No. _____

In The

Supreme Court of the United States

RAHUL RAMESH JOSHI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE GOVERNMENT'S BREACH OF THE PLEA AGREEMENT CONSTITUTED A DUE PROCESS VIOLATION, WHICH REQUIRED REMAND FOR A *DE NOVO* RESENTENCING?

RELATED CASES

United States v. Joshi, No. 4:19-CR-00188, Eastern District of Texas, judgment entered March 4, 2020.

United States v. Joshi, No. 20-40186, Fifth Circuit Court of Appeals, judgment entered January 8, 2021.

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The Petitioner, Rahul Ramesh Joshi, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Fifth Circuit Court of Appeals decision, *United States v. Rahul Ramesh Joshi*, is an unpublished decision reported at 832 Fed. Appx. 931. The decision entered January 8, 2021. A copy of the unpublished opinion is included in the attached appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law.

STATEMENT OF THE CASE

On August 14, 2019, Joshi was named in a single count indictment alleging a violation of 18 U.S.C. § 875(c) (sending threatening communications to injure another). Joshi retained counsel, David Michael

Finn, a prominent and well respected local attorney. Joshi was released on conditions. A plea agreement was promptly negotiated and a guilty plea entered October 3, 2019 pursuant to the plea agreement.

The plea agreement contained three provisions which are pertinent to this petition:

> (1) Paragraph 5 of the plea agreement provided as follows:
>
> Guideline Stipulations: The parties stipulate to the following factors that affect the appropriate sentencing range in this case:
>
> a. The base offense level is 12 pursuant to U.S.S.G. § 2A6.1(a)(l).
>
> b. A two level increase applies as to U.S.S.G. § 2A6.1(b)(2).
>
> c. A reduction of three levels for acceptance of responsibility under U.S.S.G. § 3E1.1 applies; however, this stipulation is subject to recommendation of the United States Probation Office. If circumstances indicating that the defendant has not accepted responsibility become known after execution of this Agreement, this stipulation is void and the defendant may object to the failure of the Presentence Report to recommend the reduction. The government's request to decrease the offense level by one level in accordance with U.S.S.G. § 3El.l(b) is

> contingent on the defendant demonstrating acceptance of responsibility for the offense conduct and cooperating fully in recovering restitution for all relevant conduct.

The parties understand that the Court is not bound by these stipulations. Furthermore, the parties specifically agree that other specific offense characteristics or guideline adjustments may increase or decrease the appropriate sentencing range. Nothing in this agreement will preclude argument by either party regarding any other specific offense characteristic or guideline adjustment. Based on the defendant's criminal history, the defendant's base offense level may increase under the career offender guidelines, U.S.S.G. § 4B1.1, or the guidelines implementing the Armed Career Criminal Act, U.S.S.G. § 4B1.4. It will not be a violation of this agreement for either party to argue for or against the changed offense level resulting from the defendant's criminal history.

(2) Paragraph 6 of the plea agreement provided:

Acceptance of Responsibility: The defendant understands that by accepting responsibility and giving truthful and complete information concerning his participation in the offense of conviction he may be entitled to a reduction in his offense level under § 3E1.1 of the Sentencing Guidelines. The defendant shall not violate any other state or federal law or take any

action that would obstruct the government's investigation into the offense of conviction or other criminal activities. Upon request, the defendant shall submit a personal financial statement under oath and submit to interviews by the government and the United States Probation Office regarding his ability to satisfy any fines or restitution to be imposed.

(3) Paragraph 11 of the plea agreement provided:

Waiver of Right to Appeal or Otherwise Challenge Sentence: Except as otherwise provided in this paragraph, the defendant waives the right to appeal the conviction, sentence, fine, order of restitution, or order of forfeiture in this case on all grounds. The defendant further agrees not to contest the conviction, sentence, fine, order of restitution, or order of forfeiture in any post-conviction proceeding, including, but not limited to, a proceeding under 28 U.S.C. § 2255. The defendant, however, reserves the right to appeal any punishment imposed in excess of the statutory maximum. The defendant also reserves the right to appeal or seek collateral review of a claim of ineffective assistance of counsel.[1]

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[1] One wonders why this plea agreement was accepted by the defendant. Of what it did offer which was legally possible, the stipulation as to U.S.S.G. §§ 2A6.1(a)(1) and 2A6.1(b)(2), this would have applied without an agreement from the Government, and the one thing which did appear to turn on some exercise of Government discretion, a motion by the Government for a third

