Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR CARLOS CASTANO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Victor Carlos Castano, respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Mr. Castano encloses his affidavit of indigence in support of this motion.

Dated: February 10, 2022

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether the government was impermissibly relieved of its burden to prove each element of RICO Conspiracy when the court instructed the jury that an agreement to create an enterprise at some undefined point in the future was sufficient to prove the element of an enterprise.

B. Whether the Sixth Circuit broke with Circuit Court precedent and sanctioned the unjust increase in Castano's term of imprisonment when the sentencing court attributed to Castano all drugs distributed by all members of the conspiracy without first determining that the conduct was within the scope of Castano's agreement in the conspiracy.

C. Whether the government's use of Castano's self incriminating statements against Castano during grand jury proceedings and trial violated the written proffer agreement and Castano's Fifth Amendment rights.

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The United States District Court for the Eastern District of Michigan entered final judgment of conviction on December 19, 2018. See Judgment, United States v. Castano, 2:11-cr-20066 (ED Mich 12/19/18); Appendix ("APX") at 1-7. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision in a published opinion dated September 13, 2021. United States v. Castano, App. Nos. 19-1028/1029; Opinion; APX at 8-23. The remaining portion of the decision is not recommended for publication and is listed as a Appendix to the published decision. See United States v. Castano, App. Nos. 19-1028/1029; APX at 24-128. Petition for rehearing en banc was denied on November 16, 2021. See Order; APX at 129.

V. STATEMENT FOR THE BASIS OF JURISDICTION

The district court had jurisdiction, as Castano was charged with crimes under the United States Code, including RICO Conspiracy, in violation of 18 U.S.C. § 1962(d); Conspiracy to manufacture and distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; and possession of methamphetamine precursors, in violation fo 21 U.S.C. § 834(a)(6). Judgment was entered against Castano on December 19, 2018. See APX at 1-7.

The Sixth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) when Castano timely filed a timely notice of appeal on December 23, 2018. RE 421, Notice of Appeal. See Fed. R. App. P. 4(a)(1)(A).

This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Sixth Circuit rendered an opinion affirming Castano's sentence and conviction on September 13, 2021; and a final decision on November 16, 2021, denying Petition for Rehearing En Banc. See APX at 129.

VI. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

U.S. Const. Amend. V.

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(c).

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(d)

> Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
>
> (i) within the scope of the jointly undertaken criminal activity,
> (ii) in furtherance of that criminal activity, and
> (iii) reasonably foreseeable in connection with that criminal activity;
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense

U.S.S.G. § 1B1.3(a)(1)

VII. STATEMENT OF THE CASE

On August 26, 2015, Castano and numerous codefendants were charged in three counts of a 43-count Fifth Superseding Indictment filed in the Eastern District of Michigan in case number 11-CR-20129. RE 1476 and 1476-1 Fifth SS Indictment; PageID#17989-18976. Castano was charged with the following offenses:

> Count 1: RICO Conspiracy, in violation of 18 U.S.C. § 1962(d)
>
> Count 3: Conspiracy to Manufacture, Distribute, and Possess With Intent to Distribute 50 grams of methamphetamine or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine Controlled Substances, in violation of 21 U.S.C. §§ 846 and 841(a)(1)
>
> Count 41: Possession of Methamphetamine Precursors, in violation of 21 U.S.C. § 843(a)(6)

Id; PageID#17989-18053,18061-18063,18068.

The defendants requested that the jury be instructed that the essential elements of Count One, RICO conspiracy, was a conspiracy to commit the elements of RICO statute, as defined in §1962(c). PageID#13352. However, the district court instructed the jury that it need only find an enterprise "would exist" in the future. PageID#15458; 38437-38. Following the conviction at trial, the district court imposed a sentence of 336 months' imprisonment. See, APX at 1-7.

Castano appealed his conviction and sentence to the Sixth Circuit Court of Appeals. United States v. Castano, App. Nos. 19-1028/1029. Castano argued that the district court reversibly erred in issuing jury instructions that relieved the government from its burden of proof on all essential elements of RICO conspiracy.[1] Castano also argued that the government engaged in prosecutorial

[1]Pursuant to Sixth Circuit Order dated August 27, 2019, Castano adopted the argument found in pages 15-37 of the opening brief of Jeff Smith and pages 1-12 of the reply brief of Jeff Smith, App. No. 18-2364/18-2365.

misconduct and violated the terms of a proffer agreement, in violation of Castano's Fifth Amendment rights. Castano also argued that the government wrongfully used Castano's self-incriminating statements, made pursuant to that agreement, against Castano during grand jury proceedings and trial. Castano also challenged the court's calculations under the United States Sentencing Guidelines and his 336-month sentence.

On March 9, 2021, the Sixth Circuit Panel affirmed Castano's conviction and sentence. The first 16 pages of the decision is recommended for full publication. See United States v. Castano, App. Nos. 19-1028/1029; Opinion; Apx 8-23. Judge Donald wrote a dissent with respect to the RICO jury instructions issue finding that the district court's instructions to the jury improperly relieved the government of its burden of proof as to the existence of an enterprise. Id 19-23. The remaining portion of the decision is not recommended for publication and is listed as a Appendix to the published decision. United States v. Castano, App. Nos. 19-1028/1029; App 24-128. Petition for rehearing en banc was denied on November 16, 2021. See, APX at 129.

