "punishment" remained "invariabl[y] link[ed]" to the "crime" of conviction. *Id.* at 478; *see id.* at 484 (noting that "due process and associated jury protections extend" to "determinations" concerning "the length of [a defendant's] sentence") (internal quotation marks omitted). The *Apprendi* rule implements the Framers' "design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306; *see also Booker*, 543 U.S. at 238-39 ("The Framers ... understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases.") (quoting A. Hamilton, The Federalist No. 83 p. 499 (C. Rossiter ed. 1961)).

C. The Advent of Substantive Reasonableness Review

Reaffirming its commitment to the constitutional guarantee that criminal penalties be "solely based on 'facts reflected in the jury verdict or admitted by the defendant,'" the *Booker* merits-majority determined that the rule of *Apprendi* and *Blakely* applied to the Federal Sentencing Guidelines. 543 U.S. at 232, 237 (quoting *Blakely*, 542 U.S. at 303). A separate remedial-majority went on to hold "that the appropriate remedy was to make the Guidelines nonmandatory in all cases and to review sentences on appeal only for reasonableness." *Rita v. United States*, 551 U.S. 338, 368 (2007); *Cunningham v. California*, 549 U.S. 270, 287 (2007) (noting that *Booker* "installed, as consistent with the [Sentencing Reform Act] and the sound administration of justice, a 'reasonableness' standard of review") (quoting *Booker*, 543 U.S. at 261).

Reviewing a sentence for reasonableness, appellate courts must determine, under an abuse-of-discretion standard, whether the district judge "properly analyzed the relevant sentencing factors." *Rita*, 551 U.S. at 356; *see Booker*, 543 U.S. at 261 (predicting that sentencing factors set out in 18 U.S.C. § 3553(a) "will guide appellate courts" undertaking substantive reasonableness review). If the district court imposed a non-Guidelines sentence, the appeals court should determine whether the judge "consider[ed] the extent of the deviation" from the Guidelines and "ensure[d] that the justification [was] sufficiently compelling to support [it]." *Gall*, 552 U.S. at 50.

D. Constitutional Limits on Judicial Sentencing Discretion

In the wake of *Booker*, the Courts of Appeals have permitted a judge's traditional "discretion" to "consider[] various factors relating both to offense and offender" at sentencing, *Apprendi*, 530 U.S. at 481, to swallow the defendant's constitutional right to punishment "based" exclusively on the "'facts reflected in the jury verdict or admitted by the defendant.'" *Booker*, 543 U.S. at 232 (quoting *Blakely*, 542 U.S. at 303); *see United States v. St. Hill*, 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring) ("All too often, prosecutors charge individuals with relatively minor crimes, carrying correspondingly short sentences" but then argue for "significantly enhanced terms" at sentencing to effectively punish "other crimes that have not been charged."); *United States v. Broxmeyer*, 699 F.3d 265, 298 (2d Cir. 2012) (Jacobs, CJ., dissenting) (protesting that the majority's affirmance of a 30-year sentence on the basis of uncharged conduct reduced "the offense of [] conviction to . . . a peg on which to hang a comprehensive moral accounting").

Persico's sentence is endemic of this regime. After entering a carefully circumscribed guilty plea to a relatively prosaic infraction, he was subjected to a "full-blown minitrial." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1253 (2018) (Thomas, J., dissenting). The judge, who sat as trier of fact and law at the proceeding, adjudged Persico guilty by preponderant evidence of several unconvicted crimes, including a "murder" that occurred more than two decades prior. Pet.App. 15a-18a. These unconvicted crimes then served as the basis on which

the "degree of [his] criminal culpability [was] assessed." *Apprendi*, 530 U.S. at 485 (internal quotation marks omitted). Although there was no suggestion that the crime Persico admitted justified his statutory maximum sentence, the Second Circuit, consistent with its "precedents," upheld the penalty's reasonableness based on the district judge's factfinding. *Medina*, 642 F. App'x at 62.

Neither *Booker*, which created reasonableness review, nor *Rita* and *Gall*, which added content to the standard, has considered the issue this case presents: "whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness." *Jones*, 135 S. Ct. at 9. As such, the "door remains open" for a defendant to mount an "as-applied challenge" on the grounds that "his sentence ... would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 552 U.S. at 60 (Scalia, J., concurring).

