No. _____

In The
Supreme Court of the United States

SCOTT ROTHSTEIN,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

A. Whether the Government's right to withdraw a previously earned and filed Rule 35 Motion, where the plea agreement fails to warn the defendant of the Government's right to withdraw, violates the defendant's due process rights.

B. Whether denying the defendant the right to an evidentiary hearing on the breach allegation after the defendant has already provided substantial cooperation, violates the defendant's due process rights.

II. RELATED CASES

- *United States v. Scott W. Rothstein*, No. 0:09-cr-60331-JIC, U.S. District Court for the Southern District of Florida. Judgment entered June 9, 2010. Order granting Government's Motion to Withdraw Rule 35 Motion entered April 16, 2018.
- *United States v. Scott Rothstein*, No. 18-11796, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered September 30, 2019.

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Scott Rothstein, a federal inmate by and through his counsel, Marc S. Nurik, respectfully petitions this court for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

VI. DECISIONS BELOW

On April 16, 2018, the District Court entered its Order granting the Government's Motion to withdraw the Rule 35 Motion and denied Petitioner's request for an evidentiary hearing. Petitioner timely appealed the District Court's ruling to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit Court of Appeals issued its Opinion on September 30, 2019 in Case No.18-11796, Non-Argument Calendar, affirming the District Court's Order.

VII. JURISDICTION

The Eleventh Circuit Court of Appeals entered judgment on September 30, 2019. Justice Thomas extended the time for filing this petition to and including February 27, 2020. This court has jurisdiction under 28 U.S.C. § 1254(1).

VIII. CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V, provides:

> "No person . . . shall be deprived of life, liberty or property without due process of law."

Federal Rules of Criminal Procedure 35 provides:

> (a) CORRECTING CLEAR ERROR. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.
>
> (b) REDUCING A SENTENCE FOR SUBSTANTIAL ASSISTANCE.
>
> > (1) *In General.* Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.
> >
> > (2) *Later Motion.* Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:
> >
> > > (A) information not known to the defendant until one year or more after sentencing;
> > >
> > > (B) information provided by the defendant to the government within one

> year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
>
> (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.
>
> (3) *Evaluating Substantial Assistance.* In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.
>
> (4) *Below Statutory Minimum.* When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.
>
> (c) "SENTENCING" DEFINED. As used in this rule, "sentencing" means the oral announcement of the sentence.

IX. STATEMENT OF THE CASE

Petitioner, Scott W. Rothstein was an attorney licensed to practice in the State of Florida and chairman of the Rothstein Rosenfeldt and Adler law firm, in Fort Lauderdale, Florida. Beginning in 2005, with the assistance of co-conspirators, Petitioner devised, orchestrated and executed a Ponzi scheme initially utilizing fictitious loans and later, fictitious confidential

settlements, which resulted in stipulated victim losses of three hundred and sixty-four (364) million dollars.

As the scheme began to unravel in late October 2009, Petitioner fled to Morocco, a non-extradition country. On or about November 3, 2009, Petitioner voluntarily returned to the United States and immediately began cooperating with the Government. Initially petitioner was in the protective custody of federal agents, debriefing round the clock on his scheme and the participation of others. During this initial period of cooperation, in addition to reviewing numerous documents, detailing the involvement of others and explaining the intricate details of his scheme, Petitioner participated in an undercover sting operation leading to the arrest and subsequent conviction of a Sicilian mafia member.

On December 1, 2019, Petitioner was formally arrested on an indictment and placed in a federal facility under protective custody. Petitioner subsequently pled guilty to the indictment pursuant to a plea agreement. (App.26). While in formal custody awaiting sentencing, Petitioner continued to cooperate extensively with the Government regarding his scheme and the participation of others in his and other crimes. Petitioner also continued his pro-active cooperation while in custody.

On June 9, 2010, Petitioner was sentenced to a term of incarceration of 600 months (50 years). Rather than filing a 5K1.1 motion prior to sentencing, the Government intended to subsequently file a Rule 35 Motion, as Petitioner's cooperation was continuing.