VIII. STATEMENT OF FACTS

The statement of facts is taken from the Appendix to the Sixth Circuit's Opinion**:**

> Formed in the late 1960s, the "Devils Diciples [sic] Motorcycle Club" (DDMC) was a national motorcycle club that primarily operated out of southeast Michigan, with chapters across the country. It had a top-down organizational structure, complete with national and local bylaws Defendant Jeff Smith oversaw the Club as its national president. Defendants Paul Darrah and Cary Vandiver also held national roles as vice-president and "warlord," respectively. (Each chapter had similar leadership roles for local-level control.) Members first had to go through a "prospecting" process before fully joining the Club as a "patched" member. Chapters met on a regular basis and the Club gathered periodically as a whole.
>
> At its core, the DDMC was an organization that centered on methamphetamine (but engaged in other criminal activities like stealing motorcycles and maintaining illegal gambling machines). Its members and those associated with the Club used

> methamphetamine, which was readily available at its clubhouses and social events. They also manufactured and distributed largescale quantities of it. Defendant Vincent Witort, a long-time California member with a national reputation, frequently supplied other club members with distribution levels of the drug manufactured across the country (including from an underground "lab" in Alabama). Those members who trafficked drugs were required to "kick up" a portion of their sales to national leaders. Smith, Darrah, Vandiver and defendant Patrick McKeoun (a respected club elder) all helped oversee and facilitate the drug's movement in and outside of the Club. McKeoun, for example, convinced Smith and Vandiver to let a large-scale dealer distribute his methamphetamine because he agreed to supply it to DDMC members and to help them financially when needed. And Darrah collected dealers' "taxes" and otherwise coordinated the flow of drugs throughout the Club's network. Defendant David Drozdowski was a prolific methamphetamine cook and an ambitious up-and-coming member of the Club. Defendant Victor Castano was a large-scale marijuana dealer before he joined the DDMC, and he added methamphetamine trafficking to his repertoire when he became a fully patched DDMC member. And defendant Michael Rich, like McKeoun, was an elder statesman of the Club who encouraged the drug's use and distribution—in one poignant instance at a local clubhouse, Rich "gave permission" to those who wanted to sample from a "gallon-size bag" of meth before it was divided and sold.
>
> The DDMC enforced its ways through hierarchy, discipline, and violence. Failure to abide by club rules could lead to fines, "black eyes" (being punched in the eye by order of club leadership), and ultimately expulsion from the Club (and when that happened, the DDMC would steal the former member's motorcycle and take his paraphernalia, like the patched vest). But there were more violent forms of discipline. There were at least three murders, and several assaults against members and their associates. Innocent bystanders were not safe either, with one instance of assault against someone who just happened to be wearing a vest that looked like a rival club's vest. And the Club strictly enforced its "talk s--t, get hit" motto; it made clear that "snitching" to law enforcement officials was not to be tolerated through its use of ostracization, threats, and violence. In at least one instance, club leadership coordinated perjurious testimony to help a member try to defeat a firearm charge.

See, APX 24-26.

IX. ARGUMENT ADDRESSING REASONS FOR ALLOWING THE WRIT

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the

same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

In the instant case, when instructing the jury on the elements of RICO conspiracy, and over objections from the defense, the district court failed to require the jury to find that an enterprise existed and erroneously relieved the government of its burden of proof with respect to this essential element of a RICO conspiracy. The Sixth Circuit excused this error and determined that the government is not required to prove the existence of a racketeering enterprise but need merely prove an agreement to create an enterprise in the future. This holding conflicts with decisions from other Circuit Courts which require a jury finding that the association or enterprise existed in order to secure a RICO conspiracy conviction.

The Sixth Circuit also affirmed the sentencing court's relevant conduct finding and decision to hold Castano accountable for all known ephedrine/pseudoephedrine purchases by members of the DDMC during Castano's membership without making individualized assessment as to whether the conduct was within the scope of Castano's agreement. The decision to affirm Castano's sentence directly conflicts with precedent from the Sixth Circuit and others that requires a sentencing court to conduct an individualized determination that a particular drug quantity was within the scope of a defendant's agreement within a conspiracy before the conduct can be attributed to a defendant as relevant conduct in determining punishment under the United States Sentencing Guidelines.

Finally, the government breached a proffer agreement when it used self-incriminating statements made pursuant to a proffer agreement against Castano during Grand Jury proceedings and

later against Castano at trial. The use of the Castano's self-incriminating statements in these proceedings violated the terms of the proffer agreement and Castano's rights under the Fifth Amendment. The Sixth Circuit's decision violates this Court's requirement to construe ambiguities in proffer agreements in favor of the defendant. The decision weakens society's respect for the justice system by sanctioning the violation of Castano's right not to be compelled to make self incriminating statements and by permitting the government to engage in deceit in order to obtain self-incriminating statements from Castano.

As presented herein, the Sixth Circuit's decisions with respect to each of Castano's claims are in conflict with decisions from this Court and other United States court of appeals on the same important matters. Further, the appellate court has sanctioned the district court's departure from the accepted and usual course of judicial proceedings. Therefore, this Court should exercise its supervisory power under S.Ct.R. 10(a) and grant certiorari.

A. The government was impermissibly relieved of its burden to prove each element of RICO Conspiracy when the court instructed the jury that an agreement to create an enterprise at some undefined point in the future was sufficient to prove the element of an enterprise.

