CASE NUMBER 19-6606

IN THE SUPREME COURT OF THE UNITED STATES

RYAN ROOT - PETITIONER

VS

UNITED STATES OF AMERICA - RESPONDENT

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

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I. On Petition for Certiorari, Mr. Root contends that cumulative errors of law and fact led to a miscarriage of justice. The factual and legal matters that were overlooked include: (1) a sentence based on inaccurate information that was an admitted miscalculation of the sentencing guidelines by the Government in its sentencing memorandum; (2) a breach of the plea agreement by the government by not advocating or even mentioning the lower level stipulated in the plea agreement at sentencing; (3) ineffective assistance of counsel by Mr. Root's attorney for not objecting to, or understanding, the offense level in the Pre-Sentence Report was 4 levels higher than the offense level stipulated in the plea agreement, and therefore agreeing with the higher offense level calculation of the Pre-Sentence Report at sentencing, prejudicing the Defendant from being sentenced under the lower stipulations of the plea agreement; (4) and the District Court abdicated its Judicial responsibility to consider the plea agreement at sentencing.

II. The federal international money laundering statute prohibits the transfer of a monetary instrument from a place inside the United States to or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity.

Mr. Root's conviction for money laundering is the paragon for the "merger problem". This Court has repeatedly held in United States v. Santos, Cuellar v. United States, Blockberger v. United States; to look broadly into statutes, and encourages triers of fact to take in the whole picture and rely on their common sense and experience in drawing inferences. No person of average intelligence would see the elements of Mr. Root's money laundering conviction as actual guilt of money laundering, see United States v. Santos, 553 U.S. 507 (2008). The Second Circuit, however, affirmed Petitioner's conviction for money laundering in the face of United

States v. Santos and multiple Federal Circuit findings that resemble Mr. Root's circumstances in virtually all material respects.

QUESTIONS PRESENTED

I. WHETHER CUMULATIVE ERRORS OF LAW AND FACT LED TO A MISCARRIAGE OF JUSTICE AND A CONSTITUTIONAL VIOLATION?

II. WHETHER A DEFENDANT MAY BE CONVICTED OF MONEY LAUNDERING FOR BUYING CONTRABAND WHEN THE PURPORTED CONDUCT PRESENTS A "MERGER PROBLEM" WITH A CONVICTION FOR DISTRIBUTION OF SAID CONTRABAND?

III. WHETHER THE PROBATION DEPARTMENT'S RECOMMENDATION OF OFFENSE CONDUCT AND OFFENSE LEVEL IN THEIR PRESENTENCE REPORT IS TANTAMOUNT TO A SECOND (OR DUAL) PROSECUTION, GOES AGAINST THE STANDARD PRINCIPLES OF FAIRNESS, IS NOT AUTHORIZED UNDER THE UNITED STATES CODE SERVICE, AND LEADS TO AN OVERABUNDANCE OF COSTLY PRE-TRIAL ERRORS?

PARTIES TO THE PROCEEDING

Petitioner Ryan Root was a Defendant in the District Court and an Appellant in the Second Circuit Court. The respondent is the United States of America.

OPINION BELOW

The Second Circuit's opinion can be found under Case No. 17-2568, Document 190, dated August 22, 2019, Mandate (see Appendix, pages A13-A20).

JURDISDICTION

The Second Circuit issued its opinion on August 15, 2019 and denied Mr. Root's timely petition for Rehearing En Banc under Document 189 (see Appendix page A21). This Court has jurisdiction under 28 U.S.C. 1254(1).

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On September 11, 2015, a federal grand jury in the Northern District of New York returned a two-count indictment charging Root and others with conspiracy to possess with intent to distribute and to distribute testosterone and its derivatives, in violation of 21 U.S.C. 841(a)(1), (b)(1)(E), and 846 (count 1); and conspiracy to commit international promotional money laundering, in violation of 18 U.S.C. 1956(a)(2)(A) and (h).

On November 30, 2016, Root pleaded guilty to both counts pursuant to a plea agreement, which contained a waiver but was subject to appeal on the grounds of plain error, a breach of the plea agreement by the government, and a Constitutional violation. On August 1, 2017, Root was

sentenced principally to a 78-month term of imprisonment on each count of conviction, with such terms to run concurrently, and to be followed by a three-year term of supervised release.

Mr. Root timely filed a notice of appeal on August 15, 2017. An amended judgment was filed on August 31, 2017. Root's attorney filed a motion in the District Court to be relieved as his attorney, which was granted on October 26, 2017. Root elected to proceed with his appeal and petition for writ of certiorari pro se.

Pro Se Petitioner Ryan T. Root challenges his conviction and sentence in the United States District Court for the Northern District of New York (McAvoy, T.J.), following his guilty plea to charges of conspiracy to distribute testosterone and its derivatives and conspiracy to commit international money laundering. On Appeal, Mr. Root contended that count 2, money laundering, presents a "merger problem" that is tantamount to a Constitutional violation of the Double Jeopardy Clause of the 5th Amendment, the Government breached the plea agreement by not advocating for the lower offense level stipulated in the plea agreement, and Mr. Root's attorney provided ineffective assistance of counsel by not objecting to, or even understanding the record showed that the offense level in the PSR was 4 levels higher than the offense level stipulated in the plea agreement. Here, Mr. Root petitions for a writ of certiorari on the Questions Presented for review.

STATEMENT OF THE FACTS

A. Offense Conduct

From 2012 to 2015, Mr. Root headed an operation involving the manufacture and distribution of Testosterone and its derivatives, which are Schedule III controlled substances.

Mr. Root conspired with at least nine other individuals to possess with intent to distribute and to distribute 60,000 units or more of testosterone and its derivatives. Mr. Root arranged shipments, to himself or other co-conspirators, of testosterone and its derivatives from different sources in China. Mr. Root or other co-conspirators purchased raw steroid powders from counterparts in China, and shipped these products to customers in various parts of the country.

Mr. Root and other co-conspirators transferred funds to counterparties in China using commercially available wire transfer services. The funds were sent to China to purchase raw steroid powders that were finished and distributed to customers.

B. Indictment, Plea Agreement, and Guilty Plea

1. Indictment

Count One alleged that from January 2011 to September 11, 2015, Root and nine co-defendants, conspired to possess with intent to distribute and to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and 846. The indictment further alleged that this violation involved testosterone and its derivatives.