Petitioner was transferred to a federal facility pursuant to a protective custody program and continued his cooperation with the Government.

The Government filed its Rule 35 Motion on June 8, 2011. (App.45). The motion specifically acknowledged that "prior to the defendant's guilty plea he began cooperating with the United States in the investigation of others. The defendant has continued to cooperate with federal law enforcement authorities in its criminal investigation . . . some of the information provided by the defendant to the Government has not yet become useful to the government as the investigation is ongoing and has not come to fruition." (App.46). It was anticipated that a formal Rule 35 hearing would take place once Petitioner's cooperation had ended.

The Rule 35 Motion also contained a paragraph which read: "The Government expressly reserves the right to withdraw the motion if, in the judgment of the United States the defendant should fail to comply with the terms of his plea agreement, fail to testify truthfully or falsely implicate any person or entity." (App.46).

However, the plea agreement did not contain any language reserving to the Government any right to withdraw a filed and earned Rule 35 Motion.

On September 26, 2017, more than six (6) years after filing its Rule 35 Motion and after Petitioner had continued his cooperation resulting in the successful prosecution of more than 25 individuals, the Government filed its Motion to Withdraw the Rule 35 Motion.

In its Motion, the Government stated that Petitioner "provided false material information to the Government and violated the terms of his plea agreement." (App.18). The Government did not provide any details or further information to support that statement. The Government claimed that in its sole discretion to evaluate Petitioner's cooperation; it expressly reserved the right to withdraw the Motion.

Petitioner opposed the Government's motion. And requested, at a minimum, that the court hold an evidentiary hearing.

X. REASONS FOR GRANTING THE WRIT

Petitioner argues that the Government never advised or warned him of its ability to withdraw a previously filed and earned Rule 35 Motion. Petitioner's entire agreement with the Government consists of his Plea Agreement and the incorporated Cooperation Agreement, hereinafter collectively referred to as the "Plea Agreement." The Plea Agreement contains an integration clause at paragraph 16 which states that "there are no other agreements, promises, representations, or understandings binding upon the parties unless contained in a letter from the United States Attorney's Office executed by all parties and counsel prior to the change of plea." (App.34). The Petitioner has never consented to any other agreement, promise, representation or understanding, and thus, none exist for the purposes of this Petition, beyond the Plea Agreement and incorporated Cooperation Agreement.

A plea agreement must be construed in light of the fact that it constitutes a waiver of substantial constitutional rights requiring that the Defendant be adequately warned of the consequences of his plea. *United States v. Elbeblawy*, 699 F.3d 925 (11th Cir. 2016, citing *United States v. Copeland*, 381 F.3d 1101 (11th Cir. 2004), quoting *United States v. Jeffries*, 908 F.2d 1520, 1523 (11th Cir. 1990). Additionally, absent some indication that the parties intended otherwise, the language of the plea agreement must be given its ordinary and natural meaning. *United States v. Rubbo*, 396 F.3d 1330, 1334-1335 (11th Cir. 2005). Any ambiguities in the agreement must be resolved against the Government and in favor of the defendant. *Jeffries*, 908 F.2d at 1523. A plea agreement is a contract between the United States and the defendant. *Id*. Therefore, although constrained at times by due process implications, commercial contract principles govern the interpretation and enforcement of plea agreements. *Id.* "Where the words of a . . . contract have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded." *Norfolk Southern Railway Company v. James N. Kirby*, 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004). The courts should not contravene any clause's obvious meaning. *Id.* In determining the meaning of any disputed term in the plea agreement, the court must apply an objective standard and must decide whether the Government's actions are inconsistent with what the defendant reasonably understood at the time he entered his guilty plea. *In re Arnett*, 804 F.3d 1200, 1202-1203 (11th Cir. 1986). Both constitutional and supervisory concerns require holding

the Government to a greater degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements. *Copeland*, 381 F.3d at 1106, citing *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1966).