Castano and his co-appellants argued in both the district court and in their appellate briefs that the existence of a racketeering enterprise is an essential element of RICO conspiracy and that the instructions provided to the jury improperly relieved the government of its burden of proof with respect to that element. The question faced by the Sixth Circuit was "whether a jury can convict a defendant of a RICO conspiracy merely by establishing that he joined an agreement to abstractly, in the future, form a RICO enterprise." Opinion, p. 13; Apx at 20. The Sixth Circuit concluded that the government is not required to prove the existence of a racketeering enterprise but need merely prove

that defendants agreed to form a RICO enterprise at some undefined point in the future in order to convict a defendant of RICO conspiracy. See Opinion, p 4-8; Apx at 11-15. The Sixth Circuit's decision is predicated on faulty reasoning and conflicts with decisions from at least several other Circuit Courts all of which require that the jury find that the association or enterprise existed in order to secure a RICO conspiracy conviction.

To engage in a RICO conspiracy, a defendant must "agree[] with others" to "further an endeavor which, if completed, would satisfy all of the elements of a substantive RICO offense." United States v. Cain, 671 F.3d 271, 291 (2d Cir. 2012) (alterations adopted) (citation omitted). Here, Castano was charged with conspiring to violate 18 U.S.C. § 1962(c), which provides as follows:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Section 1962(d) serves to make unlawful conspiracies to violate section 1962(c). In that regard, each defendant in a RICO conspiracy case must have joined knowingly in the scheme and been involved himself, directly or indirectly, in the commission of at least two predicate offenses. The Supreme Court has explained that in order to prove a RICO claim, a plaintiff must show both an "enterprise" and a "pattern of racketeering activity." United States v. Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981).

The term "enterprise" is defined in the RICO statute as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals *associated in fact* although not a legal entity." § 1961(4) (emphasis added), see Turkette, 452 U.S.

at 580-581. RICO conspiracy requires a knowing agreement to commit a RICO violation, and to participate in the conduct of the enterprise through a pattern of racketeering activity. Smith v. United States, 568 U.S. 106, 110 (2013).

Decisions from this Court confirm that in order to convict a defendant of RICO, the government must prove the existence of an enterprise by "evidence of an ongoing organization, formal or informal," that its "various associates function as a continuing unit" and that it exists "separate and apart" from the "pattern of activity in which it engages." Boyle v. United States, 556 U.S. 938, 944 (2009). Further held that "the existence of an enterprise is a separate element that must be proved" in order to convict a defendant for violating RICO. Boyle, 556 U.S. at 947.

Accordingly, the necessary elements of RICO conspiracy charge are (1) the existence of an enterprise, (2) that each defendant knowingly joined the enterprise, and (3) that each defendant agreed to commit a pattern of racketeering activity. United States v. Velazquez-Fontanez, 6 F.4th 205, 212 (1st Cir. 2021); Feinstein v. Resolution Trust Corp., 941 F.2d 34, 41 (1st Cir. 1991); United States v. Starrett, 55 F.3d 1525 1541 (11th Cir. 1995)("the government must prove: (1) the existence of an enterprise...")

In the instant case, the district court used future tense language throughout the jury instructions stating that an enterprise "would exist" in the future or that an enterprise "would be" engaged in activities that "would" affect interstate commerce and a conspirator did "or would" knowingly participate in the affairs of the enterprise. See RE; PageID#15458-15464; 38437-38444. The instructions permitted conviction under a scenario where two or more people agree to abstractly create an enterprise sometime in the future that would engage in activity affecting interstate commerce. Opinion, p. 13; Apx at 20.

The instructions were erroneous as a matter of law because they told the jury that the criminal enterprise element of the RICO offense must only exist at some future date. Starrett, 55 F.3d at 1541; Velazquez-Fontanez, 6 F.4th at 212. Therefore, the jury was never required to find the essential element that an enterprise existed. Because the government was relieved of its burden to prove beyond a reasonable doubt all elements of the offense for which the defendant is charged, Castano's right to due process has been violated and his convictions must be vacated. Sandstrom v. Montana, 442 U.S. 510, 524 (1979); In Re Winship, 397 U.S. 358, 364 (1970).

In affirming Castano's conviction, the Sixth Circuit recognized that the existence of an enterprise is an element of RICO under § 1962(c), but finds that proof of the existence of an enterprise is not necessary because the defendants were charged with a conspiracy to commit a RICO offense under § 1962(d). Opinion p 7; Apx at 14. This conflicts with decisions from other circuit courts finding that §1962(d) requires proof that the enterprise existed. United States v. Neopolitan, 791 F.2d 489, 499 (7th Cir. 1986)("The second distinctive aspect of a RICO conspiracy is the need to establish the existence of an enterprise."); United States v. Cornell, 780 F.3d 616, 621 (4th Cir. 2015) ("[T]o satisfy §1962(d), the government must prove that an enterprise affecting commerce existed."); United States v. Ramirez-Rivera, 800 F.3d 1, 18 (1st Cir. 2015)(the government must prove "the existence of an enterprise"); Velazquez-Fontanez, 6 F.4th at 212; Feinstein, 941 F.2d at 41; Starrett, 55 F.3d at 1541; see also, Eighth Circuit Model Jury Instruction, 6.18.1962B, RICO conspiracy.

As noted by Judge Donald in dissent, the existence of an enterprise is an essential element of a conspiracy to commit RICO and the district court's instructions to the jury relieved the government of its burden of proof on this element. APX at 19-23. The error "allowed the government

to convict multiple defendants based on potentially insufficient evidence. It is a grave error that cannot be remedied other than by reversing each of the defendants' convictions and sentences and remanding for a new trial." APX at 23. See also Skilling v. United States, 561 U.S. 358, 414 (2010)("constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory").

