No. _____

In the

Supreme Court of the United States

JOSHUA LOUIS RUPP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

SCOTT GRAHAM
Counsel of Record
SCOTT GRAHAM PLLC
1911 West Centre Avenue
Suite C
Portage, Michigan 49024-5399
269.327.0585
sgraham@scottgrahampllc.com

April 24, 2023

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the Sixth Circuit split with the Second, and erroneously departed from this Court's jurisprudence, when it refused to honor the spirit of the plea agreement here, or hold the government to its inducements, and refused to allow Mr. Rupp to withdraw his guilty plea, despite the fact that precedent (in multiple circuits) supports withdrawal of a plea when the government provides one set of sentencing-guideline calculations to induce the plea and then advocates for a higher guideline position at sentencing, rendering that plea unknowing and involuntary.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

STATEMENT OF RELATED PROCEEDINGS

The following cases against Mr. Rupp may be considered related to the present proceedings:

United States Securities and Exchange Commission v. Joshua Louis Rupp, No. 1:21-CR-643 (W.D. Mich. Aug. 24, 2022).

People v. Rupp, No. 19-043539-FH, 19-043540-FH, 19-043537-FH (Mich. 20th Cir. Ct. Aug. 10, 2020).

These state charges arose from actions that occurred when Mr. Rupp had the breakdown referred to in the following statement of the case. These charges did not involve the financial charges presented in the federal matter, but he includes these matters here to fully inform the Court.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Rules

PETITION FOR WRIT OF CERTIORARI

Petitioner Joshua Rupp requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on January 24, 2023, which affirmed the judgment of the United States District Court for the Western District of Michigan, Southern Division.

INTRODUCTION

When Joshua Rupp entered his guilty plea in this matter, he did so under the assumption that the government would honor at sentencing the sentencing-guideline calculations it had presented to induce his plea. Instead, the government advocated for a markedly higher guideline calculation. By doing so, the government breached the plea agreement—and Mr. Rupp's entry into the agreement could not have been knowing and voluntary when the government would contravene his reasonable expectations. Entry of such an unknowing and involuntary plea violated Federal Rule of Criminal Procedure 11 and due process. The Sixth Circuit's decision to uphold this plea then split with jurisprudence in other circuits, especially the Second Circuit, and resulted in an unreasonable application of federal precedent and a marked departure from this Court's jurisprudence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at *United States v. Rupp*, No. 22-1240, 2023 U.S. App. LEXIS 2052 (6th Cir. Jan. 24, 2023) (unpublished). It is also attached at **Appendix A**.

The judgment of the United States District Court for the Western District of Michigan, Southern Division, from *United States v. Rupp*, No. 1:21-CR-185 (W.D. Mich. Mar. 25, 2022), is unpublished and is attached at **Appendix B**. The transcripts of the plea and sentencing hearings, which include the district court's reasoning in accepting Mr. Rupp's plea and crafting the sentence imposed, are attached at **Appendix C.**

JURISDICTION

The United States Court of Appeals decided this case on January 24, 2023. Mr. Rupp did not seek rehearing en banc in the Sixth Circuit. The court affirmed the district court's rulings. Mr. Rupp now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). He has provided notice of this petition to the government, in accordance with this Court's Rule 29.4(a).

RELEVANT CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

This case involves application of Federal Rule of Criminal Procedure 11 and the constitutional, namely due process, considerations that surround guilty pleas and the knowing and voluntary entry of such pleas.

In relevant part, the Fifth Amendment Due Process Clause provides:

". . . nor shall [any person] 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 . . . ."

Federal Rule of Criminal Procedure 11 provides:

Rule 11. Pleas

(a) ENTERING A PLEA.

(1) *In General.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.

(1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) *Ensuring That a Plea Is Voluntary*. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) PLEA AGREEMENT PROCEDURE.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or

related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must

advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) WITHDRAWING A GUILTY OR NOLO CONTENDERE PLEA. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) FINALITY OF A GUILTY OR NOLO CONTENDERE PLEA. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) ADMISSIBILITY OR INADMISSIBILITY OF A PLEA, PLEA DISCUSSIONS, AND RELATED STATEMENTS. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) RECORDING THE PROCEEDINGS. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) HARMLESS ERROR. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

STATEMENT OF THE CASE

A. Federal jurisdiction has been proper since this case's inception, and this Court should exercise jurisdiction under Rule 10, subsections (a) and (c), to address critical questions related to what constitutes a knowing and voluntary guilty plea when the government estimates the advisory sentencing guidelines one way to induce the plea and another way (with higher guideline calculations) at sentencing.