Count two of the indictment charged Mr. Root and four co-defendants with conspiring to transport, transmit, and transfer, ... one or more monetary instruments and funds from a place in the United States to a place outside the United States with the intent to promote the carrying on of specified unlawful activity, that specified activity is, conspiracy to possess with intent to distribute testosterone and its derivatives in violation of Title 21 United States Code Sections 846 and 841(a), which happens to be the exact same charge in Count One. Count two is a violation of 18 U.S.C. 1956(a)(2)(A) and (h). This statute

redundantly charges Mr. Root for the same conduct in Count one and is the quintessential definition of double jeopardy.

2. Plea Agreement

On November 30, 2016, Mr. Root entered into a plea agreement with the government in which he agreed to plead guilty to both counts of the indictment. Mr. Root admitted that the elements of both counts satisfied his conduct. What the plea agreement did not mention, what Mr. Root did not understand, and what his lawyer did not explain, is that these two counts constitute the elements of one illicit act. The Appellant did not understand that the addition of a multiplicitous money laundering charge would effectively increase his potential sentence by 10 years, from a 10 year maximum to a 20 year maximum. Being charged with the possession and distribution of testosterone and its derivatives in count 1, and the carrying on of the possession and distribution of anabolic steroids is tantamount to a violation of the double jeopardy clause of the 5th amendment to the Constitution.

After detailing the factual basis for Mr. Root's plea, the plea agreement set forth the parties' sentencing stipulations. The parties stipulated inter alia, that:

- Mr. Root was accountable for more than 60,000 units of testosterone and its derivatives as a result of his involvement in the conspiracy charged in count 1;
- the corresponding base offense level for count one was 20 pursuant to U.S.S.G. 2D1.1(c)(10);

- Mr. Root's base offense level for count two would be determined under U.S.S.G. 2S1.1(a)(1), and the base offense level under that provision was also 20 corresponding to the base offense level for the underlying offense;
- Mr. Root acted as the organizer or leader of a conspiracy involving five or more participants, subjecting him to a four-level enhancement under U.S.S.G. 3B1.1(a);
- Root was subject to a two-level enhancement under U.S.S.G. 2S1.1(b)(2)(B), because he pleaded guilty to a violation of 18 U.S.C. 1956;
- Counts one and two "grouped" under U.S.S.G. 3D1.2(c)
- "[t]he corresponding total offense level is 26"; and,
- The government agreed to recommend a total three-level downward adjustment for acceptance of responsibility under U.S.S.G. 3E1.1(a) and (b), making the stipulated offense level 23.

3. Entry of Guilty Plea

The District Court held a change of plea hearing on November 30, 2016. As relevant here, when the appellant told his attorney that he didn't launder money, Defense Counsel's response was, "that's just what they do". What Mr. Root did not understand is that although his charges were grouped, the money laundering charge would subject him potentially to 10 more years in prison than his possession and distribution of testosterone and its derivatives charge alone. Mr. Root's understanding of the charges was based on his attorney's flawed interpretation of the Constitution and lack of knowledge of Federal case law. Mr. Root plead guilty to both counts.

The Court explained the appeal waiver in the plea agreement to Mr. Root, who confirmed he understood that he would be able to appeal in the event of plain error, a breach of the plea agreement by the government, or a Constitutional violation, despite the waiver. In describing his legal experience, Mr. Root's attorney only mentioned one other Federal case he had ever taken. He further explained that he had spent roughly 45 hours on Mr. Root's case, but he did not divulge that any of those 45 hours were devoted to reading the PSR, understanding relevant case law, or understanding the Constitution in relation to his client's case.

4. Pre-Sentence Investigation Report

The Probation Office issued the PSR on March 20, 2017. The Probation Office determined that Counts One and Two "grouped", and that Mr. Root's guidelines range would be determined, unconstitutionally, under the money laundering guideline, U.S.S.G. 2S1.1, because it resulted in a higher offense level and subjected Mr. Root to a 20 year maximum under 18 U.S.C 1956(a)(2)(A) and (h).

In accordance with 2S1.1(a)(1), the Probation Office used U.S.S.G. 2D1.1 and noted that the stipulated amount of testosterone and derivatives for which Root was responsible, at least 60,000 units (100 units is about an average cycle, or use period, so 60,000 units is only about 600 cycles, or sales), resulted in a base level of 20, pursuant to U.S.S.G. 2D1.1(c)(10). The Probation Office further determined that this offense level should be increased by two levels under 2D1.1(b)(7), because Mr. Root distributed a controlled substance through mass-marketing by means of an interactive computer service; and by another two levels under 2D1.1(b)(15)(D), because Mr. Root was subject to an

aggravating role adjustment and was directly involved in the importation of testosterone and its derivatives. It is certainly argued here that, being charged with money laundering for sending money to China to buy testosterone to carry on the possession and distribution of testosterone in the United States, is the same overt act as importation, so once again the defendant is being multiplicitously convicted on the same conduct because of the Probation Office's recommendation. The latter two enhancements of 2D1.1(b)(7) or (b)(15)(D) were not stipulations included on the plea agreement.

The Probation Office likewise added two levels under U.S.S.G. 2S1.1(b)(2)(B), because Mr. Root was convicted under 18 U.S.C. 1956 (being charged and enhanced three times for the same conduct is now triple jeopardy).

As the parties had agreed, the Probation Office further applied a four-level aggravating role enhancement under 3B1.1(a) because Mr. Root was an organizer and leader of a conspiracy involving five or more participants.

With the Probation Department determining that the total offense level was 27 and his criminal history category score was II, Mr. Root's guidelines imprisonment range was 78-97, months. The Plea agreement stipulated to an offense level 23. Offense level 23 with a criminal history category II carries a guidelines range of 51-63 months.

REASONS FOR GRANTING CERTIORARI

I. CUMULATIVE ERRORS OF LAW AND FACT LED TO A MISCARRIAGE OF JUSTICE AND A CONSTITUTIONAL VIOLATION.

Mr. Root, a pro se appellant, may not have articulated the factual matter properly in his prior appeal brief, and thus the Appeals Court may not have had all the information to make their decision. The primary factual matter to be considered by the Supreme Court in considering this request for Certiorari is that, at the sentencing of Mr. Root, both the Government and Defense Counsel mistakenly accepted and consented to, and thus did not raise an objection to, an offense level of 27 as contained in the PSR, which has a guideline range of 78-97 months, rather than an offense level of 23, which has a guidelines range of 51-63 months, as stipulated and agreed to by both parties in the plea agreement. Therefore, the District Court Judge never considered the stipulations agreed to by both parties in the plea agreement when he sentenced Mr. Root to 78 months imprisonment.