The Sixth Circuit's conclusion that an agreement to create an enterprise at some point in the future is sufficient to convict for RICO conspiracy directly conflicts with the above precedent, which makes clear that the "existence of an enterprise" is an essential element of RICO conspiracy that must be submitted to the jury for proof beyond a reasonable doubt. RICO is already an expansive statute. Boyle, 556 U.S. at 949(highlighting the "breadth of the enterprise concept in RICO" as compared to other statutes targeting organized groups). The Sixth Circuit impermissibly extends it further yet and, if not corrected, permits a defendant with tenuous connections to racketeering activity to be charged and convicted based on mere speech and on speculation of what could happen in the future.

In sum, contrary to the Sixth Circuit's decision the plain language of the RICO statutes require that the government prove the existence of an enterprise. The jury instructions here failed to require a finding that an enterprise existed, thus relieving the government's burden of proof with respect to this essential element. Because the Sixth Circuit's decision affirming Castano's conviction conflicts with Supreme Court and other circuit precedent concerning a matter of exceptional importance, petition for writ of certiorari should be granted.

B. The Sixth Circuit broke with Circuit Court precedent and sanctioned the unjust increase in Castano's term of imprisonment when the sentencing court attributed to Castano all drugs distributed by all members of the conspiracy without first determining that the conduct was within the scope of Castano's agreement in the conspiracy.

In determining Castano's recommended sentence under the United States Sentencing Guidelines, the Sixth Circuit found that it was acceptable to for a sentencing court to make a blanket finding that a defendant is accountable for all reasonably foreseeable drug sales made by members of a conspiracy during a defendant's membership in the conspiracy. See, Apx at 124-127. The decision cannot stand because it conflicts with well established precedent from the Sixth Circuit and other Circuit Courts requiring a sentencing court to make an individualized assessment that the particular conduct "was within the scope of a defendant's agreement" before the conduct can be attributed to him to increase his punishment under the Guidelines. See United States v. Willis, 476 F.3d 1121, 1129 (10th Cir. 2007)("scope of the agreement, furtherance, and reasonable foreseeability are 'independent and necessary elements of relevant conduct")(quotations omitted); United States v. McReynolds, 964 F.3d 555, 562 (6th Cir. 2020)(accord); United States v. Spotted Elk, 548 F.3d 641, 674 (8th Cir. 2008)(accord); United States v. Patton, 927 F.3d 1087, 1094 (10th Cir. 2019)(accord); United States v. Studley, 47 F.3d 569, 575 (2nd Cir. 2005)(accord); see also U.S.S.G. § 1B1.3 cmt. 3(A).

In determining a defendant's punishment under the United States Sentencing Guidelines, a defendant's offense level calculations can be derived from his or her "relevant conduct," as defined under U.S.S.G. § 1B1.3. McReynolds, 964 F.3d at 562. "[T]he scope of relevant conduct with regard to the drug amounts involved in a conspiracy under § 1B1.3(a)(1)(B) is 'significantly narrower' than the conduct needed to obtain a conspiracy conviction." McReynolds, 964 F.3d at 563. For this

reason, "relevant conduct is not necessarily the same for every participant." U.S.S.G.§ 1B1.3, cmt. n.3(B) (2018). Mere "knowledge of another participant's criminal acts" or "of the scope of the overall operation" will not make a defendant responsible under relevant conduct standards for his co-conspirators' acts. Studley, 47 F.3d at 575. "Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B)." Patton, 927 F.3d at 1094.

Indeed, a defendan's jointly undertaken criminal activity "is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." United States v. McClatchey, 316 F.3d 1122, 1127-28 (10th Cir. 2003). "[T]he focus is on the specific acts and omissions for which the defendant is to be held accountable . . ., rather than on whether the defendant is criminally liable for an offense as a . . . conspirator." § 1B1.3, comment. (n.1). Thus, to determine whether an act is attributable to a defendant as relevant conduct, "the court must first determine *the scope of the criminal activity the particular defendant agreed to jointly undertake* (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement)." McClatchey, 316 F.3d at 1128 (emphasis in original)(citing § 1B1.3 comment. (n.2)); Spotted Elk, 548 F.3d at 675 ("in addition to membership in the conspiracy, the district court must find the scope of the individual defendant's commitment to the conspiracy and the foreseeability of particular drug sale amounts from the individual defendant's vantage point"), United States v. Soto-Piedra, 525 F.3d 527, 531-33 (7th Cir. 2008) ("Conspiracy liability . . . is generally much broader than jointly undertaken criminal activity under section 1B1.3. . . . Actions of coconspirators that a particular defendant does not assist or agree to promote are generally not within the scope of that defendant's jointly undertaken activity.").