The presentence investigation report ("PSR") determined the applicable guideline base level to be as stipulated, and determined that there was only a single two level upward enhancement, also as stipulated in the plea agreement, but found that Joshi was only entitled to a two, and not a three, level reduction for acceptance of responsibility. The third level did not apply *as a matter of law* because a third level of acceptance of responsibility only applies if the adjusted offense level before application of U.S.S.G. § 3E1.1(a) *is level 16 or greater*. The parties had stipulated, correctly, that the adjusted offense level would be 14. So, based on their own stipulation there was no way Joshi could ever receive the third level the Government had agreed to recommend. The agreement was a legal impossibility.[2]

Even after receipt of the initial PSR, the defense counsel apparently did not recognize the mistake and

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level of acceptance of responsibility, the Government failed to do, and even had it been done it was legally impossible for the Court to apply it. Thus, Joshi could get nothing of benefit from the plea agreement, the one thing the Government expressly promised to do, it failed to do, and instead the only party to benefit from the plea agreement was the Government, which in exchange for a legally impossible promise, obtained Joshi's waiver of his right of appeal. Not only did the Government breach the plea agreement by omission, by failing to move for a third level of acceptance of responsibility as it obligated itself to do, it affirmatively breached the plea agreement by its upward departure motion discussed *infra*.

[2] This error and legal impossibility was so patent, it is remarkable that none of the lawyers nor the Magistrate Judge recognized it.

filed an objection to the denial of the third level of acceptance of responsibility.

> Defendant objects to paragraph 3.iii on page 3. The report states a three-level reduction for acceptance of responsibility. However, adjustment for obstruction of justice (*sic*) on paragraph 30 on page 10 only states two-levels. Please consider a reduction of three levels.[3]

Despite having obligated itself to file a motion for a third level of acceptance of responsibility under paragraph 5 of the plea agreement, the Government failed to do so. Although the *Court* was precluded from applying a third level downward adjustment under the Guidelines, there was nothing to prohibit the Government from acknowledging its mistake and filing a motion to effectuate the intent of the parties, which was that the total offense level be 11 and not 12. Any good faith interpretation of the agreement, if the agreement were to be salvaged despite this material term which was legally impossible of performance, would have required the Government to do this, which it failed to do.

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[3] The objection is misstated. Paragraph 3.iii on page 3 of the PSR was simply a recital of the stipulation in the plea agreement. The defendant would not have meant to object to that. There was no adjustment for obstruction of justice. The reference should have been to acceptance of responsibility. The objection was no doubt intended to be to the assessment of only two levels for acceptance found at paragraph 30 on page 10 of the PSR. The objection offers no basis for the objection and no reason why the third level should apply, nor could it because it was prohibited as a matter of law.

This was a breach of the plea agreement – a breach of the plea agreement by omission of an act the plea agreement required the Government to perform.

Then, in addition, after inducing Joshi to enter into the plea agreement based on a promise the Government could not perform and made no effort to remedy, the Government filed on January 23, 2020, under seal, a motion for upward departure or upward variance (which it argued as a motion both for upward variance and for upward departure at the sentencing).[4] At the sentencing hearing, the Government articulated the basis for the requested upward departure as follows:

> Basically the basis for the upward variance is two fold. First, the fact that one of the victims that was not enumerated in the PSR was a – was a juvenile at the time of the contact between the defendant and that particular victim. So I think that that's not taken into consideration in the determination of the appropriate guideline range.
>
> And secondly, what's also not depicted in the presentence report was that there were close

[4] (h) Notice of Possible Departure From Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Fed. R. Crim. P. 32(h).

to a thousand females attempted to be – or this defendant attempted to contact close to a thousand females. And that was determined after an examination of his cell phone where he used the same type of approach that he did with these four identified victims. Where he would initially approach them by asking them to a formal or to some sort of social event, and then when he was rejected then he would begin with the comments as illustrated in the PSR, threatening to hurt them, threatening to kill them, threatening to find them. So there was an attempt on his part to contact close to a thousand other potential victims in this case and I don't think that that is particularly addressed in the PSR.

So based on those two factors, based on the methodology that he used to identify the four victims that are identified now to the Court where he basically researched them and looked for a particular type of female at particular types of institutions in order to target them, we believe that that needs to be taken into consideration.