In its Sentencing Memorandum, the Government mistakenly and admittedly (see Appendix pages A1-A2, letter dated December 18, 2018) miscalculated the guidelines range for the offense level 23 criminal history category II that was stipulated in the plea agreement as "70-87 months". The actual guidelines range for offense level 23 criminal history category II is 51-63 months (see sentencing table). The Government acknowledged it made this same error in the Government's response brief. The Government acknowledges in the letter dated December 18, 2018, its "miscalculation of the guidelines range in its sentencing memorandum" and the response brief, and that the appropriate range for an offense level of 23 with a criminal history category II "results in a guidelines range of 51-63 months, NOT 70-87 months" as was

incorrectly stated in the Government's sentencing memorandum and response brief. This caused the Government to recommend a sentence of 87 months, which was above the applicable guidelines range, when it intended to recommend a sentence of 63 months.

Mr. Root's defense attorney also made a grossly negligent oversight by mistakenly accepting, and consenting to, the offense level of 27 contained in the PSR rather than the offense level of 23 contained in the plea agreement and agreed to by both parties. Defense Counsel incorrectly (and ineffectively) thought and wrote in his sentencing memorandum that the offense level in the PSR was 23 (see Appendix page A3, Defense Counsel's Sentencing Memorandum), when in fact it was 27 (see Appendix page A4, paragraph 50 of the PSR). As a result of the error by both the Government and Mr. Root's defense attorney, the District Judge mistakenly sentenced Mr. Root to a sentence of 78 months, the low end of the range of the guidelines for an offense level of 27 criminal history category II. Had the Judge sentenced Mr. Root with the appropriate information of an offense level of 23 and criminal history category II, he would likely have sentenced Mr. Root to a sentence of 51 months, the low end of the guidelines range with the agreed upon and appropriate offense level.

This factual error is very similar to what occurred in the case of Rosales-Mireles v. United States, 138 S. Ct. 1897, 1905-06, 201 L. ED. 2d 376 (2018). In Rosales-Mireles, the defendant pled guilty to illegal reentry into the United States. In calculating the Guidelines range, the Probation Office's PSR mistakenly counted a state misdemeanor conviction twice. As a result, the report yielded a Guidelines range of 77 to 96 months, when the correctly calculated range would have been 70 to 87 months. Rosales-Mireles did not object to the error in the District Court, which relied on the miscalculated Guidelines range and sentenced him to 78 months of imprisonment. On appeal, Rosales-Mireles challenged the incorrect Guidelines range

for the first time. The Supreme Court held that "a miscalculation of a Guidelines sentencing range that has been determined to be plain and to affect a defendant's substantial rights calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence in the ordinary case".

In Rosales-Mireles, the court provided that "an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence greater than necessary to fulfill the purposes of incarceration, 18 U.S.C. 3553(a)". See Molina-Martinez, 578 U.S. 136 S. Ct. 1338, 194 L. Ed. 2d 444. The Court provided further that "risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of plain Guidelines error. Ultimately, the district court is responsible for ensuring the Guidelines range it considers is correct. At times, however, an error in the calculation of the Guidelines range goes unnoticed by the court and the parties. On appeal, such error not raised in the district court may be remedied under Federal Rule of Criminal procedure 52(b), provided that, as established in United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508: (1) the error was not "intentionally relinquished or abandoned," (2) the error is plain, and (3) the error "affected the defendant's substantial rights", Molina-Martinez v. United States, 578 U.S. 136 S. Ct 1338, 194 L. Ed. 2d 444.

In Mr. Root's case, had the Government not miscalculated the sentencing guidelines in its pre-sentencing submissions when it admittedly erred with a guidelines calculation of 70-87 months with an advocation for 87 months, and advocated for 63 months as it intended, the sentencing Judge would have realized the correct applicable guidelines range was 51-63 months. Likewise, had either the Government or Defense Counsel not both mistakenly consented to and

accepted the offense level of 27 as contained in the PSR, but rather had pointed the District Judge's attention to the fact that in the Plea Agreement both parties has stipulated, and mutually agreed to, an Offense Level of 23 with a corresponding guidelines calculation of 51-63 months, it is very likely that the sentence given Mr. Root would have been substantially less than the 78 month sentence he did receive. Just as in Rosales-Mireles, it is Root's contention that a sentence of 78 months, 27 months greater than the low level of the guidelines calculation of 51 months for an offense level of 23, is a result that "affects the defendant's substantial rights" and "undermines the integrity and fairness of the Justice System".

A. <u>Mr. Root Was Sentenced On A U.S.S.G Error That Is Obligated To Be Corrected Under Rosales-Mireles v. United States, 138 S. Ct. 1897, 1905-06, 201 L. Ed. 2d 376 (2018).</u>

The Government acknowledged a "miscalculation of the guidelines range in its sentencing memorandum" when it stated that offense level 23 criminal history category II is 70-87 months incarceration, and therefore it recommended a sentence "including a term of incarceration of 87 months" (see Appendix pages A1-A2, Government letter dated December 18, 2018). The correct guidelines range that the Government intended was 51-63 months (see Appendix pages A1-A2, Government letter dated December 18, 2018). This error went uncorrected through sentencing. The District Court Judge sentenced to 78 months incarceration on information that included that error, and without otherwise considering the lower stipulations of the plea agreement (see sentencing transcript). Had the Government not erred, and recommended a sentence of 63 months, as intended, at the top of the applicable guidelines range, then the District Court Judge likely would have sentenced the Appellant to 51 months incarceration. "Any amount of actual jail time is significant, and has

exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration. The possibility of additional jail time thus warrants serious consideration in a determination whether to exercise discretion under Fed. R. Crim. P. 52(b)." (Sotomayor, J., joined by Roberts, Ch. J., and Kennedy, Ginsburg, Breyer, Kagan, and Gorsuch, JJ) Id. Rosales-Mireles Headnote 9.

Under Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016), an incorrectly calculated United States Sentencing Guidelines range presumptively satisfies the prejudice prong of plain error review because of its "centrality" to a District Court's sentence. This error, and the lack of consideration of the correct guidelines range of the offense level stipulated in the plea agreement, substantially affects the fairness and integrity of the justice system.

B. <u>The Government Breached the Plea Agreement</u>

The Courts construe plea agreements "according to contract law principles," United States v. Yetman, 70 F.3d 746, 747 (2d Cir. 1995), but "because plea agreements are unique contracts, we temper the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards." United States v. Woltmann, 610 F.3d 37, 39-40 (2d Cir. 2010). Not the Government, the Defense Counsel, nor the District Court Judge mentioned the plea agreement, or the stipulations within, at sentencing (see sentencing transcript) and it was like the plea agreement never existed.