In the instant case, the district court broke with this established precedent and made a blanket finding at sentencing that all methamphetamine precursor chemicals purchased by DDMC members during Castano's membership in the DDMC was reasonably foreseeable to Castano and therefore, attributable to him as relevant conduct. In doing so, the court failed in its duty to determine the scope of Castano's agreement within the conspiracy. In fact, the court's relevant conduct analysis was remarkably similar to the flawed analysis highlighted in McReynolds, 964 F.3d at 565. The government's best evidence indicated that Castano had little involvement with methamphetamine activities but was instead widely known as a marijuana dealer. PageID#36064. Like McReynolds, the jury verdict produced an acquittal on one of the substantive charges to the conspiracy–Count 41, possession of precursor chemicals. RE 1940 Verdict; PageID#29455. Like McReynolds, the district court used acquitted conduct to attribute the total amount of precursor chemicals to Castano. RE 2429; PageID#36002, 36008. Like McReynolds, the district court failed to determine what quantity of drugs was within the scope of Castano's agreement within the conspiracy and made a blanket finding that all drugs distributed by members of the conspiracy were reasonably foreseeable to Castano, and therefore attributable under the Guidelines. Id; PageID#36121. In fact, no attempt whatsoever was made by the sentencing court to determine the scope of the specific conduct and objectives embraced by the Castano's agreement.

The district court's finding was error as a matter of law because it was made without making an individualized determination as to whether all of those drugs were within the scope of Castano's agreement in the offense. McReynolds, 964 F.3d at 565; McClatchey, 316 F.3d at 1128; Patton, 927 F.3d at 1094; Studley, 47 F.3d at 575; Spotted Elk, 548 F.3d at 675. The Sixth Circuit's decision to affirm Castano's sentence is an affront to this well settled precedent and has resulted in Castano

receiving a unjust increase in his term of imprisonment. Because the Sixth Circuit's decision affirming Castano's sentence conflicts with Circuit Court precedent concerning this matter of exceptional importance, petition for writ of certiorari should be granted.

C. The government's use of Castano's self incriminating statements against Castano during grand jury proceedings and at trial violated the written proffer agreement and Castano's Fifth Amendment rights.

The government breached a proffer agreement when it used self-incriminating statements made pursuant to a proffer agreement against Castano during Grand Jury proceedings and against Castano at trial. In the agreement, the government promised Castano that his truthful statements would not be used against him in the government's "case-in-chief in any criminal prosecution [of Castano]." A reasonable understanding of these terms was that Castano's self-incriminating statement would not be used to prosecute Castano. Thus, the use of the Castano's self-incriminating statements to prosecute him violated the terms of the proffer agreement and Castano's right not to be compelled to make self-incriminating statements and his right to due process under the Fifth Amendment. The Sixth Circuit's decision to affirm Castano's conviction violates precedent from this Court's requiring courts to construe ambiguities in proffer agreements in favor of the defendant. The decision weakens society's respect for the justice system by sanctioning prosecutorial misconduct and the violation of Castano's right not to be compelled to make self incriminating statements and to due process.

Due process requires that the government adhere to the terms of any. . . immunity agreement it makes.") (ellipsis in original); United States v. Pelletier, 898 F.2d 297, 302 (2nd Cir. 1990); United States v. Fitch, 964 F.2d 571, 576 (6th Cir. 1992). The government's failure to adhere to its promises made in connection with bargaining agreements undermines notions of fairness and justice. See

United States v. Goldfaden, 959 F.2d 1324, 1328 (5th Cir. 1992) (plea agreement) (stating "[t]he failure of the Government to fulfill its promise, therefore, affects the fairness, integrity, and public reputation of judicial proceedings.").

Here, prior to issuance of the indictment naming Castano as a defendant in the instant offense, and pursuant to a use immunity proffer agreement, Castano participated in a proffer interview with government agents. The proffer letter promised that "no statement made . . . during [the] proffer discussion [would] be offered against [Castano] in the government's case-in-chief in any criminal prosecution . . . for the matters currently under investigation." Apx at 33. In good faith reliance on the government's promise not to use the self incriminating statements in any prosecution against him, Castano provided truthful information during the interview that was substantially relied upon by the government in securing indictments against Castano and others in this case. The government never intended to abide by the terms of the proffer agreement and immediately used the proffered statements against Castano during grand jury proceeding in order to secure charges against him and later used the information against Castano at trial. Under the circumstances, the use of the proffered statements against Castano violated the proffer agreement and his rights under the Fifth Amendment. Therefore, Castano's convictions should have been vacated.

It was never disputed that the government materially and extensively used Castano's proffered statements against him during grand jury proceedings and later at trial. APX at 34. As noted by the Sixth Circuit, "[a]bout three weeks after Castano's proffer, the government used his testimony in the ongoing grand jury proceedings related to the DDMC investigation. Castano was subsequently indicted on multiple felony counts, including RICO conspiracy, drug conspiracy, and conspiracy to suborn perjury." Id. In fact, all six counts in the 11-20066 indictment were based on

the incriminating statements made by Castano in his proffer interview. And the proffer was used in multiple subsequent Grand Jury proceedings. The use of his self-incriminating statements to prosecute Castano violated the terms of the proffer agreement, violated Castano's Fifth Amendment rights against self-incrimination and to due process.

The Sixth Circuit found that language in the proffer agreement stating "no statement made by you or your client during this proffer discussion will be offered against your client in the government's case in chief in any criminal prosecution of your client for the matters currently under investigation," was not ambiguous and allowed the government to use self-incriminating statements against Castano in grand jury proceedings. Apx at 36. Without citation to precedent, the Sixth Circuit found "case-in-chief" refers exclusively to a criminal trial, and that it was appropriate for the government to use the proffered statements against Castano during grand jury proceedings. Id. In doing so, the Sixth Circuit focused on the term "case-in-chief" to the exclusion of the remainder of terms found in the proffer letter. To be clear, the proffer letter promised that no statement made by Castano would be used against him "in the government's case-in-chief *in any criminal prosecution of your client*." Apx at 36.