Also the fact – and there is a victim in the courtroom that will address, as well as – address the Court, as well as her mother, the fact that they continue to be tormented by what occurred here, by the level of threat of violence that was perpetrated on them. How it affected them then, and has continued to affect them now. So I think the Court needs to be aware of that and have that information in front of it

> in order to make the appropriate sentencing in this case.
>
> So that's why I believe an upward departure or variance would be appropriate.[5]

This argument was an affirmative breach of the plea agreement. The Government had obligated itself in the plea agreement to stand by a stipulated adjusted and total offense level and only excepted from that agreement the following:

> Nothing in this agreement will preclude argument by either party regarding *any other specific offense characteristic or guideline adjustment*.[6]

Defense counsel responded that if there were threats, he would stipulate to that, but "this is news to me. It's kind of late in the day to be springing this on me, frankly."[7]

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[5] Indeed, this was how the Government itself characterized it: a motion for upward departure or upward variance. This was not an argument as to a specific offense characteristic or guideline adjustment. *See, e.g.*, *United States v. Stokes*, 347 F.3d 103, 105 (4th Cir. 2003) (multiple victims is a basis for an *upward departure*, citing U.S.S.G. § 2A6.1, comment. (n. 4 (B)).

[6] *See* A. Scalia & B. Garner, Reading Law 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)").

[7] It is not clear from the record if defense counsel or Joshi himself were aware of the Government's upward departure motion (which had been filed under seal) until they were confronted with it at sentencing.

> Sound practice dictates that judges in all cases should make sure that the information provided to the parties

At no point in the proceeding did the Court question the Government's breach of the plea agreement – neither the Government's failure to comply with its obligation with respect to the third level nor its evasion

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> in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues. We recognize that there will be some cases in which the factual basis for a particular sentence will come as a surprise to a defendant or the Government. The more appropriate response to such a problem is not to extend the reach of Rule 32(h)'s notice requirement categorically, but rather for a district judge to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial. As Judge Boudin has noted:
>
> > "In the normal case a competent lawyer . . . will anticipate most of what might occur at the sentencing hearing – based on the trial, the pre-sentence report, the exchanges of the parties concerning the report, and the preparation of mitigation evidence. Garden variety considerations of culpability, criminal history, likelihood of re-offense, seriousness of the crime, nature of the conduct and so forth should not generally come as a surprise to trial lawyers who have prepared for sentencing." *Vega-Santiago*, 519 F.3d at 5.
>
> The fact that Rule 32(h) remains in effect today does not justify extending its protections to variances; the justification for our decision in *Burns* no longer exists, and such an extension is apt to complicate rather than to simplify sentencing procedures. We have confidence in the ability of district judges and counsel – especially in light of Rule 32's other procedural protections – to make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made.

Irizarry v. United States, 553 U.S. 708, 715-16 (2008).

of its obligation to limit its sentencing arguments to specific offense characteristics or guideline adjustments. Instead, the Court readily agreed with the Government's upward departure argument, imposing a sentence far in excess of the applicable guideline range. The guideline range was determined to be Zone C, level 12, Criminal History Category I, which permitted a sentence of as little as 5 months incarceration.[8] The Court imposed a sentence approximately 1000% greater than the guidelines permitted, 4 years imprisonment, and immediately remanded Joshi into custody despite his totally compliant seven months of pretrial release.[9]

[8] Had the Government complied with its obligation to argue for a third level – as a variance in lieu of the impossible third level of acceptance of responsibility, the guideline range would have been Zone B, 8-14, which would have permitted a sentence of probation including further home confinement. This is clearly what the defense thought they had bargained for in the plea agreement.

[9] The Government argued for immediate detention after imposition of sentence asserting that Joshi was guilty of a crime of violence triggering mandatory detention. This was error. *See* 18 U.S.C. § 3143(b)(2), which cross references § 3142(f)(1)(A), (B) and (C). Joshi's offense did not qualify for mandatory detention. The Court appeared to recognize this when it stated to defense counsel that it had the discretion to remand, which it then did.

REASONS FOR GRANTING THE WRIT

WHETHER THE GOVERNMENT'S BREACH OF THE PLEA AGREEMENT CONSTITUTED A DUE PROCESS VIOLATION, WHICH REQUIRED REMAND FOR A *DE NOVO* RESENTENCING.

