

No. _____

In the Supreme Court of the United States

MICHAEL DAVID SCOTT, PETITIONER
v.
UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a defendant's guilty plea precludes his right of appeal when the government improperly used his own immunized information to indict and convict him.

Whether immunized information divulged by a defendant to the government under a proffer agreement can be used to indict and convict that defendant.

Whether immunized information divulged by a defendant to the government under a proffer agreement can be used to enhance his sentence under the U.S. Sentencing Guidelines.

TABLE OF CONTENTS

Questions Presented	I
Table of Authorities	III
Opinion Below	1
Jurisdiction	1
Federal Sentencing Provision	2
Statement of the Case	3
Discussion	3
Reasons for Granting Review	7
1. The First Circuit’s Decision Denied Petitioner His Right of Appeal, Which Conflicts with This Court’s Affirmation of That Right	7
2. The First Circuit’s Decision Ignores Petitioner’s Notice to the Trial Court That His Plea Was Involuntary	13
3. The Trial Court Relied Upon Immunized Testimony to Enhance. Petitioner’s Sentence, In Contravention to Federal Sentencing Law ..	15
Conclusion	18

APPENDIX

Judgment of the United States Court of Appeals for the First Circuit, <i>United States v. Michael David Scott</i> , App. 15-2405 (1st Cir. 2017)	1a
Opinion of the United States Court of Appeals for the First Circuit, <i>United States v. Michael David Scott</i> App. 15-2405 (1st Cir. 2017)	2a
Mandate of the United States Court of Appeals for the First Circuit, <i>United States v. Michael David Scott</i> , App. 15-2405 (1st Cir. 2018)	25a

TABLE OF AUTHORITIES

Cases

<i>Boag v. MacDougall</i> , 454 U.S. 364 (1982).....	14
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	8, 13
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	14
<i>Brady v. United States</i> , 397 U.S. 742 (1970).....	8, 10
<i>Carnley v. Cochran</i> , 369 U.S. 506 (1962).....	13
<i>Class v. United States</i> , 583 U.S. ____ (2018).....	9, 10
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	17
<i>Hughes v. Rowe</i> , 449 U.S. 5 (1980)	14
<i>In re Grand Jury Proceedings Kinamon v. United States</i> , 45 F.3d 343 (9th Cir. 1995).....	12
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972).....	7, 9, 12, 17
<i>Mabry v. Johnson</i> , 467 U.S. 504 (1984)	10
<i>McCarthy v. United States</i> , 394 U.S. 459 (1969)	15
<i>Menna v. New York</i> , 423 U.S. 61 (1975).....	8, 9c
<i>North Carolina v. Alford</i> , 400 U.S. 25 (1970)	8
<i>Santobello v. New York</i> , 404 U.S. 257 (1971)	8
<i>Tollett v. Henderson</i> , 411 U.S. 258 (1973)	9, 10
<i>United States v. Amato</i> , 46 F. 3d 1255 (2d Cir. 1995)	17
<i>United States v. Baird</i> , 218 F. 3d 221 (3rd Cir. 2000)	17
<i>United States v. Beery</i> , 678 F.2d 856 (10th Cir. 1982)	12

<i>United States v. Cocilova</i> , 584 F.Supp.2d 885 (W.D. Va. 2008)	16
<i>United States v. De-La-Cruz Castro</i> , 299 F. 3d 5 (1st Cir. 2002)	8
<i>United States v. Lopez</i> , 605 F. Supp. 2d 852 (S.D. Tex. 2009)	11
<i>United States v. Papaleo</i> , 853 F. 2d 16 (1st Cir. 1988)	8
<i>United States v. Perry</i> , 640 F. 3d 805 (8th Cir. 2011).....	16, 17
<i>United States v. Pielago</i> , 135 F.3d 703 (11th Cir. 1998)	11
<i>United States v. Robinson</i> , 898 F.2d 1111 (6th Cir. 1990)	16
<i>United States v. Schmidgall</i> , 25 F.3d 1523 (11th Cir. 1994)	11, 12
<i>United States v. Scott</i> , 877 F.3d 30 (1st Cir. 2017)	10, 13
<i>United States v. Shorteeth</i> , 887 F.2d 253 (10th Cir. 1989)	16
<i>United States v. Teeter</i> , 257 F.3d 14 (1st Cir. 2001)	8

Other Authority

U.S. Const. amend. V.....	12
---------------------------	----

Statutes

18 U.S.C. § 1343.....	3
18 U.S.C. § 1344.....	3
18 U.S.C. § 1957.....	3
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2101(c).....	1

Rules and Guidelines

U.S.S.G. § 1B1.8, <i>et seq.</i>	2, 7, 15, 16, 17
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Petitioner herein respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the First Circuit entered judgment in this case. The opinion (Appendix, 2a) has been reported at 877 F.3d 30 (1st Cir. 2017).