The decision to affirm Castano's convictions must be corrected. The Sixth Circuit's decision violates this Court's requirement to construe ambiguities in proffer agreements in favor of the defendant and creates a rule the works absurd results. The Sixth Circuit misapplied Supreme Court precedent and created a rule of law that works absurd results in this case and in future cases. Further, the decision weakens society's faith in the justice system by sanctioning prosecutorial misconduct and the violation of Castano's right not to be compelled to make self incriminating statements. See, Goldfaden, 959 F.2d at 1328.

A proffer agreement, like a plea agreement, is rooted in contract law. United States v. Castaneda, 162 F.3d 832, 835 (5th Cir. 1998); United States v. Liranzo, 944 F.2d 73, 77 (2nd Cir. 1991); United States v. Khan, 920 F.2d 1100, 1104 (2nd Cir. 1990) ("Cooperation agreements, like plea bargains, may usefully be interpreted with principles borrowed from the law of contract."). A proffer agreement is a contract, and the interpretation of its terms is therefore governed by contract-law principles. Baker v. United States, 781 F.2d 85, 90 (6th Cir.), cert. denied, 479 U.S. 1017, 93 L. Ed. 2d 719, 107 S. Ct. 667 (1986) (citation omitted). Because "a [proffer agreement] is a contract, [its] terms … necessarily must be interpreted in light of the parties' reasonable expectations." United States v. Mooney, 654 F.2d 482, 486 (7th Cir. 1981) (citations omitted). However, proffer agreements are also "unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain." United States v. Ready, 82 F.3d 551, 558 (2nd Cir. 1996); citing Carnine v. United States, 974 F.2d 924, 928 (7th Cir. 1992) (quoting United States v. Ataya, 864 F.2d 1324, 1329 (7th Cir. 1988)); see also United States v. Herrera, 928 F.2d 769, 773 (6th Cir. 1991) ("Although the plea agreement is contractual in nature, it is by no means an ordinary contract."); United States v. Giorgi, 840 F.2d 1022, 1026 (1st Cir. 1988).

Because of the government's advantage in bargaining power, courts must construe ambiguities in such agreements against the government. See United States v. Baird, 218 F.3d 221, 229 (3rd Cir. 2000) ("In view of the government's tremendous bargaining power, we will strictly construe the text against it when it has drafted the agreement."); United States v. Difeaux, 163 F.3d 725, 728 (2nd Cir. 1998)("The reviewing court must … construe ambiguous provisions against the government, which drafted the agreement and enjoys unequal bargaining power in the sentencing process."); United States v. Harvey, 791 F.2d 294, 303 (4th Cir. 1986)(ambiguous provision in plea

agreement must be read against the government); United States v. Randolph, 230 F.3d 243, 248 (6th Cir. 2000)("any ambiguities in the language of a plea agreement must be construed against the government"); Margalli-Olvera v. INS, 43 F.3d 345, 353 (8th Cir. 1994)("Where a plea agreement is ambiguous, the ambiguities are construed against the government."); United States v. Anderson, 970 F.2d 602, 607 (9th Cir. 1992)(government bear responsibility for any lack of clarity in plea agreement), as amended by 990 F.2d 1163 (9th Cir. 1993); United States v. Jefferies, 908 F.2d 1520, 1523 (11th Cir. 1990)("a plea agreement that is ambiguous must be read against the government"). See also Restatement (Second) of Contracts, § 206 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

When a proffer agreement "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, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). In determining whether the government has violated such an agreement, a court must determine whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement. United States v. Huddleston, 929 F.2d 1030, 1032 (5th Cir. 1991); United States v. Valencia, 985 F.2d 758, 761 (5th Cir. 1993); United States v. Boatner, 966 F.2d 1575, 1578 (11th Cir. 1992). And as demonstrated above, in determining a defendant's reasonable understanding of a proffer agreement, ambiguities must be strictly against the government and resolved to the benefit of the defendant. Randolph, 230 F.3d at 248 (6th Cir. 2000).

A proffer agreement is "ambiguous if it is capable of more than one reasonable interpretation." United States v. Gebbie, 294 F.3d 540, 551 (3rd Cir. 2002) (quotation omitted);

Collins v. Harrison-Bode, 303 F.3d 429, 433 (2d Cir. 2002)("[c]ontract language is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire agreement"). "In deciding whether an agreement is ambiguous, particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought." Harrison-Bode, 303 F.3d at 433 (internal quotations and citations omitted).

In the instant case, the Sixth Circuit failed to adhere to these well settled principles when ambiguities in the written proffer agreement led directly to the use of Castano's self-incriminating statements during grand jury proceedings to secure indictments against him. Castano entered into the proffer agreement justifiably believing that as long as he provided truthful information during the proffer, none of the truthful information could later be used against him in any criminal prosecution against him. This is because the proffer agreement expressly provided that protection, stating:

> "[N]o statement made by you or your client during this proffer discussion will be offered against your client in the government's case-in-chief *in any criminal prosecution of your client* for the matters currently under investigation."

RE 1538-2 Proffer Letter (emphasis added). Under its express terms, Castano's "reasonable understanding of the agreement" was that his truthful admissions could not be used against him in any criminal prosecution. Valencia, 985 F.2d at 761. However, the Sixth Circuit found that the proffer letter protected Castano from the use of his statements against him at trial and not during grand jury proceedings. APX at 36 ("The term 'case-in-chief' does not render the agreement ambiguous. 'Case-in-chief' is a term of art that refers to a trial, and not preliminary proceedings. See

Case-in-Chief, BLACK'S LAW DICTIONARY (11th ed. 2019)").