In accordance with this Honorable Court's Rules 14(1)(g)(ii) and 10(a) and (c), Mr. Rupp offers this statement of jurisdiction and suggestion of justifications for this Court's consideration of his case.

The Sixth Circuit in this case has decided a vital question of criminal procedure in a manner that conflicts with decisions in other circuits, especially the Second Circuit. *See* S. Ct. R. 10(a). It has departed from a plain reading of the relevant federal procedural rules and case law, and the decision it rendered in this matter involves "an important federal question," with the Sixth Circuit's conclusions conflicting "with relevant decisions of this Court." *See* S. Ct. R. 10(c).

i. Legal background: circuits have split over how to handle defendants' motions to withdraw guilty pleas when the government advocates for higher guideline calculations at sentencing than estimated during plea negotiations.

Under Rule 11, a defendant's guilty plea is valid only when it is made knowingly and voluntarily. The Second Circuit, as will be discussed below, allows for the withdrawal of a guilty plea when the interests of justice warrant it because the government advocated for a higher sentence as sentencing, when compared to the sentencing estimates it provided to induce the plea. It has come to this conclusion even when a plea agreement has contained language about the guideline estimates not being binding.

In Mr. Rupp's case, in contrast, the Sixth Circuit found no error in the plea process and outcome since "[h]is plea agreement and plea colloquy both show that he knew that any earlier sentencing estimate would not bind the court and that he could not void his plea if the estimate turned out to be wrong." *United States v. Rupp*, No. 22-1240, 2023 U.S. App. LEXIS 2052, at *11 (6th Cir. Jan. 24, 2023) (unpublished). This decision simply flies in the face of this Court's precedent, Second Circuit decisions, and decisions in the First and D.C. circuits, as explored below.

ii. Factual background: Mr. Rupp relied on the government's guideline estimates in entering his guilty plea.

Joshua Rupp grew up in a stable, loving home. He grew up with supportive parents, married a woman he cared deeply about, and discovered an indescribable new level of love upon the birth of his two children. From about 2006 to 2011, he owned a construction business in Texas. Then he worked as a salesperson in the recreational-vehicle field. Later, when he began worrying more about his family's financial future and looking for ways to build financial security for them, he turned to investing and stock trading. Sadly, while sliding into an abyss of mental-health issues and financial stresses, and abusing cough syrup, Mr. Rupp made a series of terrible choices involving taking other people's money for investment. He ended up suffering a mental breakdown (during which he accosted people in a neighborhood while he was naked, made faces, yelled at dogs, entered homes, and caused a vehicle accident—he truly broke down).

Because of what he'd done with the investing activity, the government accused him of securities fraud, specifically that, between May 2015 and July 2019, he executed a scheme to defraud people in connection with securities, by recruiting investors using materially false pretenses, promising people he was making significant returns on investments (and would do so for them in the future). The people defrauded included Mr. Rupp's friends and family. In the end, Mr. Rupp lost his wife and children when his wife divorced him because of the situation.

After learning of the government's investigation, Mr. Rupp came in pre-indictment and agreed to plead guilty after the government suggested guideline enhancements that would yield an applicable advisory sentencing guideline range that would produce something like a ten-to-twelve-year sentence. The government filed a felony information, charging securities fraud, on October 14, 2021, and Mr. Rupp pleaded guilty on November 12, 2021, in accordance with a written plea agreement. From the start of his involvement in these proceedings, Mr. Rupp was cooperative with authorities, even turning over business records.

Not surprisingly, Mr. Rupp's decision to plead guilty came after negotiations with the government that included the government discussing the potential advisory sentencing guidelines. The government presented guideline estimates that were significantly lower than those eventually detailed in the presentence investigation report and at the sentencing hearing. (At sentencing, Mr. Rupp would end up explaining that he "took the plea agreement based on [the government] sending over the thing that said it was 10 to 12 years, those are my guidelines, so I'm here today because of that.")