"To determine whether a plea agreement has been breached, a court must look to what the parties reasonably understood to be the terms of the agreement," and "any ambiguity should

be resolved against the Government." United States v. Miller, 993 F.2d 16, 20 (2d Cir. 1993). "Because the Government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant." United States v. Riera 298 F.3d at 133 (2d Cir. 2002). Moreover, "because plea bargaining requires defendants to waive fundamental constitutional rights, we hold prosecutors engaging in plea bargaining to the most meticulous standards of both promise and performance." United States v. Velez Carrero, 77 F.3d 11, 11 (1st Cir. 1996).

1. **The Government asserted the higher offense level stipulations of the PSR (27) were properly determined over the lower stipulations of the plea agreement (23); identical to the circumstances of United States v. Lawlor 168 F.3d at 637 (2d Cir. 1999).**

   At sentencing, the Government breached the plea agreement by agreeing with the Presentence Report and its higher offense level of 27 rather than the offense level of 23 stipulated in the plea agreement. The appellate Court, in its opinion (see Appendix pages, A13-A20, Government Mandate), never considered this aspect of a breach of the plea agreement

   A brand new prosecutor was assigned to the case at the time of sentencing. This prosecutor (Mr. Loveric) admitted he was not familiar with the case at the end of sentencing, so he rested on the former prosecutor's papers (see sentencing transcripts). However, the Appellate Court did not consider that he rested on his papers at the end of sentencing, after the adoption of PSR offense level 27, and he rested on a Sentencing Memorandum that contained a miscalculation of the Sentencing Guidelines (see

Appendix pages A1-A2, Government letter dated December 18, 2018) and a breach of the plea agreement.

At sentencing, the Government stated:

"Mr. Loveric (Prosecutor): We agree with the [Presentence] report, your Honor" (see Appendix page A6, sentencing transcript)

The Government's adoption of the findings of the Presentence Investigation Report without any mention of the plea agreement (see sentencing transcript, where the Government failed to even mention the plea agreement) violated the plea agreement insofar as this endorsement advocated, by reference, the imposition of a higher sentence than that which the parties agreed, United States v. Amico, 416 F.3d 163, 162 (2d Cir. 2005).

In United States v. Lawlor, 168 F.3d 633, 637 (2d Cir. 1999), the Court concluded that the Government breached a plea agreement when it told the Court that "the Presentence Report was appropriately scored in the first instance" notwithstanding the disparity between the PSR's and the plea agreement's offense level. Regarding Mr. Root's case, in the Government's Sentencing Memorandum, it is first stated, "The United States adopts the facts set forth in the Presentence Investigation Report ("PSIR) filed by the United States Probation Office on June 13, 2017." (see Appendix page A7, under number 1, paragraph 2, first sentence). At sentencing, as stated above, Mr. Lovric (the Government) stated, "we agree with the [presentence] report, your Honor." (see Appendix page A6,

sentencing transcript). With these statements, the Government in no way "acknowledged its obligation to advocate for the calculation presented in the plea agreement." United States v. Dykes, U.S. App. Lexis 4948 (2d Cir. 2018). At sentencing, the Government did not mention the plea agreement (see sentencing transcript), let alone acknowledge its obligation to advocate for the calculation presented in the plea agreement.

A defendant is not required to object to the violation of a plea agreement at the sentencing hearing, (Id. Lawlor 633)(quoting United States v. Salcido-Contreras, 990 F.2d 51, 52 (2d Cir. 1993). Thus Mr. Root's claim is not barred by his failure to raise this issue with the District Court, nor is this Court bound to apply a plain error standard of review. Yet, in its opinion (see Appendix pages A13-A20, Government Mandate), the Appellate Court did apply a plain error standard of review.

The Government, in its response brief, uses United States v. Riera, 298 F.3d 178, 133 (2d Cir. 2002) to determine whether a plea agreement has been breached. The Court looks to "the reasonable understanding of the parties as to the terms of the agreement". The understanding of the parties as to the terms of the agreement were an offense level of 23 as stated in the "Sentencing Stipulations" section of the plea agreement, and the Government needed to mention that in its memorandum and at sentencing without explicitly also stating it adopts and agrees with the findings of the PSR, which included an offense level 27.

The agreement to an offense level 23 urged the Government to advocate to a guidelines range of 51-63 months as a stipulation. By concurring with the Presentence Report's findings, the Government implicitly agreed with the application of offense level 27, and explicitly agreed with the offense level 27 when it stated, "The Government agrees with the calculations and the analysis set forth in the PSIR, which scores a total offense level is 27" (see Appendix page A8).

2. **The Government Advocated For 87 Months Imprisonment (Appendix Page A7, Fourth Line Under The Heading "GOVERNMENT'S SENTENCING MEMORANDUM") While The Plea Agreement Stipulated To Offense Level 23 Or 51-63 Months, And The Plea Agreement Did NOT Allow The Government To Recommend A Higher Sentence.**

The Appellate Court, in its opinion (see Appendix pages A13-A20, Government Mandate), and the Government, admitted that the Government advocated for a sentence of 87 months and "above the applicable guidelines" range stipulated in the plea agreement of 51-63 months. The Appellate Court stated in its opinion (see Appendix pages A13-A20, Government Mandate) that the "plea agreement explicitly permitted the Government to do so". BUT IT DOES NOT! The Appellate Court, in its opinion (see Appendix pages A13-A20, Government Mandate), using only a portion of the actual sentence, quoted ""...[T]his agreement does not prevent the government from...recommending that the Court impose a sentence above the applicable guidelines range."" The Court only used a portion of the sentence, and took the quote out of context. The whole sentence states: **"Unless a stipulation in this plea agreement explicitly limits the Government's discretion with respect to recommendations at**

sentencing, this agreement does not prevent the Government from...recommending that the court impose a sentence above the applicable guideline range." (see Appendix page A9). A stipulation in the plea agreement DOES explicitly limit the Government's discretion with respect to recommendations at sentencing, an EXPLICIT stipulation of offense level 23 that is in the "Sentencing Stipulations" section of the plea agreement (see Appendix pages A10-A11)! The Government plea agreement is a cookie cutter solution, or a template that is used for all plea agreements, and the Defendant's information is simply plugged in where it is pertinent. This is an example of a generalized provision that was taken out of context and misunderstood. The plea agreement does not permit the Government to advocate for a sentence above the stipulated guidelines range of 51-63 months.