A review of the plea agreement reveals more than nine extremely detailed pages, clearly delineating the rights and obligations of the parties in plain, ordinary English. The agreement goes into precise detail as to all of the rights Petitioner is giving up and the wide-ranging punishments he is subjecting himself to by entering into the plea agreement. The agreement further details all the rights retained by the court and outside the control of Petitioner and the Government. The agreement goes into excruciating detail establishing the Government's unfettered discretion to evaluate Petitioner's cooperation and to decide whether or not to file a 5K1.1 or Rule 35 Motion on his behalf. The agreement goes into great detail advising Petitioner as to all the events that could trigger the Government refusing to recommend at sentencing that the court reduce the advisory sentence guideline base sentence, upon acceptance of responsibility. The agreement goes into detail as to all of Petitioner's rights and responsibilities related to restitution and related to forfeiture, including waiver of the statute of limitations and his rights under the Eighth Amendment. The agreement expressly reserves to the Government the right to make any recommendations as to the quality and quantity of Petitioner's punishment. The agreement details the limits of what the agreement resolves: only Petitioner's criminal liability in the Southern District

of Florida known to the U.S. Attorneys as of the date of the plea agreement. The agreement goes into great detail regarding Petitioner's appellate waiver and the Government retaining its appellate rights. The agreement also details Petitioner's waiver of his right to collaterally attack his Sentence. And the agreement contains a very specifically worded integration clause. The agreement clearly adequately warns Petitioner of a wide range of potential consequences of his plea. And it does so in a manner such that Petitioner could reasonably understand the terms of his agreement. And there the agreement stops. There is not one single word, phrase, sentence or paragraph that could possibly be said to have warned Petitioner that one of the consequences of his plea was that even after the Government exercises the two discretionary authorities clearly set forth in ordinary English in the plea agreement, the discretion to evaluate Petitioner's cooperation to determine if it rises to the level of substantial assistance and the discretion to file a Rule 35 Motion on his behalf, that the Government was retaining the unbridled discretion to withdraw the Rule 35 Motion upon the occurrence of some triggering event. The Government was certainly capable of including language that would have adequately warned Petitioner that even after his Rule 35 Motion was earned and filed that the Government was retaining the discretion to withdraw it.

Instead the Government used the language that should have been in the plea agreement—more than a year later in the Rule 35 Motion—in a veiled attempt to insert a new term into their agreement with

Petitioner. The obvious problem with what they attempted to do is that in order to be enforceable, the discretion to withdraw the Rule 35 Motion needed to be in the plea agreement or the Government needed to obtain Petitioner's consent to the new term, in writing. However, rather than attempt to obtain Petitioner's written consent to this new potential consequence to his plea, the Government put the new term in the Rule 35 Motion and then got Petitioner's counsel to join in the motion. The obvious problem with this is that while an attorney does not have an obligation to obtain his client's consent to every tactical decision, an attorney undoubtedly has a duty to consult with his client regarding important, critical decisions. *Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is beyond doubt that a decision which would have given the Government sole, unbridled discretion to withdraw a Rule 35 Motion for sentence reduction after Petitioner had earned it and the Government had filed it is exactly the type of critical decision encompassed by this Court's opinions mandating that the attorney obtain the client's consent to such a term. The critical nature of this potential new consequence which the Government attempted to insert into Petitioner's plea agreement by including it in the Rule 35 Motion, is made all the more evident by the fact that without the Rule 35 Motion, Petitioner's 50-year sentence will result in him dying in prison for his crimes, despite his extraordinary cooperation with the Government. Once Petitioner had earned his Rule 35 Motion and the Government filed it, there was no chance that he was

going to consent to a new term that would give the Government the unfettered discretion to act as his judge, jury and executioner.