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on December 8, 2017. After declining to rehear the case *en banc*, the First Circuit issued a mandate on January 30, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rules 13.1 and 13.3 and 28 U.S.C. § 2101(c), this petition is timely filed if deposited in the United States mail, with first-class postage prepaid, on or before April 30, 2018.

FEDERAL SENTENCING PROVISION

The federal sentencing provision at issue in this case is U.S.S.G. § 1B1.8, which provides:

- (a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.
- (b) The provisions of subsection (a) shall not be applied to restrict the use of information:
 - (1) known to the government prior to entering into the cooperation agreement;
 - (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);
 - (3) in a prosecution for perjury or giving a false statement;
 - (4) in the event there is a breach of the cooperation agreement by the defendant; or
 - (5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).

STATEMENT OF THE CASE

The government indicted Petitioner and then elicited a guilty plea from him on the claim its evidence was obtained from wholly independent sources and not directly from the many proffer sessions in which Petitioner had participated under an immunity agreement. A subsequent review of the grand jury transcripts showed otherwise. At sentencing, the U.S. District Court for the District of Massachusetts (hereinafter “trial court”) imposed an excessive sentence based in part on financial loss information which Petitioner provided during the proffer sessions.

Petitioner appealed and requested a hearing to determine if the government’s evidence was the same information supplied directly by Petitioner, in violation of the immunity agreement. The First Circuit Court of Appeals denied the appeal, affirming both the conviction and the sentence.

This petition seeks relief because the First Circuit decision conflicts with decisions of this Court and misapplies the clear directive of federal law.

DISCUSSION

Petitioner pleaded guilty to 32 counts of Wire Fraud, in violation of 18 U.S.C. § 1343; 24 counts of Bank Fraud, in violation of 18 U.S.C. § 1344; and, 22 counts of Unlawful Monetary Transactions, in violation of 18 U.S.C. § 1957. Those charges were the result of a lengthy investigation in which Petitioner himself supplied the Federal Bureau of Investigation (“FBI”) with the bulk of source material the government eventually used to indict and convict him. The government’s use of this material was in contravention to the proffer agreement letter which Petitioner

signed before participating in 18 separate proffer sessions, either in person or by phone, from February 23, 2009 to June 23, 2010.¹ The agreement stated, in relevant part:

This letter confirms that the United States Attorney for the District of Massachusetts will consider an accurate and complete proffer from your client, Michael Scott, in connection with conspiracy, bank fraud, mortgage fraud, money laundering and related offenses currently under investigation by federal and state agencies. The terms under which the contemplated proffer will be received are as follows:

No statements made or other information provided by Michael Scott will be used by the United States Attorney directly against him, except for purposes of cross-examination and/or impeachment should he offer in any proceeding statements or information different from statements made or information provided by him during the proffer, or in a prosecution of Michael Scott based on false statements made or false information provided by Michael Scott.

The government may make derivative use of, or may pursue any investigative leads suggested by, any statements made or other information provided by Michael Scott in the course of the proffer. Any evidence directly or indirectly derived from the proffer may be used against him and others in any criminal case or other proceeding. This provision is necessary in order to eliminate the possibility of a hearing at which the government would have to prove that the evidence it would introduce is not tainted by any statements made or other information provided during the proffer.

Petitioner's trial counsel assured him the letter was standard and that it would immunize his statements and information, prohibiting their direct use against him. In reliance, Petitioner provided the government and the FBI with full

¹ Petitioner was represented by counsel at only four of these sessions.

and truthful proffers regarding the alleged fraudulent mortgage scheme under investigation. Part of this information included the role other involved individuals played, including a bank loan officer who kept copies of many of the same mortgage documents which Petitioner supplied to the FBI. In fact, after the third proffer session, the FBI prepared – and subsequently executed – a search warrant to retrieve those documents from the loan officer’s house and computers. The search warrant cited Petitioner as the confidential source who informed the government where the documents were kept.