While it is true that the term "case-in-chief," standing alone refers to a trial, the Sixth Circuit's finding ignores the full terms of the proffer agreement, which promised that Castano's self-incriminating statements would not be used in the "case-in-chief *in any criminal prosecution of your client*." Thus, when read in conjunction with the language surrounding the term in the proffer agreement, the term "case-in-chief" is ambiguous. Randolph, 230 F.3d 243, 248 (ambiguities are construed in favor of the defendant); Valencia, 985 F.2d at 761 (same); Margalli-Olvera, 43 F.3d at 353("Where a plea agreement is ambiguous, the ambiguities are construed against the government."); Anderson, 970 F.2d at 607(government bear responsibility for any lack of clarity in plea agreement), as amended by 990 F.2d 1163 (9th Cir. 1993); Jefferies, 908 F.2d 1520, 1523 (11th Cir. 1990)("a plea agreement that is ambiguous must be read against the government").

Notably, the proffer letter does not use the term "criminal trial" at any point. Instead it provides that "no statement [] will be offered against your client in the government's case-in-chief in any criminal prosecution of your client for the matters currently under investigation." The term "case-in-chief" does not modify the phase "any criminal trial" as that phrase is not used in the agreement. Instead, the term it modifies the phrase "any criminal prosecution." Thus, under the express terms of the proffer letter, Castano's "reasonable understanding of the agreement" was that his truthful admissions could not be used against him in any criminal prosecution. Harrison-Bode, 303 F.3d at 433("In deciding whether an agreement is ambiguous, particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought.").

If the government meant that the term "case-in-chief" in the proffer letter referred to trial only and that Castano's incriminating statements would be used against him during grand jury proceedings, it should have clearly stated as much. The proffer letter is ambiguous because unlike the term "case-in-chief," the term "any criminal prosecution" is not limited to a criminal trial. The dictionary meaning of "criminal prosecution" refers not simply to a trial, but to the initiation of criminal charges against an individual through the conclusion of a trial. For example, Merriam-Webster Dictionary defines "prosecution" as, "the act or process of prosecuting specifically: the institution and continuance of a criminal suit involving the process of pursuing formal charges against an offender to final judgment."[2] Similarly, Cambridge Dictionary defines the term "prosecution" as "the act of officially accusing someone of committing an illegal act, esp. by bringing a case against that person in a court of law" or "the process of officially accusing someone in a court of law of committing a crime."[3] And, Black's Online Law Dictionary, 2nd Edition, defines the term prosecution to mean, "A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime."[4] Thus, the term "criminal prosecution" can refer to the process of officially accusing a defendant with a crime through the conclusion of a trial.

By denying Castano's claims on appeal, the Sixth Circuit implicitly found that the term "criminal prosecution" does not include grand jury proceedings. This result defies common sense and works absurd results. As noted, the language in the proffer letter prohibited the government from

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[2]See, https://www.merriam-webster.com/dictionary/prosecution

[3]See, https://dictionary.cambridge.org/us/dictionary/english/prosecution

[4]See, https://thelawdictionary.org/prosecution

using self-incriminating statements against Castanoin "any criminal prosecution." In this context, it would be unreasonable for Castano, or any defendant, to agree to directly incriminate himself and guarantee that he would be charged with a crime. Such and agreement would be a contract that could only bring Castano "detriment–and as such was offensive both to the fundamental common law canons of contract construction and to the constitutional guarantee of due process." Randolph, 230 F.3d at 250. And, it would be unreasonable for counsel to advise a client to provide self-incriminating information to the government so that the client could be charged with a crime. Id. Further, if it were true that the proffer letter provided no protection for Castano from prosecution, the protections of the letter were illusory and the agreement was unconscionable. Id. Thus, "the requirement that a defendant be afforded due process of law necessitates that [Castano's] reasonable expectation of benefit from the [proffer] agreement be respected, for it is a violation of due process to hold a defendant to an unconscionable agreement." Id.

In sum, had the government meant to limit the protections of the agreement to the "case-in-chief at trial" it could have easily stated as much in the agreement. Such a statement would have made the terms clear and unambiguous. At minimum, the agreement is ambiguous to the scope of its protection, which is to be construed in favor of Castano and a reasonable understanding of the proffer letter was that Castano's self-incriminating statements would not be used by the government during any criminal prosecution of Castano. This necessarily includes grand jury proceedings. However, the government substantially and materially relied upon Castano's self incriminating statements in presenting its case to the grand jury. The use of Castano's self-incriminating statements to secure charges and prosecute Castano violated the proffer agreement and Castano's Fifth Amendment rights. Therefore the Sixth Circuit should have vacated Castano's convictions. The

decision otherwise conflicts with Supreme Court and other circuit precedent. Therefore, petition for writ of certiorari should be granted.

(1) Castano substantially complied with the terms of the proffer agreement by providing significant truthful information during a single proffer interview that was materially and extensively used by the government in securing indictments against Castano and others; i.e. the government received the benefit of the bargain.