It is well settled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971). Additionally, in determining whether a breach has occurred, the court must consider "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." *United States v. Valencia*, 985 F.2d 758, 761 (5th Cir. 1993). If a breach has in fact occurred, the sentence must be vacated without regard to whether the judge was influenced by the government's actions. *Santobello*, 404 U.S. at 262-63; *United States v. Grandinetti*, 564 F.2d 723 (5th Cir. 1977); *United States v. Saling*, 205 F.3d 764, 766-67 (5th Cir. 2000).

The Fifth Circuit analyzes a breach claim under general contract principles and *strictly construes* the terms of the agreement *against the Government* as the drafter. *United States v. Casillas*, 853 F.3d 215, 217 (5th Cir. 2017); *see also United States v. Williams*, 949 F.3d 237, 238 (5th Cir. 2020). The plain language of the agreement, taken with the intent of the parties at the time the agreement was executed, controls. *United*

States v. Cortez, 413 F.3d 502, 503 (5th Cir. 2005) (per curiam).

Ambiguities are construed against the government as the drafter. *United States v. Elashyi*, 554 F.3d 480, 501 (5th Cir. 2008); *United States v. Farias*, 469 F.3d 393, 397 & n. 4 (5th Cir. 2006); *United States v. Nino-Mata*, 668 F. App'x 567, 568 (5th Cir. 2016); *see also United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) ("Both constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements."). The rationale for this approach to interpretation is that "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 the plea." *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990).

As to the Government's agreement in paragraph 5(c) of the plea agreement, there was no ambiguity. The Government agreed to make a recommendation of a third level of acceptance of responsibility and was obligated to follow through with its recommendation at sentencing. During the change of plea colloquy, the Magistrate Judge expressly addressed paragraph 5 with Joshi and explained to Joshi that the Government had agreed that a "reduction of three levels for acceptance of responsibility applies . . . " and asked Joshi if he understood. There was no condition or

qualification attached to the Government's promise other than the standard caveats:

> If circumstances indicating that the defendant has not accepted responsibility become known after execution of this Agreement, this stipulation is void and the defendant may object to the failure of the Presentence Report to recommend the reduction. The government's request to decrease the offense level by one level in accordance with U.S.S.G. § 3El.l(b) is contingent on the defendant demonstrating acceptance of responsibility for the offense conduct and cooperating fully in recovering restitution for all relevant conduct.

None of the exceptions to the Government's obligation set forth in paragraph 5 of the plea agreement applied. U.S.S.G. § 3E1.1(b) expressly requires the Government to file a motion in support of the Defendant's qualification for the third level based on the Defendant's timely notification of his intent to plead guilty. Clearly, this was the defendant's reasonable understanding of the plea agreement and he is entitled to have it enforced.

The Government breached the agreement by not following through with its agreed upon recommendation. When the PSR was first disclosed and presumably then for the first time the Government recognized that it had made a promise to support a guideline adjustment that was legally impossible, it had a a duty of good faith to seek a one level downward variance to

accomplish the one level reduction it had agreed to under § 3E1.1(b). Instead, it did nothing.

Instead, the Government swung wildly the other way and filed under seal a motion for *upward departure*. This was contrary to its implicit obligation in paragraph 5 of the plea agreement, a plea agreement which the Government itself had drafted. The Government had only reserved the right *to argue for specific offense characteristics* and *guideline adjustments*, not the right to argue for an upward departure.

The Government was obligated under its plea agreement, as reasonably understood by the Defendant, to advocate at sentencing for a three level reduction for acceptance of responsibility, or in the alternative for a downward variance of one level to accomplish the intended result of a total offense level of 11. A total offense level of 11 would have permitted a probationary sentence.

> Purser's argument that a breach initially occurred succeeds. The defendant's reasonable understanding of the agreement was that the Government would recommend to the district court and the probation officer that § 2B1.1(b)(2)(B) would apply and that it would not deviate from that recommendation. By initially advocating for the higher adjustment found in § 2B1.1(b)(2)(C), the Government contradicted the express language found in the plea agreement. As a result, Purser was deprived of the benefit for which he bargained: namely, that the Government

> would present a united front that § 2B1.1(b)(2)(B) applied. We do not agree with the Government's contention that the episode viewed in its entirety does not constitute a breach. When the Government acts contrary to the express terms of the plea agreement, it has breached the plea agreement. Similarly, we do not find our prior precedent distinguishable on the grounds that in those cases the breach took place at the sentencing hearing itself, whereas here the breach occurred before the hearing. The plea agreement's express language states that the Government would "recommend to the Court and the United States Probation office" the agreed upon conditions. Therefore, it is of no moment that the Government breached the plea agreement before the sentencing hearing, because the Government still breached the express terms of the plea agreement.