The FBI agent who conducted the majority of the proffers subsequently appeared as the sole witness at three grand jury sessions in which the government secured an indictment – followed by a superseding indictment – against Petitioner. The agent’s explanation of the mortgage scheme repeated Petitioner’s proffer information and included many of the documents Petitioner provided in his proffers and through his computer files.

Despite repeatedly indicating it would not use Petitioner’s statements against him, the government continually attempted to use proffered information in its case-in-chief, including duplicate paper and computer hard drive files it seized from records held by a trustee in an unrelated bankruptcy case. The latter attempt prompted Petitioner to file a motion to suppress, which the trial court granted. Despite the loss, the government claimed it still had enough evidence from “wholly independent” sources to convict Petitioner. No plea agreement was reached, and

after Petitioner lost several motions for release from detention he pleaded guilty on May 29, 2015.

After his plea and shortly before sentencing, Petitioner was finally given access to the grand jury transcripts. After reviewing them, Petitioner believed the evidence presented to indict him was the protected information he supplied to the government. He wrote to the trial court in September 2015 to express his deep concern about the grand jury proceedings and to ask that his sentencing hearing be continued and that the trial court address his concerns before sentencing commenced. The court took no action on the letter and sentenced Petitioner to 135 months in prison. The harshness of the sentence was largely driven by an 18-level enhancement for financial loss, a figure which was based on values of properties Petitioner had directly identified during his proffers to the FBI and for which he supplied the relevant paperwork.

Petitioner appealed his conviction and sentence, claiming the government made direct use, not derivative use, of his proffered statements and information. In claiming that he did not have the requisite knowledge to voluntarily plead guilty, he cited the impermissible use of his statements and material to secure a search warrant of a third-party's computer and residence, which resulted in the seizure of identical documents to those he supplied, which were then used against him. He cited the use of these and other identical documents which were presented without his knowledge to the grand jury by the very FBI agent to whom he provided this information. And he cited the use of this information to enhance

his sentence under the U.S. Sentencing Guidelines, which should have been excluded under U.S.S.G. § 1B1.8 (“Where...the government agrees that self-incriminating information provided pursuant to the [cooperation] agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range...”).

As the government claimed none of the evidence it used was directly obtained from the proffers, Petitioner requested on appeal to the First Circuit that his case be remanded to the trial court for a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441, 460 (1972), to determine if the evidence came from Petitioner or wholly independent sources. After a First Circuit panel ruled against Petitioner on December 8, 2017, affirming the conviction and sentence, Petitioner applied for a rehearing *en banc*, before the entire First Circuit. That petition was also denied, and the appellate court issued a mandate on January 30, 2018.

REASONS FOR GRANTING REVIEW

1. The First Circuit’s Decision Denied Petitioner His Right of Appeal, Which Conflicts with This Court’s Affirmation of That Right.

Although the First Circuit continued its analysis beyond the issue of Petitioner’s guilty plea, the decision affirming Petitioner’s conviction is squarely anchored to it. By deeming it an “unconditional guilty plea” the appellate court foreclosed any possibility the plea was not binding, even though the appellate court’s own decisions acknowledge that a court “may refuse to enforce a knowing and voluntary waiver of appellate rights if doing so would work a miscarriage of

justice.” *United States v. De-La-Cruz Castro*, 299 F. 3d 5, 13 (1st Cir. 2002) (citing *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001)).

This Court recognizes that due process under the Fifth Amendment requires that a defendant’s guilty plea be voluntary, knowing and intelligent. *Brady v. United States*, 397 U.S. 742 (1970). *See also Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (involuntary pleas violate the Due Process Clause). While fair trial concerns significantly diminish because a defendant admits guilt, *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (*per curiam*), that is not the end of the discussion, as pleas are “no more foolproof than full trials.” *Brady, supra* at 757. As this Court has stated, “[r]easons other than the fact that he is guilty may induce a defendant to so plead....” *North Carolina v. Alford*, 400 U.S. 25, 33 (1970) (internal citations omitted).