Modification of the terms of a plea agreement is beyond the power of the District Court. *United States v. Melton*, 861 F.3d 1320, 1328 (11th Cir. 2017) citing *United States v. Howie*, 166 F.3d 1166, 1168-1169 (11th Cir. 1999). Any such modification would impermissibly alter the bargain at the heart of the plea agreement. *Id.* Courts should not adopt "hyper-technical" readings of the text of plea agreements. *Id.* citing *United States v. Harris*, 376 F.3d 1282, 1287 (11th Cir. 2004). Plea agreements must be interpreted based upon what they say, not what they might have said if the Government could have foreseen the future. *Melton*, 861 F.3d at 1328. The district courts are not authorized to ink-in revisions to plea agreements to reflect a term the Government neglected to include. *Id.*

"It is the duty and responsibility of the courts, not to rewrite Contracts according to their own views of what is practical and fair, but to enforce them in accordance with the evidence and recognized principles of law. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 86 L.Ed. 855 (1942). The above is a synopsis of well-established law controlling the interpretation of the language of plea agreements. Criminal defendants have been able to rely on the enforcement of these critical rules for decades. With little variance, these cases mirror the law of every other Federal Circuit in the United States. In the case at bar, the Eleventh Circuit's opinion violates each and every one of these legal

principles, resulting in a holding which, if left unchecked by this Court, will literally turn the law regarding interpretation of plea agreements on its head.

The Eleventh Circuit's opinion ignores the Supreme Court precedent controlling the issue of when an attorney must obtain his client's consent. The Eleventh Circuit simply states that the motion was joined by Petitioner through the assent of his attorney oblivious to the enormity of such a ruling. If permitted to stand, the rule in the Eleventh Circuit regarding when an attorney must obtain the consent of his client will lie in direct contravention of Supreme Court precedent, creating a significant pitfall for the unwary criminal defendant. In addition to the holdings in *Nixon* and *Strickland* on this issue, the Government has another hurdle to overcome: the integration clause of the plea agreement requiring that any modification of the plea agreement be made in writing signed by all the parties and their counsel. Despite the fact that this issue was raised by Petitioner in his initial brief, the Eleventh Circuit never even addressed this issue, choosing instead to ignore it completely in order to reach a decision adverse to Petitioner. Clearly, the inclusion of this new term giving the Government the unbridled discretion to withdraw the Rule 35 Motion violates the plain ordinary meaning of the plea agreement's integration clause. Thus, the new term should be found to unenforceable.

A thorough review of the operative language of the plea agreement reveals that the Eleventh Circuit, in holding that the language of the agreement giving the

Government the sole discretion to file the Rule 35 Motion somehow also includes the sole discretion to withdraw the Rule 35 Motion after it has been earned and filed, where the agreement does not contain any language giving the Government this discretionary authority, abrogates long-standing, well-established principles controlling the interpretation of plea agreements. Absent an indication that the parties' intended language of the plea agreement must be given its plain, ordinary, natural meaning, so as to adequately warn the defendant of the potential consequences of his plea. *Rubbo*, 396 F.3d at 1334-1335; *Elbeblawy* citing *Copeland* quoting *Jeffries*. Criminal defendants in the Eleventh Circuit and its sister circuits must be able to trust that the language the Government chooses for their plea agreements does not have any meaning other than its ordinary, natural meaning. Criminal defendants must be able to interpret the language of their plea. Agreements without having to resort to researching the law of every circuit in the United States to see if, perhaps, lurking in some obscure case there is a holding that could possibly alter, to their detriment the plain, ordinary, natural meaning of the language chosen by the Government. To reach the conclusion reached by the Eleventh Circuit, a criminal defendant would have to go well beyond the plain, ordinary natural meaning of the language of his plea agreement making an already unleveled playing field, a minefield. This is made even more untenable by allowing the withdrawal to be unreviewable. Without the ability to have the court inquire into the basis of the Government's withdrawal without any showing other than a

conclusory statement, violates all standards of fair play and violates a defendant's Due Process rights.