The Government advocated for an 87 month sentence (see Appendix page A7, fourth line under "GOVERNMENT'S SENTENCING MEMORANDUM), and Mr. Root received a 78 month sentence, the bottom of the only guidelines range the Judge considered, because the Judge did not realize the guidelines range stipulated in the plea agreement was 51-63 months (no mention of it at sentencing as seen in the sentencing transcript). Had the Government advocated for the highest sentence allowed under the plea agreement, 63 months, as it intended, the Judge would likely have sentenced Mr. Root to the low end of the applicable guidelines range, 51 months.

The District Court Judge is not obligated to sentence within the guidelines determined in the plea agreement, but the District Court Judge is obligated to consider the guidelines in

the plea agreement. The District Court Judge did not consider the sentencing factors in the plea agreement's guidelines range (see sentencing transcript). The court made no indication that it was aware that the parties had stipulated to a lower offense level (see sentencing transcript). How could it with all the misstating, agreeing, and adopting of the PSR the Government was doing? The Government stated in its Sentencing Memorandum, "the Defendant's total offense level is 23 and his criminal history category is II. As a result, absent any departures, the sentencing guidelines advise that the Defendant receive a sentence of 70-87 months incarceration." (see Appendix page A12). The Government and the Appellate Court have since admitted that this is incorrect. For offense level 23 at a criminal history category II is 51-63 months incarceration (see sentencing table). This is where the Government breached the plea agreement by recommending 87 months incarceration in its Sentencing Memorandum. With all the adopting, and agreeing with the PSR, and using the incorrect Sentencing Guidelines by the Government, how could the District Court understand what was actually agreed to by both parties in the plea agreement? The Court chose the bottom of the PSR guidelines, the only guidelines range it knew to consider due to the Government breach, Defense Counsel ineffectively agreeing with the higher offense level of the PSR (27), and Defense Council failing to mention the offense level in the plea agreement (23). And so it should be that the District Court would have sentenced to the bottom of the guidelines range of 51 months if the proper, intended, and applicable guidelines range was even mentioned or considered at sentencing.

We reiterate the admonition that we have expressed to the Government on other occasions "that [it] take much greater care fulfilling its responsibilities where the plea agreements are involved." United States v. Brody, 808 F.2d 944, 948 (2d Cir. 1986). "Given the Government's often decisive role in the sentencing context, we will not hesitate to scrutinize the Government's conduct to ensure that it comports with the highest standard of fairness".

C. MR. ROOT'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

1. Defense Counsel Failed To Understand The Offense Level In The PSR.

Defense Counsel thought and wrote in his Sentencing Memorandum that the offense level in the PSR was 23 (see Appendix page A3, Defense Counsel's Sentencing Memorandum), when in fact it was 27 (see Appendix page A4, PSR paragraph number 50), because he failed to read and understand the Presentence Investigation Report.

A Defense counsel that was conforming to an objective standard of reasonableness under prevailing professional norms (Lafler v. Cooper, 566 U.S. 156, 163 (2012)) would have read and understood the offense level laid out in the PSR was higher than the offense level in the plea agreement and objected to the disparity. As evident in Defense Counsel's Sentencing Memorandum, he erroneously thought the offense level in the PSR was 23 (see Appendix page A3, Defense Counsel's memorandum). Defense Counsel's ineffectiveness is fully developed on the record and in the Sentencing Memorandum as the first sentence of the second paragraph states, "As set forth in Mr. Root's Pre-Sentence

report, the applicable guideline level based upon the plea herein is 23" (see Appendix page A3, Defense Counsel's Sentencing Memorandum). Again, the offense level in the PSR is clearly 27 (see Appendix page A4, paragraph 50). There was no objection to the PSR at all by Defense Counsel (see Appendix page A5 in the PSR), and this gross negligence and miscomprehension of the offense level in the PSR lasted through sentencing. This prejudiced Mr. Root by allowing the Government and the Court to adopt the higher offense level of the PSR, and prejudiced the Petitioner from being considered and likely sentenced under an offense level of 23, 51-63 months, instead of offense level 27, 78-97 months.

2. **At Sentencing, Defense Counsel Agreed With The Higher Offense Level In The PSR, And Failed To Mention The Lower Offense Level Stipulated In The Plea Agreement.**

Defense Counsel's ineffectiveness continues when, at sentencing, The Judge asked:

"The Court: Is there anything in [the PSR] , Mr. Battista (Defense Counsel), you think is factually not accurate (see Appendix page A6 of the Sentencing Transcript)?

Mr. Batista: I do not, your Honor (see Appendix page A6 of the Sentencing transcript)."

Defense Counsel agreed with and failed to object to the PSR at sentencing. He never even mentioned the lower offense level of 23 in the plea agreement at all. Defense Counsel then allowed the Court and the Government to adopt the higher offense level in

the PSR (27) over the lower offense level stipulated in the plea agreement (23) without any objection.

A competent Counsel would have objected to the disparity between the PSR and the plea agreement and advocated for the offense level of 23 in the plea agreement. From the sentencing transcript, it is obvious the District Court Judge was not aware of the lower offense level in the plea agreement, and Defense Counsel's objection would have forced the Government and the District Court Judge to have a conversation about the plea agreement.

Defense Counsel abdicated his role as the Defendant's advocate, and did not function as the effective Counsel that is guaranteed by the 6th Amendment to the Constitution.

D. THE COURT ABDICATED ITS RESPONSIBILITY TO CONSIDER THE PLEA AGREEMENT.

At sentencing, the District Court adopted the offense level 27 of the PSR, 78-97 months, and sentenced Mr. Root to 78 months. It is apparent that the District Court Judge did not realize the plea agreement stipulated to a lower offense level 23, 51-63 months, because it was never considered or even mentioned by the District Court Judge (see sentencing transcript).

Understanding that the Court was not obligated to the terms of the plea agreement, the District Court is obligated to consider the plea agreement. Why would anyone knowingly, voluntarily, and competently agree to a plea and waive their right to appeal when, at

sentencing, without a word, without an utterance, without any consideration of the plea agreement at all by the Government, Defense Counsel, nor the District Court, the Defendant is suddenly blindsided and relegated to almost twice the imprisonment for which he agreed to plead guilty? This is an agreement for which the Defendant agreed to sign away his freedom, and the government, Defense Counsel, nor the District Court mention the word "plea" or "agreement" in the entire sentencing transcript. At least a mention of the stipulations in the plea agreement, and an explanation as to why the Court adopted the higher offense level of the PSR would have been more in line with the standard principles of fairness. "[T]he sentencing court failed to enunciate any rationale for the defendant's sentence [range], thus amounting to an abdication of judicial responsibility subject to mandamus." Gomez-Perez, 215 F.3d at 319.