Under this Court’s precedent, a binding prosecutorial representation that is accepted by a defendant and becomes the basis for a change of plea must be performed. *See Santobello v. New York*, 404 U.S. 257, 262 (1971). Petitioner claimed that the government made a material misrepresentation which induced him to involuntarily plead guilty. *See Brady, supra* at 755. “Due process concerns may also arise prior to the entry of a guilty plea when the defendant detrimentally relies upon the government’s promise.” *United States v. Papaleo*, 853 F. 2d 16, 18 (1st Cir. 1988).

After Petitioner won the ruling on his motion to suppress, there should have been no remaining evidence, as the basis for the entire case against him was the

information he provided under the guise of the proffer immunity agreement.

However, the government continued toward trial, claiming in open court before a magistrate judge it would use other evidence from “wholly independent sources.”

That representation was the basis for Petitioner’s plea. Petitioner chose to plead as an exercise in damage control.

The government had promised in writing not to use his proffered statements or other information directly against him, except to cross-examine or impeach him, or prosecute him for giving false statements. As he had not yet reviewed the grand jury transcripts, he did not realize the indictment and the government’s remaining evidence was tainted and subject to a challenge under *Kastigar*, 406 U.S. at 460.

The First Circuit claimed that Petitioner’s challenge to his plea was an independent claim and did not meet any exception that this Court indicated in decisions such as *Tollett v. Henderson*, 411 U.S. 258 (1973). However, the First Circuit decision mischaracterizes the *Tollett* decision even though its main issue concerned grand jury proceedings, just as one facet of Petitioner’s case did. In *Tollett*, the petitioner challenged, for the first time, the racial makeup of the grand jury, claiming it was unconstitutionally prejudiced against him. *Id.* at 259.

On the other hand, Petitioner’s case concerns the tainted evidence used against him at the grand jury as well as every other phase of the prosecution. His case has more in common with other decisions of this Court, such as *Menna v. New York*, *supra*, and the recently-decided *Class v. United States*, 583 U.S. ____ (2018), in which the prosecution itself is questioned. While Petitioner does not directly

challenge the legitimacy of the statutes under which he was convicted, as did the petitioner in *Class*, he does challenge the government's right to proceed against him with a case which was constitutionally infirm from the outset. As Justice Breyer's opinion in *Class* indicates, there are broader grounds under which a defendant may legitimately challenge his conviction, even after having entered an unconditional guilty plea. "[T]he voluntary and intelligent character of the guilty plea," *Tollett*, 411 U.S. at 267, is not an independent claim. That has been Petitioner's argument from the outset, and an involuntary plea is a circumstance the First Circuit acknowledged is not precluded by *Tollett* or its progeny. *See Scott*, 877 F.3d 30 (Appendix, 10a-11a).

Petitioner's basis for his plea was the government's misrepresentation it had complied with the proffer agreement, a faulty reliance on his part considering the government's direct use of Petitioner's information in its search warrants and at the grand jury. *See Mabry v. Johnson*, 467 U.S. 504, 510 (1984) (prosecutorial misrepresentations can call into question the "consensual character of the plea" and its ultimate validity) (citing *Brady v. United States*, 397 U.S. at 755).

The government's evidence was identical information obtained from other sources, who appeared to have been almost exclusively the codefendants and co-conspirators who were under investigation as the direct result of Petitioner's proffered information. This was not "derivative" use or information from "wholly independent sources." Yet the First Circuit's decision allows such duplicate material, which included photocopies of mortgage statements and closing

documents from a bank, to be used as evidence if it was acquired from a third party. If that ruling is allowed to stand, such use by the government could negate the immunity in nearly any proffer agreement. Even the trial court, in its order granting Petitioner's motion to suppress, stated:

If the right to make derivative use of proffered evidence means that an offer of immunity can be overcome by simply making a copy of the thing proffered, a defendant is left bare of protection for anything but the verbatim use of his statements at trial, thus rendering meaningless the protection extended in the agreement to "other information provided.

Yet, that appears to be an acceptable definition of derivative use in the First Circuit, which is not only at odds with logic but also with other federal courts and Circuit Courts of Appeal. *See, e.g., United States v. Lopez*, 605 F. Supp. 2d 852, 859 (S.D. Tex. 2009) (clear derivative use entails "pursuing leads suggested by defendant's testimony to discover evidence of **wholly new and unrelated crimes** and using that evidence against him") (emphasis added). *See also United States v. Pielago*, 135 F.3d 703 (11th Cir. 1998) (allowing direct use of defendant's proffer information at trial only after defendant stopped cooperating, thereby breaching the agreement).