United States v. Purser, 747 F.3d 284, 290-91 (5th Cir. 2014).

Under *Santobello* and basic Due Process – the Due Process Clause of the Fifth Amendment[10] – the

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[10] The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S.

Government had a duty to act in good faith and had it done so, it could have cured this initial breach:

> We agree with the Government's contention that the breach of the plea agreement was adequately cured in this case. While we have previously rejected arguments that the government successfully cured a plea agreement breach, some of our sister courts have allowed for the curing of a plea agreement breach. Indeed, even the Supreme Court has opined that "some breaches may be curable upon timely objection – for example, where the prosecution simply forgot its commitment and is willing to adhere to the [plea] agreement." Cure and harmless error stand on different footing from each other. Cure, unlike harmless error, is the removal of legal defect or correction of legal error; that is, performance of the contract. Simply put, with a cure of breach, the government abides by the plea agreement, while harmless error excuses a lapse of government performance. Allowing the government to cure a plea agreement breach vindicates the "policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining." Here, the

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319, 325-326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process.

United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101 (1987).

> Government cured its breach by withdrawing its objection and urging the application of the lesser enhancement, both prior to and at sentencing, and the district court subsequently acted consistently with the plea agreement. Even though the revised PSR recommended that § 2B1.1(b)(2)(C) should apply, the district court specifically applied § 2B1.1(b)(2)(B) in order to cure the breach.

United States v. Purser, 747 F.3d 284, 293-94 (5th Cir. 2014).

But the Government failed to cure its breach in Joshi's case; it did nothing to act in good faith to remedy the breach. It could and should have argued for a downward variance to effectuate the intent of the parties that the total offense level be 11, not 12, or any upwardly departed level.[11]

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[11] This touches on the obligation under contract law for a party to take action to surmount an obstacle which renders an obligation impossible:

> Generally speaking, the impossibility or impracticability doctrine excuses a party from performance under a contract if, without that party's fault, an event occurs, the non-occurrence of which was a basic assumption when the contract was made. Restatement (Second) of Contracts § 261. To assert this defense, Mackie must show he had no reason to know at the time the contract was made of the facts on which he relies. *Nat'l Iranian Oil Co. v. Ashland Oil Inc.*, 817 F.2d 326, 333 (5th Cir. 1987). Even then, a party may not rely on the doctrine of impossibility or impracticability "if the event is due to the fault of the party himself." Id. (internal alterations omitted). Simply put, a party may not affirmatively cause, Id., or fail to prevent the event, *Nissho-*

The Government was further obligated, under its plea agreement as reasonably understood by the defense and as clearly implicit in the agreement itself, to not argue for an upward departure. There was no point in the plea agreement for the defendant otherwise. Sentencing under the federal sentencing guidelines is a procedure which requires strict compliance with highly technical procedures. The sentencing guidelines have been in effect for over three decades. The technical terms used in the guidelines are well known at this point. When the Government drafts a plea agreement which uses technical terms to carve out an exception to its agreed upon offense level stipulation, those terms must be strictly construed against the Government as the draftsman. Alternatively, if there were any ambiguity in the terms the Government chose to use, that ambiguity must be construed against the Government. The Government reserved the right only to argue for specific offense characteristics and guideline

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Iwai Co. v. Occidental Crude Sales Inc., 729 F.2d 1530, 1540 (5th Cir. 1984), that impedes the performance. *See also Organizacion JD Ltda. v. Dep't of Justice*, 18 F.3d 91, 95 (2d Cir. 1994) (impossibility doctrine extends to "judicial action as long as the party seeking to be excused has not caused or failed to prevent the judicial action." (quoting *RSB Mfg. Corp. v. Bank of Baroda*, 15 B.R. 650, 654 (S.D.N.Y. 1981) (emphasis added))). ***Further, a party "must use reasonable efforts to surmount the obstacle to performance."*** *Sherwin Alumina L.P. v. AluChem Inc.*, 512 F. Supp. 2d 957, 973 (S.D. Tex. 2007).