If these circumstances were indicative of the fairness and integrity of the justice system, then no one would ever sign a plea agreement. "[A] defendant may be deemed incapable of waiving a right that has an overriding impact on the public interests", United States v. Ready, 82 F.3d 551, 555 (2d Cir. 1996), as such an abdication of judicial responsibility to consider the plea agreement may "irreparably discredit[] the federal courts," id at 556 (quoting United States v. Mezzanatto, 513 U.S. 196 204, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995)).

II. A DEFENDANT MAY NOT BE CONVICTED OF MONEY LAUNDERING FOR BUYING CONTRABAND WHEN THE PURPORTED CONDUCT PRESENTS A "MERGER PROBLEM" WITH A CONVICTION FOR DISTRIBUTION OF SAID

CONTRABAND AS DELINEATED IN THE SUPREME COURT DECISION IN UNITED STATES V. SANTOS.

A. The Supreme Court Plurality Decision In United States v. Santos Should Apply In The Second Circuit As It Does In Other Circuits.

In United States v. Santos, 553, U.S. 507, 514, 128 S. Ct. 2020, 2026, 170 L. Ed. 2d 912 (2008), the 'proceeds' argument was used to attack a broader "merger problem", where Justice Stevens admitted "[a]llowing the Government to treat the mere payment of the expense of operating an illegal ... business as a separate offense is tantamount to double jeopardy, which is particularly unfair in this case because the penalties for money laundering are substantially more severe than those of the underlying offense..." Santos, 128 S. Ct. at 2020. The five affirming Judges had to define 'proceeds' to mean profits, solely to keep recalcitrant and insidious prosecutors from choosing between an underlying activity and the money laundering statute itself for a harsher conviction. The plurality in Santos could not see "why Congress would have wanted a transaction that is a normal part of a crime it has duly considered and appropriately punished elsewhere in the criminal code to radically increase the sentence of that crime", Santos, 553 U.S. 2020, 2026.

The Government notes that 1956(a)(2)(A), and the 1956 statute in general, prohibits the transfer of money to buy contraband. But, as we see in United States v. Santos, Albernaz v. United States, Blockberger v. United States, Cuellar v. United States, the Second Circuits United States v. Zvi, 168 F.3d 49 (2d Cir. 1999), United States v. Stravroulakis, 952 F.2d 686 (1982), and United States v. Huezo, 546 F.3d 174, 179 (2d Cir. 2008), not when multiplicity

is at issue, and the defendant is already charged with distributing said contraband. These cases spoke broadly about the 1956 statute, and encourage triers of fact to take in the whole picture and "rely on their common sense and experience in drawing inferences". No person of average intelligence would see the elements of Mr. Root's money laundering conviction as actual guilt of money laundering. The overseas transfer in this case, as stated in the Pre-Sentence Report, were solely intended to purchase testosterone and its derivatives from China, "a mere payment of an expense of operating" a business (Santos, 553 U.S. 2020, 2026), with no attempt to conceal or hide the money transfer. Buying products from China is not independently illegal and buying testosterone from China is not illegal. The illegal act began with the possession and distribution of testosterone and its derivatives in the United States, which is the same overt act for both of Mr. Root's convictions, and is therefore a violation of the Double Jeopardy Clause of the 5th Amendment. The money transfer to buy products was not a subject of unlawful activity and therefore does not violate the statutes of 18 U.S.C. 1956(a)(2)(A) or 1956(h). The independent but overlapping statutes simply are not "directed toward separate evils" under the circumstances, Albernaz v. United States 450 U.S., at 343, 67 L. Ed 2d 275 101 S. Ct. 1137 (1981).

The Second Circuit set its precedent on the matter in United States v. Quinones, 635 F.3d 590, 599 (2d Cir. 2011). The Quinones Court followed Mark v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) in determining; when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of 5 Justices, "the holding of the Court may be viewed as that position taken by those MEMBERS who CONCURRED in the judgments on the narrowest grounds" (emphasis mine), and elected to

take only Justice Stevens' viewpoint that "proceeds" does not mean "profits" for contraband. This Marks quote is highly contested by Circuits and other Supreme Court cases. Who is to decide which opinion is myopically "narrower"? Justice Stevens himself said in a footnote to his opinion in Santos, only if he could locate adequate legislative history to rebut the presumption that "proceeds" does not mean "profits" only for contraband, would he conclude that Congress meant for the "NARROWER" definition to apply, Santos, 128 S. Ct. at 2034 n.7 (emphasis mine). We now have adequate legislative history in the Second Chance Act and the First Step Act where many contraband sentencing guidelines and mandatory minimums were lowered; that the intent of Congress is to lower contraband sentencing, not to increase it through the unrelated 1956 statute. The Justice Stevens footnote in Santos means that even he indicated that the "narrower" definition is that "proceeds" means "profits" in all cases where a "merger problem" is presented, contradictory to what the Quinones Court set as Circuit precedent. This means that of the five Judges affirming, four Judges, or "Members" (using the term out of the Marks quote), concurred that 'proceeds' means profits when a "merger problem" is presented. Four of the five assenting Justices "narrow" down the controlling view. It should not mean that the most myopic viewpoint is the governing standard. If four out of five affirming Judges concur on one position, why would the one odd Judge out dictate the governing standard? The "merger problem" is tantamount to double jeopardy, that is agreed upon by all 5 assenting Justices, and that is what the instant case is about, as it does not even present the 'proceeds' argument because the term 'proceeds' is not in the 1956(a)(2)(A) provision. And, the "merger problem" is tantamount to double jeopardy for some predicate crimes and not for others, is contrary to the Supreme Court's holding that

Judges cannot give the same statutory text different meanings in different cases, Clark v. Martinez, 543 U.S. 371 125 S. Ct.716, 160 L. Ed. 2d 734 (2005).

The Appellate Court, in its opinion (see Appendix pages A14-A19), used United States v. Peirvinanzi, 23 F.3d 670, 680 (2d Cir. 1994), a pre-Santos case before there was a defined "merger problem", to deny Mr. Root's appeal on the grounds that this case did not require 1956(A)(2)(a) to have two analytically distinct illegal acts, one of which contains an element of money laundering. In Piervinanzi, the defendant fraudulently transferred funds out of a bank account to steal the money, and transferred this money to the Cayman Islands to conceal, hide, and prevent the money from being traced. In other words, Piervinanzi actually laundered money. This is precisely what Mr. Root did NOT do, and is in compelling contrast to the facts of the instant case. Mr. Root did not fraudulently transfer money overseas, and he did not act or intend to hide or conceal the funds. The transactions were simply to buy business inventory. The money transfer was not independently illegal, and the underlying specified unlawful activity was already charged and convicted in Count 1.