The language of the plea agreement at issue gives the Government two distinct discretionary authorities: (1) the discretion to evaluate Petitioner's cooperation to determine if it rose to the level of substantial assistance; and (2) the discretion as to whether or not to file a Rule 35 Motion on his behalf. There is no language anywhere in the agreement giving the Government a third discretionary authority to withdraw the Rule 35 Motion after it has chosen to exercise both of its other authorities in favor of the defendant. Despite the fact that there is no language that would adequately warn Petitioner of this additional consequence of his plea, the Eleventh Circuit has opined that it is somehow included in the first two discretionary authorities. The problem with this ruling is that it defeats the purpose of the rules requiring the Government to draft its plea agreements in a manner that will adequately warn the defendant of the potential consequences of his plea. In essence: it requires the defendant to blindly guess at the possible parade of horribles that could be hidden in language which, to the defendant, seems clear on its face.

An analysis of the language chosen by the Government in drafting Petitioner's plea agreement is revealing. First, the agreement gives the Government the sole discretion to evaluate Petitioners to determine if it reaches the level of substantial assistance. The agreement then goes on to spell out the Government's second discretionary authority, giving the Government the sole discretion to make a motion consistent with

the intent of Rule 35; the sole discretion as to whether to "file" a Rule 35 Motion. The agreement says absolutely nothing about withdrawing the Rule 35 Motion after the Government has exercised its discretion in the defendant's favor and has filed his Rule 35 Motion. In fact, the word "withdraw" or any form of it does not appear anywhere in the plea agreement related to the Rule 35 Motion. Where the Government knows what it wants to say, it should say it. If the Government wanted the discretion to withdraw the Rule 35 Motion, they should have stated so in the plea agreement. Then Petitioner would have been adequately warned of this potential consequence of his plea and would have had at least some modicum of an opportunity to try to negotiate the term with the Government or refuse to execute the plea. Here, the Government's poor drafting has literally blind-sided Petitioner. There is nothing ambiguous about the language the Government chose. Of course, if it were found to be ambiguous it would have to be construed against the Government as the drafter. *Jeffries*, 908 F.2d at 1523. A term is ambiguous if it is susceptible to two or more reasonable interpretations that can be fairly made. *Alexandra v. Oxford Health*, 833 F.3d 1299 (11th Cir. 2016) citing *Novak v. Irwin Yacht and Marine*, 986 F.2d 458, 472 (11th Cir. 1993). There is nothing ambiguous about the word "file" and the phrase "make a motion consistent with the intent of [Rule 35]." Courts often turn to resources such as Black's Law Dictionary to determine the plain, ordinary and natural meaning of a term. *United States v. Fla. West Int'l Airways*, 853 F.Supp.2d 1209 (S.D. Fla. 2011). Black's Law Dictionary defines the term "file" as

it appears in the plea agreement at issue as follows: "to deliver a document to the court clerk or record custodian for placement in the official record." Black's Law Dictionary, Eighth Edition 2004. Black's defines the term "withdraw," found nowhere in the plea agreement relating to the Rule 35 Motion as follows: "to take back something presented, granted, enjoyed, possessed or allowed; to refrain from prosecuting or proceeding with." *Id.* And finally, and perhaps most importantly, is the following, phrase contained in the plea agreement, in pertinent part: "If in the sole and unreviewable judgment of this office, the defendant's cooperation is of such quality and significance to the investigation or prosecution of other criminal matters . . . this office may . . . make a motion consistent with the intent of Rule 35 subsequent to sentencing, reflecting that the defendant has provided substantial assistance . . . " The Eleventh Circuit has previously held that where a plea agreement is unambiguous, courts are not to read into the agreement terms that were not agreed upon with specificity, even when the defendant misunderstood the agreement. *United States v. Al-Arian*, 514 F.3d 1184, 1191-1193 (11th Cir. 2008).