On March 14, 2022, the probation office filed a final presentence investigation report that calculated a total offense level of 32 and a criminal-history category of IV, recommending a sentence of 180 months. Leading up to, and at, sentencing, Mr. Rupp lodged multiple sentencing objections: (1) he objected to application of overlapping sentencing enhancements/double counting; (2) he argued for

application of a downward departure under the advisory guidelines; and (3) he specifically challenged application of the sophisticated-means enhancement. The defense calculated a total offense level of 30, which (with criminal-history category IV), would have yielded an advisory range of 135 to 168 months. *See id.* at 172, 179.

The district court sentenced Mr. Rupp, on March 23, 2022. During the hearing, the defense argued its sentencing points. The district court overruled these objections and agreed with the presentence report's guideline calculations, applying an offense level of 32, a criminal-history category of IV (based on 8 points), and a range of 168 to 210 months. Ultimately, the court chose a sentence of 192 months of custody, 5 years of supervised release, $2,730,319.54 in restitution, and a $100 special assessment. The district court filed its judgment on March 25, 2022, and Mr. Rupp filed a timely notice of appeal on March 25, 2022. He then appealed his conviction and sentence to the Sixth Circuit Court of Appeals. (Under the plea agreement, Mr. Rupp did preserve his right to appeal sentencing guideline calculations if he raised an objection at sentencing, and he preserved his right to challenge whether his plea qualified as knowing and voluntary.)

iii. Appellate procedural background: in affirming Mr. Rupp's conviction, the Sixth Circuit split with the Second Circuit (and others, including the First and D.C. Circuits, but the Second Circuit has been a leader in this area).

The Sixth Circuit exercised jurisdiction over Mr. Rupp's appeal under 28 U.S.C. § 1291, and on January 24, 2023, it affirmed Mr. Rupp's conviction and sentence. *See United States v. Rupp*, No. 22-1240, 2023 U.S. App. LEXIS 2052 (6th Cir. Jan. 24, 2023) (unpublished). The court acknowledged the Second Circuit case law addressing the issue of withdrawing a guilty plea when the government calculated the advisory guidelines one way, to induce a plea, and then advocated for a higher calculation at sentencing. *See Rupp*, 2023 U.S. App. LEXIS 2052, at *13-*14. The court tried to distinguish the Second Circuit's reasoning. *See id.* at *14. Mr. Rupp did not seek rehearing by the panel or rehearing en banc. The mandate issued in the case on February 15, 2023.

B. In attempting to distinguish the Second Circuit's precedent, the Sixth Circuit split with that court and deviated from this Court's precedent, as well.

The Sixth Circuit framed Mr. Rupp's appeal like this: "Rupp raises three arguments on appeal. He argues that his guilty plea was not knowing and voluntary. He argues that the district court should not have used the sophisticated-means enhancement. And he argues that the court imposed a substantively

unreasonable sentence." *United States v. Rupp*, No. 22-1240, 2023 U.S. App. LEXIS 2052, at *8 (6th Cir. Jan. 24, 2023) (unpublished). In considering the voluntariness of the plea, the court began, "Rupp first claims that he entered an unknowing and involuntary plea. Specifically, he says that his decision to plead guilty rested on the government's prediction during their plea negotiations that his guidelines range would fall between 10 and 12 years—well below the range that the district court determined (14 to 17.5 years)." *Id.*

As preliminary matter, the court considered the applicable standard of review. Ultimately, it found it did not need to "decide whether Rupp adequately raised this claim because our standard of review does not matter to the outcome." *Id.* at *9. It "assume[ed] that the normal standard applie[d]." *Id.* Next, the court mulled evidentiary issues and the record on appeal. *Id.* It found that, because the government had conceded on appeal "that, during plea negotiations, it estimated that Rupp's offense level would be 30 and his criminal history category would be III" ("estimates that would produce a guidelines range of 121 to 151 months") and "Rupp's offense level turned out to be 32 and his criminal history category turned out to be IV," it would not parse the issue of the record. *Id.* at *9-*10. "Because the parties d[id] not dispute the basic facts," the court found it did not need to decide how any possible lack of evidence could affect things. *Id.* at *10.