The appellate court's view that the grand jury proceedings were not tainted conflicts with the view the 11th Circuit expressed in *United States v. Schmidgall*, 25 F.3d 1523, 1528 (11th Cir. 1994): "The protection against self-incrimination is violated whenever the prosecution presents a witness whose testimony is shaped — directly or indirectly — by immunized testimony, regardless of how or by whom the

witness was exposed to that testimony.” The opinion also contradicts that of the 9th and 10th Circuit Courts. *See In re Grand Jury Proceedings Kinamon v. United States*, 45 F.3d 343, 347 (9th Cir. 1995) (“prohibition against the use of immunized testimony covers such use at grand jury proceedings as well as at trial”); *United States v. Beery*, 678 F.2d 856, 860, n. 3 (10th Cir. 1982) (if defendant's use immunity is violated by direct or derivative use before grand jury, indictment must be dismissed unless error is harmless).

For this reason, Petitioner asked that his conviction be vacated and the case remanded for a hearing pursuant to *Kastigar*, 406 U.S. at 460. Under *Kastigar*, the trial court could determine if the evidence used to secure the indictment, as well as enhance Petitioner’s guidelines sentence, came directly from Petitioner or was obtained from wholly independent sources, and that the evidence was untainted through each step of the investigation. *Schmidgall*, 25 F.3d at 1528.

The First Circuit’s decision to deny that request is an unjust and, considering the violation Petitioner’s rights under the Fifth Amendment’s Due Process Clause (rights he believed he had preserved by signing a proffer agreement), an unconstitutional result which must be vacated by this Court. “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. *See also Kastigar, supra* at 453 (Fifth Amendment prohibits “the use of [immunized] testimony, as well as evidence derived directly and indirectly therefrom.”).

2. The First Circuit's Decision Ignores Petitioner's Notice to the Trial Court That His Plea Was Involuntary.

Petitioner did not formally move to withdraw his guilty plea after reviewing the grand jury transcripts, as the First Circuit's decision noted, but he did indicate to the trial court in writing prior to sentencing that he was deeply uncomfortable with the direction his case was heading. His September 2015 letter expressed his clear belief that, in light of his discovery that the evidence used to obtain his indictment appeared to be the same information he provided under an immunity grant, the circumstances under which he entered a plea had changed dramatically and that further proceedings could be tainted if, at the very least, the court did not address his concerns during the upcoming hearing. Petitioner wrote, "I am asking this court to make a determination on these issues as I do not believe that my entire proceedings have been fair, further constitutional."

The trial court ignored the letter and made no inquiries. Because Petitioner did not specifically say his plea was "involuntary" or explicitly request withdrawing his plea, the First Circuit determined he "did not do enough" and found no error in the trial court's inaction. *Scott*, 877 F.3d 30 (Appendix, 12a). However, as this Court has noted, "Presuming waiver from a silent record is impermissible." *Boykin*, 395 U.S. at 242 (quoting *Carnley v. Cochran*, 369 U.S. 506, 516 (1962)).

Petitioner's silence on the matter, *i.e.*, not formally moving to withdraw his plea, was not an indication he made peace with the government's breach of its proffer agreement. Petitioner is not an attorney and is not naturally possessed with the knowledge and experience needed to circumnavigate the court system and the

federal rules of criminal procedure. Even if he was, the letter clearly indicated he did not believe his trial counsel was adequately representing his interests. In fact, the handwritten cover letter asked for a continuance of the sentencing and stated very clearly that there was an “effective assistance of counsel” issue which concerned him. Acting *pro se* as he did, the letter itself should have been considered a *de facto pro se* motion regarding the voluntariness of his plea. This Court has instructed federal courts to liberally construe the “inartful pleading” of *pro se* litigants. *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (*per curiam*). “It is settled law that the allegations of [a *pro se* litigant] however inartfully pleaded are held to less stringent standards than formal pleadings drafted by lawyers....” *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (internal citations omitted).