Mackie v. Mills, Civil Action No. 3:13-CV-2328-N-BK, 2015 U.S. Dist. LEXIS 117704, at *9 (N.D. Tex. Aug. 11, 2015) (emphasis supplied).

adjustments. Neither term refers to a motion for an upward departure. If the Government intended to reserve the right to argue for an upward departure, it needed to expressly say so. It did not, instead the implicit meaning of the reservation of rights it drafted was that the Government could not argue for an upward departure. As Justice Scalia explained in *Reading Law*, the concept of the negative implication in legal interpretation is that the expression of the one thing excludes the other. By expressly reserving the right to argue specific offense characteristics and guideline adjustments, the Government excluded the right to argue for an upward departure.

This certainly is Joshi's reasonable understanding of paragraph 5 and his reasonable understanding governs the interpretation and application of the plea agreement.

APPEAL WAIVER

Joshi's appellate waiver was not knowing and voluntary because he relied upon, and the Government breached, an explicit promise that it move for a third level of acceptance of responsibility and an implicit promise that it would not argue for an upward departure. The Fifth Circuit has held that a defendant may raise a claim for breach of an implicit promise in a plea agreement even though the agreement also contained an appellate waiver. *United States v. Cluff*, 857 F.3d 292, 297, 300 (5th Cir. 2017).

> Williams' plea agreement included a waiver of appeal rights, but we nonetheless consider whether the Government breached the plea agreement because a breach by the Government would release him from the waiver. *See United States v. Purser*, 747 F.3d 284, 289 & n. 11 (5th Cir. 2014).

United States v. Williams, 949 F.3d 237, 238 n. 1 (5th Cir. 2020).

Therefore, based on *Williams, Cluff*, and *Purser*, Joshi is not bound by the appeal waiver in his plea agreement due to the breach by the Government of both explicit and implicit terms in the plea agreement.

REMEDY

Under *Santobello*, when the government breaches a plea agreement, a defendant is entitled to specific performance and resentencing by a different judge or the opportunity to withdraw his plea. Joshi does not seek to withdraw his plea – he seeks only a resentencing at which the Government is informed by the mandate of the Court of Appeals to zealously fulfill its plea agreement obligations.

The law in the Fifth Circuit (and the majority view) is that when remand for resentencing is required because the Government breached a plea agreement, resentencing must be before a different judge. *See United States v. Goldfaden*, 959 F.2d 1324, 1329 (5th Cir.1992) (defendant "must be sentenced by different judge" if "specific performance is called for"); *United*

States v. Yesil, 991 F.2d 1527, 1533 n. 7 (11th Cir.1992) (following "practice of remanding to a different sentencing judge following the breach of a plea agreement"); *United States v. Rivera*, 357 F.3d 290, 297 (3d Cir.2004) (if specific performance is sufficient remedy, defendant must be resentenced by different judge); *United States v. Clark*, 55 F.3d 9, 14 (1st Cir.1995) (same); *United States v. Peglera*, 33 F.3d 412, 415 (4th Cir.1994) (judicial reassignment is "required"); *United States v. McCray*, 849 F.2d 304, 306 (8th Cir.1988) (per curiam) (defendant is "entitled" to be resentenced by a different judge); *United States v. Brody*, 808 F.2d 944, 948 (2d Cir.1986) (requiring judicial reassignment). Even the Ninth Circuit, which previously subscribed to the minority approach, has recognized more recently the controlling nature of *Santobello's* prescription of judicial reassignment. *See United States v. Mondragon*, 228 F.3d 978, 981 (9th Cir. 2000); *United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995).

Were the Government to fulfill its plea agreement obligations, the sentencing guideline range would be total offense level 11, criminal history category I, for a Zone B sentence permitting probation with home detention.

Joshi's judgment and sentence should be vacated and the case remanded for resentencing consistent with the arguments herein with further instructions that the Government reassign this case for purposes of resentencing to a new Assistant United States Attorney outside the District and that Assistant United States Attorney Ernest Gonzalez, who negotiated this

plea agreement and conducted the sentencing at issue, be prohibited from any further involvement in the case. Further, the Court should mandate that the case be reassigned to a new judge for a *de novo* resentencing at which the Government is further mandated to abide by the terms of its plea agreement, that is, to argue for a one level downward variance for acceptance of responsibility and not argue for but oppose any upward variance or upward departure.

CONCLUSION

Based on the foregoing arguments, Petitioner Joshi respectfully requests this Honorable Court grant certiorari to decide the above question.

Respectfully submitted,

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