With those preliminaries behind it, the court could then dig in on the substantive issue. Beginning with the legal foundations of the inquiry, the court observed, "the Constitution and the Federal Rules of

Criminal Procedure place limits on a district court's ability to accept a plea," and "[t]he Due Process Clause prohibits defendants from waiving these rights unless they do so in a 'knowing' and 'voluntary' manner." *Id.* Then "Rule 11 requires a court to ask a series of questions to defendants at a plea hearing to ensure their knowledge of several items." *Id.* Under Rule 11(b)(1), "[c]ourts must ensure, among other things, that [defendants] know of their potential punishments." *Id.*

Building upward from this foundation, the court started getting into the meat of Mr. Rupp's issue. It remarked that, "[w]hen defendants receive a sentence higher than the one that they anticipate, they often argue that they did not enter a knowing and voluntary plea because their decision to plead guilty rested on their mistaken sentencing prediction." *Id.* at *10-*11. It then observed that "We have regularly rejected this type of challenge." *Id.* at *11.

The court cited the proposition that, when a plea agreement or "colloquy explains to a defendant that any earlier sentencing estimate represented only a nonbinding prediction, the defendant does not enter an unknowing and involuntary plea merely because the 'prediction' does not come true." *Id.* at *11. It then found that "This rule dooms Rupp's claim." *Id.* To the court, "His plea agreement and plea colloquy both show[ed] that he knew that any earlier sentencing estimate would not bind the court and that he could not void his plea if the estimate turned out to be wrong." *Id.*

To support its position, the court cited the plea agreement and the provision in it related to the nature of the guidelines and the parties' lack of agreement on the guidelines. *See id.* In rejecting Mr. Rupp's arguments, the court stated, "In response, Rupp does not cite a single Sixth Circuit decision to support his argument that the government's estimate rendered his guilty plea unknowing. He instead turns to the Second Circuit. But the cases on which he relies concerned a different issue—whether the government had breached a plea agreement when it advocated for a higher guidelines range than the one referred to in the agreement." *Id.* at *13-*14. The court tried to distinguish the Second Circuit cases Mr. Rupp had cited by distinguishing the plea agreements: "Because the agreements in these cases noted that their estimates incorporated the information that the government knew at that time, the court read them to allow the government to seek other enhancements based only on new information," so "[n]o similar breach occurred here" because "Rupp's plea agreement indicated that the government could argue for any sort of enhancement without limit." *Id.* at *14.

This position, however, misapprehends the nature of the Second Circuit cases and the plea agreements involved in them. And it ignores the vital rights at stake in these inquiries. Essentially, the Sixth Circuit pushed aside any consideration of a defendant's "reasonable expectations" and the implicit limits on government power--considerations that the Second Circuit has recognized in its cases, including *United States v. Palladino*, 347 F.3d 29, 34 (2d Cir. 2003). By ignoring these vital aspects of the inquiry

and trying to cabin the Second Circuit's approach, the Sixth Circuit split with the Second (and other circuits, as explored below) and ruled on this critical federal question in a way that cries out for this Court's intervention.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari in this case to affirm that defendants should be able to hold the government to its representations with regard to guideline calculations it presents while trying to induce a guilty plea. The Court should use Mr. Rupp's case as a vehicle to resolve the circuit split on the matter of when a defendant may withdraw their guilty plea based on the government advocating for a higher sentence at sentencing than that estimated during plea negotiations.

For almost a century, "this Court has recognized that 'unfairly obtained' guilty pleas in the federal courts ought to be vacated." *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (citing *Kercheval v. United States*, 274 U.S. 220, 221 (1927)). Along these lines, this Court has also long recognized the need for knowledge and volition in the plea context. Only when a defendant enters a guilty plea *knowingly* and *voluntarily* can courts uphold that plea. *See, e.g.*, *id.* at 261-62 ("The plea must, of course, be voluntary and knowing and if

it was induced by promises, the essence of those promises must in some way be made known.") Federal Rule of Criminal Procedure 11 and due process require as much, as the circuit courts have generally recognized. *See, e.g.*, Fed. R. Crim. P. 11(b)(2); *see also United States v. Presley*, 18 F.4th 899, 903 (U.S. 6th Cir. 2021) (acknowledging that, in this context, "constitutional and rule-based challenges are often 'entangled'"). Yet the Sixth Circuit has broken with this precedent in Mr. Rupp's case.