While the Second Circuit holds the most myopic interpretation of Santos, other Circuits have kept to its intended interpretation, and recognize that fairness dictate a distinct, illegal, laundering act must accompany a 1956(a)(2)(A) conviction. United States v. O'Conner, 158 F. Supp. 2d 697, 726 n.52 (Ed. Va. 2001); United States v. Savage, 67 F.3d 1435, 1440 (9th Cir. 1995), United States v. Johnson, 971 F.2d 562, 566 (10th Cir. 1992), are three circuits that require concealment or an "aura of legitimacy" to accompany a conviction on a 1956(a)(2)(A) charge. Garland v. Roy, 615 F.3d 401 (5th Cir. 2010) states, if a Court

determines the defendant faces a "merger problem", then consistent with the plurality's decision in Santos, the rule of lenity governs, and the Court need not proceed to Justice Stevens' analysis. The fact is, because Mr. Root's conviction presents a "merger problem", there is no need to analyze the "proceeds" argument and the conclusion is a finding tantamount to double jeopardy. Other Circuits have analyzed Santos and interpreted Justice Stevens as too narrowly limiting the decision of the plurality or failing to give full effect to the concurrences meaning, Id. at 403. Garland's convictions "merged", as defined by Justice Stevens and the plurality, with his money laundering convictions Id. at 404, just as Mr. Root's convictions "merge" and act as a conviction of a non-existent offense.

United states v. Kratt, 579 F. 3d 558, 562 (6th Cir. 2009) held that proceeds mean profits when the predicate offense presents a merger problem. The Kratt Court argues whether proceeds mean profits to decide if there is a merger problem. The Kratt Court makes it clear that in Santos, if there is no proceeds argument, but a merger problem exists as in Mr. Root's instant case, then there is no question it is tantamount to double jeopardy and the offense is non-existent.

United States v. Simmons, 737 F.3d 319 (4th Cir 2013) states that the money laundering transactions were elements of the offense, and hence, the conviction could not stand.

United States v. Halstead, 634 F.3d at 279 (4th Cir. 2011) states that because the merger problem provided the driving "force" behind both the plurality's and Justice Stevens' opinions, we recognize that Santos compelled us to construe the money laundering statute so

as to avoid punishing a defendant twice for the same offense, Id. at 278-79. "We concluded that a defendant cannot be convicted of money laundering merely "for paying the essential expenses of operating the underlying crime."" Id. at 278.

United States v. Cloud, 680 F.3d 406 (4th Cir. 2012) states the money laundering convictions constituted "essential expenses" of the scheme. As in Mr. Root's case, the possession and distribution "depended...upon payments" or the conspiracy "could not have succeeded, and the Cloud Court held that convicting him separately for these transactions would present the very same merger problem identified in Santos, Id. at 407.

As in United States v. Abdulwahah, 715, F.3d 521 (4th Cir. 2013), Mr. Root resembles the paradigmatic person who uses "stolen money to pay for a getaway car", and it is therefore concluded that the same merger problem presented in Santos barred the money laundering convictions.

As in United States v. Simmons 737 F.3d 325 (4th Cir. 2013), similarly, Mr. Root has been convicted of possession and distribution of testosterone and its derivatives in count 1, money laundering for buying said testosterone and carrying on the possession and distributing of the testosterone in count 2, and Mr. Root was charged with the volume of 60,000 units in count 1 which was due to the buying and carrying on of the possession and distribution activity charged in count 2; and he is given an enhancement and more prison time under 2S1.1(b)(2)(B) just because Mr. Root "was convicted under 18 U.S.C. 1956". Santos's gambling scheme and Mr. Root's scheme resemble each other in virtually all material

respects; both constituted ongoing schemes rather than discrete criminal transactions. The indictments in both cases charged underlying conduct that spanned a number of years rather than a single illegal act. And both schemes required occasional payments to third parties to sustain the crime during its lifespan.

B. Congress Can Not Create A Redundant Provision In A Statute Barring Conduct That Does Not Conform To The Definition Of The Statute's Term.

Black's Law Dictionary defines Money Laundering as: "The act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced". Buying products from China for inventory to operate a business without the attempt to conceal the source or prevent the money from being traced does not constitute money laundering. Any rational trier of fact could not ascertain that buying inventory for the operation of his business constitutes money laundering. Inherent within the concept of money laundering, there exists a requirement to conceal or legitimize money in order to fit the innate definition. If Mr. Root had transferred money to China, and bought art, or something of value, and sold it in the United States, and then claimed that money as legitimate income on his taxes; then that would be money laundering under 1956(a)(2)(A). The elements have to be construed in conjunction with the circumstances. If someone is legally target practicing with a gun, and a bystander suddenly and accidentally jumps in the way of someone's bullet and the bystander is killed, that person is not charged with manslaughter or involuntary manslaughter. Even though technically the elements fit the definition of the crime because someone fired a bullet that was the direct cause of a person's

death, the circumstances do not conform to the concept of manslaughter. In the same way, the circumstances of Mr. Root's case do not conform to the concept of money laundering.

Prior to United States v. Santos in 2008, Courts allowed convictions for money laundering merely for buying contraband (now only the Second Circuit allows this). Prosecutors insisted that Congress intended to further punish contraband crimes using the money laundering statute. But, buying contraband does not constitute money laundering. In order to possess and/or distribute contraband, one inherently has to obtain it, usually through buying the contraband. When anything is bought, it is also simultaneously and overtly possessed. Would it be less illegal to steal the contraband? That seems like a dangerous precedent to set. If Congress intended to increase the punishment for contraband, then they have to write that directly into the contraband statute. With the Second Chance Act, the Fair Sentencing Act, and the First Step Act, legislative history has suggested a bipartisan push to lower excessive punishment for contraband, not to increase punishment through the unrelated money laundering statute.

In this case, the canons of justice beg the question: Can Congress capriciously write a provision barring actions that do not fit the inherent definition of the Statute? Would Congress be able to write a provision barring; the transfer of a monetary instrument from a place inside the United States to a place outside the United States in order to carry on specified unlawful activity (the same charge as count 2 in the instant case), into the murder statute? So, when the Petitioner sends money to China to purchase inventory for his business, he would be guilty of murder? The notion of this occurring is ludicrous, and such a

law would not prevail through our system of checks and balances. So, why does the Second Circuit continue to convict for money laundering when the Defendant's actions do not conform to the definition of money laundering (United States v. Sanchez, another case currently in the Second Circuit, similar to the instant case, has just charged money laundering for the same circumstances as the instant case)?