An as-applied challenge amounts to a straightforward application of *Apprendi*'s "bright-line rule." *Cunningham*, 549 U.S. at 288. It posits that any fact that "increases the punishment above what is otherwise legally prescribed" (*Alleyne v. United States*, 570 U.S. 99, 107-08 (2013)), is, then, "an element of a crime," *Jones*, 135 S. Ct. at 8, that must be "submitted to the jury." *Alleyne*, 570 U.S. at 107-08. Therefore, "any fact necessary to prevent a sentence from being substantively unreasonable – thereby exposing the defendant to [a] longer sentence – is an element that

must be either admitted by the defendant or found by the jury." *Jones*, 135 S. Ct. at 8.

Applying this reasoning to the facts presented here, the Court should grant certiorari and hold that Persico's sentence violates the Sixth Amendment because it could "not have been upheld" on appeal "but for . . . [the] fact[s] found by the sentencing judge." *Gall*, 552 U.S. at 60 (Scalia, J., concurring).

II. THE COURT SHOULD GRANT CERTIORARI TO REAFFIRM *SANTOBELLO* AND RESOLVE A CIRCUIT SPLIT ON THE PRECEDENCE ACCORDED TO A PLEA AGREEMENT'S SPECIFIC TERMS

A. Introduction

The terms of Persico's plea agreement were clear and conventional. In exchange for his guilty plea to a single loansharking charge, the government promised, among other things, to

> b. take no position concerning where within the [37 to 46 month] Guidelines range determined by the Court [his] sentence should fall; and
>
> c. make no motion for an upward departure under the Sentencing Guidelines.

Pet.App. 3a. The government reneged on these obligations. Refraining from *expressly* requesting an enhanced sentence, prosecutors advanced a position that effectively ensured an upward departure from the

37-46 month Guidelines range: they urged the court to impose a sentence that reflected Persico's complicity in the "ultimate crime" of murder. *Id.* at 15a.

Endorsing this tactic on appeal, the Second Circuit pointed to a clause in Persico's plea agreement that permitted the prosecution to "advise the Court and the Probation Department of [relevant] information ... including criminal activity engaged in by the defendant." *Id.* at 4a. On the strength of this language, the Court of Appeals characterized the government's conduct as "hew[ing]" to the plea agreement. *Id.* at 5a.

The Second Circuit's interpretation of the plea agreement marks a departure from the law of its sister circuits, which construe plea agreements according to their specific terms rather than their general provisions. *See*, *e.g.*, *United States v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998) (holding that the government's specific "promise" to refrain from taking any position on a sentencing issue trumped a general reservation of its authority to inform the sentencing court of relevant facts and conduct). This rule properly "safeguards" the defendant's right to the "fulfill[ment]" of promises offered as "inducement or consideration" for his plea. *Santobello v. New York*, 404 U.S. 257, 262 (1971). Adopting it, the Court should vacate Persico's sentence and remand the case to the district court for resentencing.

B. The Circuit Split

As part of the plea deal at issue in *Nolan-Cooper*, the government agreed that it would "not oppose" the defense's objection to a "special skill" adjustment

(U.S.S.G. § 3B1.3) and "promise[d] to recommend a sentence" within a stipulated Guidelines range of 41 and 51 months. *Nolan-Cooper*, 155 F.3d at 236, 239. At the defendant's sentencing, however, the prosecution took positions that were inconsistent with its obligations. With respect to the enhancement, the government purported "not [] to comment on the [adjustment's] applicability" even as it "pointed . . . the [c]ourt" to evidence that supported it. *Id.* at 236. Likewise, the government's commentary suggested that a third downward adjustment point was not warranted despite its agreement not to oppose a three-point adjustment for defendant's acceptance of responsibility. *Id.* at 238. The district court thus found that defendant's applicable Guidelines range was 63 to 78 months rather than the 41 to 51 months range contained in the plea agreement. *Id.*

Attempting to justify its conduct on appeal, the government relied on "clause[s]" in the plea agreement that permitted it to "'bring to the [c]ourt's attention all [relevant] facts'" and "rebut any [defense] statement ... at sentencing." *Id.* at 236-37. (emphasis supplied). Unpersuaded, the Third Circuit rejected the government's reading of the plea agreement and vacated the sentence. *Id.* at 236.