Starting with the fundamentals, this Court has recognized that due process requires fair dealing in the plea context. *See Santobello*, 404 U.S. at 265 (Douglas, J., concurring) (noting precedent finding that "if he had been tricked by the prosecutor through misrepresentations into pleading guilty then his due process rights were offended"). And federal appellate courts have followed the *Santobello* reasoning and allowed withdrawal of a guilty plea in circumstances like those at hand.[1]

In applying and citing case law—including *Santobello*—in this plea context, federal courts *do* look at the "spirit" of the matter. The Second Circuit, for example, has allowed withdrawal of guilty pleas in

[1] Mr. Rupp would point out the nuances that both distinguish and bind together the often-intertwined issue of *breaching* a plea agreement and issue of entering a knowing and voluntary plea. *See United States v. Rupp*, No. 22-1240, 2023 U.S. App. LEXIS 2052, at *13-14 (6th Cir. Jan. 24, 2023). Here, distinguishing the two issues would be inconsequential. The government both breached the agreement *and* presented its guideline estimates in a manner that, regardless of breach, induced Mr. Rupp to enter an unknowing and involuntary plea.

just the sort of situation presented here in Mr. Rupp's case. In *United States v. Palladino*, 347 F.3d 29, 30-31 (2d Cir. 2003), the court even relied on the "spirit of the plea agreement," not just its language, in allowing for withdrawal of a guilty plea when the government and probation office advocated for an offense level six levels higher than the one anticipated during plea negotiations.

That court emphasized, "In the circumstances presented, we agree with defendant that the Government's actions were inconsistent with the language and the spirit of the plea agreement, and we therefore vacate the judgment and remand the cause to the District Court to permit defendant to withdraw his plea." *Palladino*, 347 F.3d at 30. In that case, the plea agreement had given the government's estimate of the adjusted offense level as ten, and then the agreement noted that its guideline estimates would not bind anyone and that, should the offense level advocated by the government, or determined by the probation office, or found by the court, be different from the estimate of level ten, the defendant would *not* be entitled to withdraw his plea. *See Palladino*, 347 F.3d at 31. Before sentencing, though, the government and probation office both concluded that an additional six-level enhancement should apply, which would raise the total offense level to sixteen. *See id.*

In concluding that the defendant should be allowed to withdraw his plea, the Second Circuit admonished, "A sentence imposed pursuant to a plea agreement 'must follow the reasonable understandings and expectations of the defendant with respect to the bargained-for sentence.'" *See id.* at

33 (citation omitted). The court also stressed the government's "awesome advantages in bargaining power" and the need to resolve any ambiguities in a plea agreement in favor of the defendant. *See id.* (citation omitted); *see also id.* at 34 ("We have consistently held that any such ambiguity in a plea agreement must be construed against the Government.").

The D.C. Circuit has taken a similar approach. In *United States v. Murray*, 897 F.3d 298, 304 (2018), that court looked "to the reasonable understanding of the parties" and emphasized the need to construe "any ambiguities against the government." In that case, the court considered a plea agreement that had included an estimated guideline range. *Murray*, 897 F.3d at 301. The agreement also stated that this range "would constitute a reasonable sentence in light of all of the factors set forth in 18 U.S.C. § 3553(a)," but both parties reserved the right to seek a sentence outside that range. *Id.* at 302.

Despite this reservation of advocacy options, the court still concluded that "the best reading of the agreement is that the parties understood the Estimated Guidelines Range would be the final Guidelines range at sentencing, absent any material changes in the known circumstances." *Id.* at 304. Even though the plea agreement repeatedly made clear that the projected guideline range constituted only an estimate, and could change before sentencing, both parties knew about pending state charges that would result in state guilty pleas, so if the parties had expected those state offenses to increase the guidelines calculations, "there would have been no

reason to include in the plea agreement three 'estimates' that the parties knew would be wrong by the time of sentencing." *Id.* at 304-05. Thus, the guideline estimates in the plea agreement should have been honored. "If the parties had known from the get-go that the Estimated Guidelines Range would be wrong at the time of the sentencing, it would not have been of much assistance to the court—or to the parties in deciding whether to enter into the plea agreement." *Id.* at 305. The plea agreement addressed known criminal history. *Id.*

In finding that the government had breached the plea agreement by advocating for a sentencing range based on the two state convictions not accounted for in the plea agreement, the *Murray* court was mindful of the potential for misleading a defendant and of the prosecutor's implied obligation to deal in good faith and fairly in connection with plea agreements. *Id.* at 305, 307. (One should note that the *Murray* court, however, found no plain error. *See id.* at 308. It did find, and remand for consideration of, a colorable ineffective-assistance-of-counsel claim. *See id.* at 313.) The *Murray* court cited *Palladino* and other cases. It highlighted the idea that this Court's precedent prohibits not only explicit repudiation of government assurances, but must, in the interests of fairness, be read to forbid end-runs around such assurances. *See id.* at 309-10 (citing cases).