The 1956(a)(2)(A) provision does not contain the word concealment, but it is sandwiched in between two provisions that do. The language and interpretation of that language is the same for all of the money laundering provisions, and the 1956 statute as a whole implies some form of concealment as a necessary contingency. The Government wrote; "The Supreme Court noted in Cuellar:, that 1956(a)(2)(A) "punishes the mere transportation of lawfully derived proceeds, " where the defendant "inten[ded] to promote the carrying on of specified unlawful activity." Cuellar, 553 U.S. at 561 n.3. So how could this occur? If someone, say, built a big house for $200,000, and then sold it for $1,000,000 cash, then transferred that $1,000,000 to the Cayman Islands to avoid taxes, there would be two distinct elements and two independent illegal acts; transferring money to hide it from the United States Government, and evading taxes. THAT would be a violation under 1956(a)(2)(A). Money was transferred to hide it from the United States Government, which constitutes money laundering, in order to carry on a scheme to evade taxes. 1956(a)(2)(A) contains an unlawful activity, but it also has to contain an element of money laundering, or some form of concealment. Other businesses do not get charged with money laundering when they buy products from China to sell in the United States. Mr. Root was charged in count 1 with possession and distribution of testosterone and its derivatives in the United States, so take

those elements out, now Mr. Root bought products from China to sell in the United States, and there is nothing illegal about that aspect.

The language in Cuellar v. United States and United States v. Santos spoke broadly about the 1956 statute. It encourages triers of fact to take in the whole picture and "rely on their common sense and experience in drawing inferences". No person of average intelligence would see the elements of Mr. Root's money laundering conviction as actual guilt of money laundering.

III. THE PROBATION DEPARTMENT'S RECOMMENDATION OF OFFENSE CONDUCT AND OFFENSE LEVEL IN THEIR PRESENTENCE REPORT IS TANTAMOUNT TO A SECOND (OR DUAL) PROSECUTION, GOES AGAINST THE STANDARD PRINCIPLES OF FAIRNESS, IS NOT AUTHORIZED UNDER THE UNITED STATES CODE SERVICE, AND LEADS TO AN OVERABUNDANCE OF COSTLY PRE-TRIAL ERRORS.

The presentencing proceedings can be wrought with errors and unfairness. First, a defendant mounts a contentious defense with a prosecution to arrive at a plea agreement. Subsequently, the defendant is again forced to defend against an often more draconian and unfair second prosecution of offense conduct from the probation department. This could be considered tantamount to a second, or dual, prosecution.

In the presentation of the Presentence Investigation report, the probation officer exhibits a personal opinion of offense conduct sentencing enhancements which acts to adjudicate the length of a defendant's sentence. The probation officer's uneducated recommendation of a defendant's

offense level is most often higher than the offense level agreed to by the United States Attorney in the plea agreement. This combined with the preferential weight given by the District Court Judge to this Presentence Investigation report leads to a large portion of the merciless unfairness and over sentencing that is endemic within the judicial system.

The probation department has misinterpreted its duties under the Federal Rules of Criminal Procedure 32(d), (see Appendix pages A22-A23). Rule 32(d) Presentence Report, does not infer that offense conduct sentencing enhancements and prosecution of a criminal defendant may be dictated by a probation officer.

Rule 32(d) Presentence Report, (1) Applying the advisory Guidelines (see Appendix pages A22-A23), the presentence report must: (A) identify all applicable guidelines and policy statements of the Sentencing Commission; (B) calculate the defendant's offense level and criminal history category; (C) state the resulting sentencing range and kinds of sentences available; and (D) identify any relevant factor to: (i) the appropriate kind of sentence, or (ii) the appropriate sentence within the applicable sentencing range. The meaning of this has been misinterpreted. The word "IDENTIFY" in Rule 32(d)(A) means to identify all applicable guidelines that have been determined by the United States Attorney in the plea agreement and the policy statements of the sentencing commission thereof. From the United States Attorney's stipulations, identify the offense level, sentencing range, and kinds of sentences available (e.g. probation, incarceration). Relevant factors (e.g. 18 U.S.C.S. 3553(a) factors, collateral factors) to the appropriate kind of sentence and the appropriate sentence within the applicable sentencing range that has been determined by the United States Attorney are also identified. Black's Law Dictionary defines IDENTIFY as: "To specify as the object of a contract <identify the appliances to the contract>". In the context of a pre-trial criminal case, the word "IDENTIFY" here means

to specify the appliances of the contract made in the plea agreement, or to reiterate the facts from other presentencing submission for purposes of consolidation. The word "IDENTIFY" in Rule 32(d)(A) does not mean that a legally unschooled probation officer should re-prosecute the case a second time by giving his/her opinion as to offense level and length of a defendant's sentence. But, somehow, the probation department has misunderstood Rule 32 under (d) Presentence Report, and they have been allowed to play a large role in determining the length of many defendant's sentences.

The probation department, and a probation officer, lack colorable authority to act as a prosecutor. A probation officer does not possess the prosecutorial power to bring charges against a criminal suspect before a Court. A probation officer is not educated in law administration, as is a United States Attorney, and does not possess the qualifications or credentials to administer the law. Such discretion is an integral feature of the criminal justice system, and is appropriate so long as those administering law have the proper qualifications to do so. This authority is delegated solely to the United States Attorney under Article II, section 3 of the United States Constitution and 28 U.S.C.S. 519 (see Appendix page A24), 515(a)(see Appendix page A25), and 547(1)(see Appendix page A26) - Not to probation officers

A probation officer lacks the education and credentials under the American Bar Association to understand the advanced concepts of offense conduct (i.e. multiplicity, duplicity, double counting...), and cannot be allowed to present his/her recommendation of a sentence in the Presentence Investigation Report. The Presentence Investigation Report is considered first by the District Court Judge, and often given greater weight than any other presentencing submission, including the plea agreement. This routinely causes errors of fact and law,

unfairness, and leads to innumerable post-conviction remedies that clog up the court system and force the taxpayer to bear the burden of the associated cost.

It is respectfully requested that probation departments be compelled to act within the scope of their authority by precluding a probation officer's prosecutorial opinion of a defendant's offense conduct and sentencing enhancements that determine offense level in the presentence investigation report, and that they just restate the facts of the presentencing submissions.

CONCLUSION

This case typifies the "deep[] pathology" in the federal criminal code that has led to "overcriminalization and excessive punishment." Yates v. United States, 135 S. Ct. 1074, 1100-01 (2015). The petition for writ of certiorari should be granted.

Respectfully Submitted,

Ryan Root

November 4, 2019