It is not as if the Government was incapable of choosing language that would have adequately warned Petitioner that the Government was retaining the discretion to withdraw his Rule 35 Motion. United States Attorney's across the Eleventh Circuit have frequently utilized such language in their plea agreements to ensure that the criminal defendants they were dealing with were well aware of the consequences of their plea. In *United States v. Adkins*, 466 Fed. Appx. 855, 857-858

(11th Cir. 2012), the U.S. Attorney for the Northern District of Florida drafted a plea agreement which explicitly gave the Government the right to unilaterally revoke the plea agreement while leaving the guilty plea in full force, if the defendant, among other things, committed further criminal conduct. In *Adkins* the U.S. Attorney had filed a substantial assistance motion on defendants behalf but later withdrew the motion because he committed another crime. The withdrawal was based upon the specific language of the plea agreement giving the Government this right. *Id.* In *United States v. Berner*, 572 F.3d 1239, 1248-1249 (11th Cir. 2009), the U.S. Attorney for the Northern District of Georgia drafted a plea agreement which also gave the Government the explicit right to withdraw a substantial assistance motion. The agreement stated in pertinent part: "Based upon the substantial assistance the defendant has provided in this case . . . the Government will file a [5K1.1] motion at sentencing—if the defendant fails to cooperate truthfully or completely, or if the defendant engages in additional criminal conduct or other conduct inconsistent with cooperation, he will not be entitled to any consideration, whatsoever, pursuant to this and the preceding paragraphs." That is exactly the type of language available to the AUSA's in the present case that they either specifically or neglectfully did not utilize. In *United States v. Pittman*, 2017 U.S. APP LEXIS 18136 (11th Cir. 2017), the U.S. Attorney for the Middle District of Alabama drafted a plea agreement which specifically stated, in pertinent part: "if Pittman failed or should fail in any way to fulfill completely her obligations under this agreement,

then the Government will be released from its commitment to honor all of its obligations to Pittman without her being allowed to withdraw her guilty plea." One of the obligations from which the Government would be released was the filing of a substantial assistance motion. *Id.* Again, had the Government in this case chosen similar language, we would not be here. Even the cases relied upon by the District Court and the Eleventh Circuit, in finding against Petitioner, involve plea agreements which use the type of language that Petitioner herein is arguing must be used if the Government wants to adequately warn a criminal defendant that one of the consequences of his plea is that the Government is retaining the discretion to withdraw a filed substantial assistance motion. The cases relied upon by the District Court and the Eleventh Circuit offer them no relief. In *United States v. Hartwell*, 448 F.3d 707 (4th Cir. 2006) relied upon by the Government, the District Court and the Eleventh Circuit in support of the proposition that the discretion to file a Rule 35 Motion includes the right to withdraw it, the appellate court specifically stated that Hartwell himself, had explicitly agreed to the language giving the Government the right to withdraw his Rule 35 Motion and that the plea agreement itself specifically stated that if *Hartwell* " . . . failed to fulfill any of his obligations under this plea agreement, the United States may seek release from any or all of its obligations under [the] plea agreement." *Id.* at 710. This is exactly the language that Petitioner herein is arguing should have been included in his plea agreement to adequately warn him of the potential consequence that his Rule 35 Motion

could be withdrawn after it had been earned and filed. *Hartwell* supports the Petitioner's position. In citing to *Hartwell*, the Eleventh Circuit completely ignores the operative language of the plea agreement in *Hartwell*, simply extracting a sentence from the opinion that says "we conclude that the language giving the Government 'sole discretion' to file a Rule 35(b) Motion also includes the discretion to file a motion to withdraw it." *id.*, avoiding any discussion of the language that the Fourth Circuit based its holding on. The plea agreement in *Hartwell*, unlike the plea agreement in the present case, gave the Government the discretion to withdraw the Rule 35 Motion. The language in the *Hartwell* plea agreement supports the Fourth Circuit's holding. But that holding is wholly inapplicable to the case before this Court, as no such language is contained anywhere in Petitioner's plea agreement. The Eleventh Circuit, in its opinion erred by extracting a single sentence from a case as support for their opinion, when the facts are directly inapposite to the case under review.