Finally, turning northward, the First Circuit has found that this Court's precedent, namely *Santobello*, and the circuit's own jurisprudence "require more than good faith by the government in securing through plea bargaining a defendant's

waiver of constitutional rights." *United States v. Canada*, 960 F.2d 263, 269 (1st Cir. 1992) (citing cases). The prosecution must keep its promises, or the defendant must be released from any plea bargain. *Id.* (footnote omitted). That court found a breach of the plea agreement when the government merely paid "lip service" to the negotiated agreement and that agreement's recommendation of a thirty-six-month sentence. *See id.* at 269.

In coming to its conclusion, the court (like the *Murray* court) admonished that, while it could be argued that the government had stopped short of explicitly repudiating the plea agreement, *Santobello* prohibits not only explicit repudiation of government assurances, but must, "in the interests of fairness," be construed to forbid end-runs around them. *Id.*

So the questions here in Mr. Rupp's case come in a few forms and involve this sort of spirit-of-the-agreement analysis. First, one must ask if a plea can even be knowing and voluntary when a defendant enters into it believing the government will advocate for one guideline calculation, but the government ends up advocating for a significantly higher calculation at sentencing. Second, one has to consider whether the Sixth Circuit erred in ruling as it did and splitting with the Second Circuit (and other circuits, namely the First and D.C.). Mr. Rupp, this Court's precedent, and case law in some circuits (including the Second) reject the Sixth Circuit's approach and its choice to ignore the spirit of plea negotiations and the need to hold the government to the deal it bargained for.

Here, Mr. Rupp entered his guilty plea in the district court believing that the government would acknowledge and agree to certain guideline calculations, namely calculations that would result in an advisory sentencing guideline range of about ten to twelve years of custody. In the end, however, the government reneged, and Mr. Rupp's case now echoes *Santobello*, in which this Court was clear: "This record represents another example of an unfortunate lapse in orderly prosecutorial procedures . . . ." *Santobello*, 404 U.S. at 260.

When it became clear that the government would not hold to its original position and would instead acquiesce in, or even encourage, additional sentencing enhancements, Mr. Rupp tried to explain the situation to the sentencing court. At the sentencing hearing, he bemoaned the "bait-and-switch" situation, explaining, "I wouldn't have taken this plea agreement if I knew you were going to give me more than 12 years. I took the plea agreement based on [the government] sending over the thing that said it was 10 to 12 years, those are my guidelines, so I'm here today because of that." He affirmed unequivocally that he would not have entered his plea but for the guideline estimates he received.

At that hearing, Mr. Rupp's counsel at the time (undersigned counsel took over the case only at the appellate stage) also expressed an expectation of a sentence near ten years. He explained the expectations he had, given the pre-indictment discussions: "When we talked pre-indictment when Mr. Rupp and I met, you know, he had in mind 120

months for this, 10 years for this type of crime, and *I agree with that*."

The government did nothing at sentencing to try to clarify the situation or honor its earlier guideline estimates, and while the plea agreement included a provision related to the inability to predict the final advisory guideline calculations, such a provision cannot nullify a reasonable expectation based on evidence the government presented during plea negotiations. Paragraph 9 of the plea agreement simply stated:

> 9. There is No Agreement About the Final Sentencing Guidelines Range. The defendant and the U.S. Attorney's Office have no agreement as to the applicable Guidelines factors or the appropriate Guidelines range. Both parties reserve the right to seek any sentence within the statutory maximum, and to argue for any criminal history category and score, offense level, specific offense characteristics, adjustments, and departures.

Implicit in plea negotiations is the government's good faith and the idea that the government will not withhold evidence only to spring it on the defense at sentencing. *See, e.g.*, *United States v. Wilson*, 920 F.3d 155, 167 (2d Cir. 2019).