The appellate court explained that the "precepts" identified in *Santobello* required the court to construe "general provision[s]" in a plea agreement according to the "purpose" reflected in the agreement's "specific" terms. *Id.* at 237. As such, a government promise "to take no position" on a particular sentencing issue trumped a general reservation of the government's

right to "comment on [the] facts" bearing on the defendant's sentence. *Id.* Finding that the *Nolan-Cooper* prosecutor's pledge "not to oppose" was the "functional equivalent" of a promise to take no position, the Third Circuit held that the prosecutor's indirect "attempt to influence" the judge's resolution of the defendant's objection had breached the plea agreement. *Id.*; *see id.* (remarking that the prosecutor had "clearly" intended to furnish the sentencing judge "'with a basis . . . to ignore the stipulation in the plea agreement'") (quoting *United States v. Badaracco*, 954 F.2d 928, 939 (3d Cir. 1992)).

The court similarly found that the government's "comments" concerning the defendant's offense "could only be interpreted as an attempt to influence the court to impose a longer sentence than stipulated in the agreement." *Id.* (observing that "[a]dvocacy 'of a position requiring a greater sentence is flatly inconsistent with recommendation of a lesser sentence'") (quoting *United States v. Taylor*, 77 F.3d 368, 370 (11th Cir. 1996)).

The Eighth Circuit has adopted substantially the same rule. In *United States v. DeWitt*, for instance, the defendant's plea agreement contained a stipulation that set "[t]he amount of pseudoephedrine to be used to calculate the [G]uidelines [at] 1.12 grams." 366 F.3d 667, 668 (8th Cir. 2004). The agreement also included clauses providing that "uncharged related criminal activity may be considered as 'relevant conduct' pursuant to USSG § 1B1.3(a)(2) in calculating the offense level for the charge to which defendant will plead guilty" and permitting the "parties [to] advocate

any position at [] sentencing [] regarding any sentencing issues not addressed in th[e] agreement." *Id.* At the defendant's sentencing, the government persuaded the district court that these clauses permitted it to present evidence supporting the Presentence Report's assertion that the defendant's "relevant conduct made her accountable for 53.02 grams of pseudoephedrine." *Id.* at 669 (internal quotation marks omitted).

Vacating the sentence on appeal, the Eighth Circuit explained that the plea agreement's "*specific* drug quantity and base offense level stipulations" should have been "give[n] effect ... over the [] agreement's more *general* provisions." *Id.* at 670 (emphasis supplied); *see id.* (perceiving that the district court's contrary ruling "render[ed]" the principal term of the plea agreement "meaningless"). The court held that the government breached the plea agreement when it "initiate[d] the presentation of [] evidence" that undermined the parties' Guidelines stipulation. *Id.* at 671.

The *DeWitt* court's conclusion applies with equal force to Persico's case. Branding Persico a murderer and racketeer at sentencing, the government rendered its promise to abstain from seeking a sentence above Persico's modest 37 to 46 month Guidelines range "meaningless." *DeWitt*, 365 F.3d at 670; *Nolan-Cooper*, 155 F.3d at 237. The government, then, deprived Persico of the benefit of his bargain, breaching the plea agreement. *See id.* at 238 (reiterating that prosecutors breach the plea agreement when they deprive the defendant of a benefit that he "reasonably understood

[]he would be receiving from the government in return for [his] plea of guilty").

The Second Circuit reached the opposite conclusion by an inverted analysis that subordinated core terms – those that embodied the "promise[s]" and "inducement[s]" that prompted Persico's guilty plea – to plea-agreement boilerplate. *Santobello*, 404 U.S. at 262; *see* Pet.App. 4a (concluding that a phrase generally authorizing the government to "advise the Court ... of information relevant to sentencing" narrowed the government's obligations to "take no position" concerning where "within" the Guidelines range Persico should be sentenced and to refrain from seeking an above-Guidelines sentence). The court thus relieved the government of its obligations under the plea agreement and deprived Persico of the promises he was "reasonably due." *Santobello*, 404 U.S. at 262.

C. Conclusion

The Court should grant certiorari, reaffirm *Santobello* and hold that the Second Circuit erred in failing to give effect to the specific terms of Persico's plea agreement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/

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