As an alternative ground to affirm Castano's convictions, the Sixth Circuit found that Castano violated the terms of the proffer agreement because the information he provided was not complete. See, Apx at 35-38. This finding is plainly incorrect. During a single proffer interview lasting only one hour, Castano provided reliable and significant information that was substantially relied upon by the government in its investigation and prosecution. The government was not mislead by Castano's proffer, but squarely received the benefit of its bargain because just three weeks after the proffer interview, Castano's statements were presented to a grand jury and used as the basis to secure the indictments in this case. APX at 34. As noted by the Sixth Circuit, "the government used his testimony in the ongoing grand jury proceedings related to the DDMC investigation." Id. Castano correctly argued that the use of his self-incriminating statements to prosecute him violated the terms of the proffer agreement, violated Castano's Fifth Amendment right against self-incrimination, and amounted to prosecutorial misconduct.

Proffer agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law. United States v. Moulder, 141 F.3d 568, 571 (5th Cir. 1998); United States v. Ballis, 28 F.3d 1399, 1409 (5th Cir. 1994); United States v. Fitch, 964 F.2d 571, 574 (6th Cir. 1992); United States v. Brown, 801 F.2d 352, 354 (8th Cir. 1986). Under these principles, if a defendant lives up to his end of the bargain, the government is bound to perform

its promises. United States v. Tilley, 964 F.2d 66, 70 (1st Cir. 1992). If a defendant "materially breaches" his commitments under the agreement, however, the government can be released from its reciprocal obligations. Ballis, 28 F.3d at 1409; Tilley, 964 F.2d at 70; United States v. Crawford, 20 F.3d 933, 935 (8th Cir. 1994). Therefore, the use of Castano's self-incriminating statements to prosecute him would be permissible only if it was proved that Castano "materially breached" the proffer agreement. See Fitch at 574(the government must prove that any breach was material and substantial" in order to be released from its obligation not to use defendant's proffered statements against him).

In determining whether a proffer agreement has been materially breached, the court must consider whether the non-breaching party received the benefit of the bargain, as well as the incriminating nature of the information provided by the defendant. See, United States v. Castaneda, 162 F.3d 832, 837 (5th Cir. 1998)("a breach is not material unless the non-breaching party is deprived of the benefit of the bargain"); see also Fitch, 964 F.2d 571, 575 (6th Cir. 1992) ("in evaluating the Government's effort to rescind an immunity agreement on the basis of breach of contract, the most important factor is the incriminating nature of the information provided by the defendant") (citing United States v. Johnson, 861 F.2d 510, 513 (8th Cir. 1988)); United States v. Mark, 795 F3d 1102 (9th Cir. 2015)("When it comes to proving breach of an immunity agreement, the government should do better than 'he said, she said.'").

Here, the Sixth Circuit concluded that Castano intentionally withheld information about some DDMC members and the DDMC leadership, and thus he did not provide complete and truthful information and breached the proffer agreement. APX at 35-38. Castano asserts that this finding is factually incorrect as the record demonstrates that he provided information concerning Rich and

Lonsby and information about DDMC leadership including Iron Mike and information on DDMC activities in Texas. Further, the indictments returned after the interview were based substantially on the information provided by Castano during the proffer. APX at 34.

Importantly, in determining whether an omission or fabrication constitutes a material breach, a court must determine if the government received the benefit of its bargain. "[T]he most important consideration is the incriminating nature of the proffered statements, not the amount of information provided to the government. Id at 574; citing Johnson, 861 F.2d at 513 n.3 (8th Cir. 1988). Castano has never disputed that some facts were not discussed during his proffer interview because it would have been impossible for Castano to provide all the information he knew in one interview lastly only an hour. In this context, any omission by Castano could not be proved to be intentional. But even if he omitted some information in order to protect an associate, any omission was not so profound to constitute a material breach of the agreement because the government received significant benefit from Castano's proffer. See, United States v. Castano, 162 F.3d 832, 838 (5th Cir 1998)(although Castaneda omitted information during his interviews with the government, the omissions did not rise to the level of a material breach); Fitch, 964 2d at 574-75(Even though false information was provided, "[i]n light of all the incriminating information supplied by Fitch, we do not find that this fabrication was sufficient to constitute a substantial material breach.").

As the above case precedent makes clear, whether a defendant has breached his agreement depends, in large part, on the incriminating nature of the testimony given by the defendant. Thus, if information provided pursuant to a proffer agreement was significantly relied upon by the government to secure indictments, the government will have received the benefit of its bargain and a material breach has not occurred. In this case, the government cannot deny that Castano provided

significant material information in the proffer interview. Castano supplied the government with enough information to allow it to secure a multicount indictment against numerous individuals, including Castano. Therefore, "the government received the benefit of its bargain" and despite any omissions, the agreement should have been enforced. Fitch at 575.

The Sixth Circuit ignored the above precedent and failed address whether the government had received the benefit of the bargain in reaching the conclusion that Castano violated the agreement. The decision to affirm Castano's conviction conflicts with Supreme Court and sister circuit precedent and has resulted Castano's wrongful conviction. In affirming Castano's convictions, the Sixth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

X. CONCLUSION

Castano respectfully submits that he has demonstrated compelling reasons to grant writ of certiorari in this case. Accordingly, certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a on February 10, 2022, a true and accurate copy of the petition for writ of certiorari was sent via U.S. Mail with sufficient postage affixed to the Office of the Assistant U.S. Attorney for the Eastern District of Michigan, 211 W. Fort Street, Suite 2001, Detroit, MI 48226 and to the Office of the Solicitor General, Room 5614, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001. Further a PDF copy was emailed to the Office of the Solicitor General to SupremeCtBriefs@USDOJ.gov.

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