The Eleventh Circuit opinion also relies on *United States v. Jackson*, 635 Fed. Appx. 657 (11th Cir. 2015), which again is factually inapposite to Petitioner's case. In *Jackson*, the plea agreement specifically gave the Government the right to nullify the 5K1.1 motion.

The plea agreement recites that "if in judgment of this office the defendant's cooperation is of such quality and significance to the investigation or prosecution of other criminal matters . . . this office may . . . make a motion consistent with the intent of . . . Rule 35 . . .

subsequent to sentencing, reflecting that the defendant has provided substantial assistance . . . " According to *Black's*, a motion is a written or oral application requesting a court to make a specified ruling or order. Random House Webster's defines "consistent" as follows: "agreeing or accordant; compatible; not self-contradictory." Random House Webster's Dictionary, Unabridged Second Edition, 2001. And of course, as this Court is well aware, a Rule 35 Motion is a motion for reduction of a sentence for substantial assistance. Thus, simply, in plain, ordinary, natural language, making a motion consistent with the intent of Rule 35 can only mean filing a motion seeking a reduction of sentence for substantial assistance. The Eleventh Circuit's opinion directly contradicts the plain and ordinary meaning of the language the Government chose when drafting the operative plea agreement. Inclusion of the language used, and exclusion of language not used was the Government's choice as drafter. The Government could have easily ensured that Petitioner would be adequately warned that his Rule 35 Motion could be withdrawn at any time, at the Government's sole discretion, had the Government simply chosen to include language in the plea agreement saying so.

The Eleventh Circuit's opinion below is in conflict with the Second Circuit's decision in *United States v. Padilla*, 186 F.3d 136 (2d Cir. 1999). In *Padilla*, the Second Circuit found that the Government was not permitted to withdraw a previously filed 5K1.1 motion. The Eleventh Circuit decision below, wrongfully distinguished the *Padilla* holding on the basis that the

Padilla plea agreement stated that the Government "will" file a substantial assistance motion if the defendant provided the requisite cooperation whereas in Petitioner's case the Government had the discretion whether or not to file the Rule 35 Motion. However, a closer reading of the *Padilla* opinion reveals that the Second Circuit's decision turned upon the fact that while the plea agreement there (like the agreement in Petitioner's case) set forth in detail the other rights of the Government, the right to withdraw the 5K1.1 Motion was not included anywhere in the Padilla agreement. The court held that "reading the agreement strictly against the Government, as our precedent requires, we conclude that the [plea agreement] prohibits the Government from withdrawing the [5K1.1] because it failed to enumerate specifically, the right to withdraw the motion and the several and serious consequences that would follow if Padilla committed further crimes or otherwise violated the agreement." *Id.* at 141-142. This is precisely the situation in Petitioner's case.

In addition to the above, there is another troubling feature of the Eleventh Circuit's opinion, dealing again with the issue of language inclusion, exclusion, and plain meaning. The Eleventh Circuit states that the "Government reiterates too, that the Rule 35(b)(1) Motion was really just a 'placeholder' motion to preserve the one-year time limitation . . . " That statement is belied by the language the Government chose to use when filing the Rule 35 Motion. First, and most importantly, the Eleventh Circuit seems to intimate, as