Petitioner’s letter was not a hodgepodge of “vague complaints” about the judicial system, as the First Circuit claimed. He listed clearly-expressed concerns about his conviction’s fairness and constitutionality. For example, he wrote about being informed post-plea about additional discovery the FBI possessed but did not previously disclose. He unambiguously wrote, “This conduct denies me due process as I had no knowledge that this discovery existed before I accepted responsibility on May 29, 2015.” Petitioner clearly inferred from the government production that the discovery was material to punishment, and therefore should have been previously disclosed. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The letter also implied that Petitioner did not understand if he could withdraw his plea, even though government misconduct would have given him the

grounds to apply. When a defendant misapprehends how a guilty plea affects his rights, it cannot be considered voluntary. *See McCarthy v. United States*, 394 U.S. 459, 466 (1969) (“[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.”). As this Court has declared, when a “guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.” *Id.*

3. The Trial Court Relied Upon Immunized Testimony to Enhance Petitioner’s Sentence, In Contravention to Federal Sentencing Law.

Under the U.S. Sentencing Guidelines, any self-incriminating information a defendant provides to the government under a cooperation agreement “shall not be used in determining the applicable guideline range...” U.S.S.G. § 1B1.8(a). None of the listed exceptions to the guideline apply here, as no breach of the agreement was committed by the defendant. *See* § 1B1.8(b)(4). Instead, the government breached its proffer agreement by requesting that the sentencing court determine loss, via the relevant conduct section, by adding the value of five specific properties from the mortgage fraud scheme.

Petitioner objected to including the property information, as it came directly from Petitioner’s oral proffers and was contained on his computer hard drives, as was virtually all the mortgage information on the properties the government used both in the indictment and as relevant conduct at sentencing. As such, the usage restriction the government drafted in its proffer agreement triggered application of

§ 1B1.8. *See id.* *See also United States v. Robinson*, 898 F.2d 1111, 1117 (6th Cir. 1990) (agreement not to bring “additional charges” based on defendant's statements “seems to be one contemplated by § 1B1.8”); *United States v. Shorteeth*, 887 F.2d 253, 256 (10th Cir. 1989) (applying § 1B1.8 where government agreed not to bring separate prosecution based on defendant’s debriefing statements); *United States v. Cocilova*, 584 F.Supp.2d 885, 893 (W.D. Va. 2008) (applying § 1B1.8 where government agreed not to introduce defendant’s statements made under immunity agreement in its case-in-chief).

The trial court allowed the information to enhance the sentence, finding that it was “independent” of the immunized proffer information, even though the same court had conducted a hearing on the motion to exclude, which it ruled on in Petitioner’s favor, and it understood the evidence revealed through the proffer agreement included far more than just Petitioner’s statements. It also involved Petitioner’s computer and paper files which contained the very files it identified at sentencing as “independent.” Including this information enhanced Petitioner’s guidelines sentencing range by a whopping 18 levels, an action the First Circuit affirmed.

This decision conflicts squarely with the Eighth Circuit’s decision in *United States v. Perry*, 640 F. 3d 805 (8th Cir. 2011). After analyzing an immunity agreement similar to the government’s proffer agreement with Petitioner, the Eighth Circuit determined that an “absolute and unqualified promise not to ‘use’ the self-incriminating information” was unnecessary to trigger § 1B1.8. *Id.* at 811.

Instead, the appellate court found that the government's promise not to use Perry's statements in its case-in-chief at trial, despite the agreement's specificity, was enough to also cover their use at sentencing. *See id. See also United States v. Baird*, 218 F. 3d 221, 228 (3rd Cir. 2000) ("government may not evade U.S.S.G. § 1B1.8(a) where the evidence was elicited solely as a result of, or prompted by, the defendant's cooperation immunity agreement.").

Petitioner was the source from which all the critical information here flowed. The First Circuit erred by allowing the trial court to use that information to calculate his guidelines sentencing range. *See Gall v. United States*, 552 U.S. 38, 51 (2007) ("failing to calculate (or improperly calculating) the Guidelines range" constitutes procedural error). His case must be remanded for further proceedings, consistent with this Court's holding in *Kastigar*. *See United States v. Amato*, 46 F. 3d 1255, 1262-1263 (2d Cir. 1995) (sentencing enhancement likely based on defendant's immunized testimony, in violation of § 1B1.8, prompting remand for hearing).

CONCLUSION

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

Respectfully submitted,

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APRIL 30, 2018