did the Government, that at the time the Government filed the Rule 35 Motion, it had not yet determined whether Petitioner's cooperation had risen to the level of substantial assistance. The Rule 35 Motion, in the opening paragraph, clearly states that the motion is being filed based upon the defendant having rendered substantial assistance to the Government. The motion goes on to state that "some" of defendant's cooperation is not yet complete and advised the Court that the Government wishes to wait until all of Petitioner's cooperation is complete before any ruling on the motion is made. The Government specifically states that "upon completion of the defendant's cooperation, the Government WILL file a motion for a hearing at which time the Government WILL advise the Court of the nature, extent and value of defendant's cooperation." Rule 35 Motion. Again, the language chosen by the Government, and moreover, the language not used by the Government, is revealing: The word "placeholder" does not appear anywhere in the Rule 35 Motion. Nor does any language similar, such as "saving motion." The Rule 35 Motion does not state that the Government has not yet been able to determine whether defendant's cooperation has risen to the level of substantial assistance. In fact, it says just the opposite; that the defendant has rendered substantial assistance. By the time the Government filed Petitioner's Rule 35 Motion, his cooperation had already been extraordinary. In addition to having worked undercover wearing a wire on dangerous criminals and working undercover inside a federal facility, eight of the targets Petitioner cooperated against had already been charged and four of them had

already pled guilty. There is simply no definition of substantial assistance under which any AUSA who is being honest could say that Petitioner's cooperation had not yet, risen to the level of substantial assistance. And, to the Government's credit, they specifically state in the Rule 35 Motion that Petitioner had already rendered substantial assistance; they simply wanted to wait until all his cooperation was complete before advising the court.

To refer to the Rule 35 Motion as a mere placeholder motion is inaccurate, misrepresents what the Rule 35 Motion actually says, and denigrates the cooperation Petitioner had already completed for the Government, often at great risk to his personal safety. And finally, the statement by the Government, reiterated by the Eleventh Circuit, that the motion was being filed to prevent the expiration of the one-year time limitation of Rule 35(b)(1) is a red herring. Rule 35(b)(2) is specifically meant to cover just such a situation by obviating the need for any type of alleged "placeholder" motion. As the Government clearly stated in the Rule 35 Motion and as the Eleventh Circuit stated in its opinion, "some of the information provided [by Petitioner] . . . ha[d] not yet become useful to the Government." (App.46). In plain English, that clearly means just what the Government stated in the opening paragraph of the Rule 35 Motion . . . that Petitioner had rendered substantial assistance to the Government by the time the Rule 35 Motion was filed. "Some" of the information had not yet become useful clearly means that "some" of the information had, supporting the

basis for filing the Rule 35 Motion. By holding that the Government's unfettered discretion to withdraw a filed and earned Rule 35 Motion without adequate warning is equivalent to the Government's discretion to file or not file in the first place, the Eleventh Circuit goes too far. Permitting the Eleventh Circuit to interpret the language selected by the Government to a criminal defendant's clear detriment, will have a significant chilling effect on criminal defendant's and the public's ability to trust that the Government will deal with them fairly, with a sharpened sense of good faith. The public must be able to believe that the courts of this nation serve as a reality check on the government's unbridled exercise of power, rather than simply a cheerleader and co-signer for whatever the Government chooses to do.

Finally, Petitioner urges this Court to consider the draconian consequences that could flow from letting the Eleventh Circuit's decision stand, holding that a defendant in Petitioner's situation is not entitled to an evidentiary hearing on the Government's bare claim of a breach. Without the right to a hearing, what would prevent the Government from withdrawing a filed Rule 35 Motion without any reasonable cause after the cooperation has already been provided by the defendant? Such a result is not only patently unfair, it violates a defendant's right to Due Process of Law. Yet, in its Opinion, the Eleventh Circuit suggests such a result is permissible stating: "an evidentiary hearing to allow Rothstein to present evidence that he complied with the cooperation agreement is warranted. . . . No

facts Rothstein can allege regarding his actual level of cooperation would disturb the government's unilateral conclusion that his help was insufficient to warrant a substantial assistance motion." (App.13). This finding is faulty for the simple reason that the Government had already concluded that Rothstein deserved a reduction based on filing the motion. It was simply a matter of waiting for its completion so that the Court would have the full measure of his cooperation in deciding the amount of reduction.

XI. CONCLUSION

For the foregoing reasons, Scott Rothstein respectfully requests that this Court issue a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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