Courts within the Sixth Circuit have even affirmed the Second Circuit *Palladino* reasoning. *See, e.g.*, *Lee v. United States*, No. 3:19-cv-00850, 2020 U.S. Dist. LEXIS 238539, at *13 n.7 (M.D. Tenn. Dec. 18, 2020) (unpublished) (citing cases and noting that ambiguities in a plea agreement must be construed against the government, since the government

ordinarily enjoys "certain awesome advantages in bargaining power"). And the critical issues here do not revolve around the specific paragraphs of a written plea agreement. Rather, the vital points revolve around Mr. Rupp's knowledge and volition when he entered his plea.

The *Palladino* court did note the language of that case's specific plea agreement, which provided the government's offense-level estimates, based on the evidence it had at the time (evidence which did *not* change to give rise to the later, higher, guideline estimate). *See Palladino*, 347 F.3d at 34. But the plea agreement really wasn't unique or unlike the plea agreement in Mr. Rupp's case. It made no promises with regard to the guidelines, and it specifically attempted to preclude withdrawal of the plea based on higher guideline calculations down the road. *Compare id.* The defense in that case did not make its specific argument related to the plea agreement's language (that the government's estimates were based on the information known at the time, so those estimates should not have changed without any uncovering of new information) in the district court—it only made the argument on appeal. *See id.* at 33-34. The court ruled into its favor, though. *Id.* at *35.

This ruling shouldn't seem surprising. Federal courts around the country recognize the contract-law principles applicable in the plea-agreement context, and that sentences imposed pursuant to plea agreements must follow the reasonable understandings and expectations of defendants, with respect to bargained-for sentences. *See, e.g.*, *Palladino*, 347 F.3d at 32-33; *see also Lee*, 2020 U.S.

Dist. LEXIS 238539, at *13 n.7 (citing cases, including *Palladino*, and discussing interpretations of plea agreements).

Likewise, state courts have long recognized these principles, and "[s]tate convictions founded upon coerced or unfairly induced guilty pleas have also received increased scrutiny as more fundamental rights have been applied to the States." *Santobello*, 404 U.S. at 265 (Douglas, J., concurring). For at least the past fifty years, federal courts "have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of 'involuntariness,' while a few permit only specific enforcement." *Id.* at 266 (Douglas, J., chief judge).

In his concurrence in *Santobello*, Justice Douglas reminded people that "a prosecutor's promise may deprive a guilty plea of the 'character of a voluntary act.'" *Id.* at 266 (Douglas, J., concurring). It isn't any difference in plea-agreement language that somehow distinguishes Mr. Rupp's case from *Palladino* and other cases where courts have allowed withdrawal of a plea. It is the Sixth's Circuit's decision to split with this Court's precedent, Justice Douglas's position, and the position of courts like the *Palladino* court, that a prosecutor should be held to their promises. To find otherwise is to begin a tumble down that slope toward upholding what are essentially involuntary and unknowing guilty pleas.

Returning to *Palladino* for another comparison of that case to Mr. Rupp's, and returning again to the issue of specific language in the plea agreement, the *Palladino* agreement stated that the guideline estimates were not binding, and it made clear that, if the guideline offense level advocated by the government, or determined by the probation office or the Court, turned out to be different from the estimate, the defendant would not be entitled to withdraw the plea. *See Palladino*, 347 F.3d at 31. Mr. Rupp's plea agreement likewise stated he could not withdraw his plea based upon disagreement with the final guideline calculations/range or sentence. The plea-agreement language here simply can't answer the questions at hand.

Nor does the language in *Palladino*, regarding the guideline estimates being subject to change but resting on information known to the government at the time of the plea, come out as determinative. *See id.* at 32. Mr. Rupp's case did not somehow fundamentally change or involve newly discovered evidence post-plea. So none of these language points distinguish the two, opposite, outcomes one sees here when one compares Mr. Rupp's case to *Palladino* (and similar cases). Rather, a fundamental jurisprudential split distinguishes the cases—and cries out for a remedy from this Court.

Where courts have held a defendant to a plea in the face of the government's advocacy for a higher sentence, the plea agreement has explicitly, and emphatically, provided for the possibility of a higher sentence. *See, e.g.*, *Wilson*, 920 F.3d at 164 (distinguishing cases). When a plea agreement

includes language reserving the government's right to argue for an above-guidelines sentence, for example, and clearly states that the guideline range set forth is merely a non-binding estimate, and warns in several different ways that the government is "likely" to advocate for a higher sentence, a court may hold the defense to that plea, even in the face of the government seeking a higher sentence. *See id.* (comparing cases).

One must also distinguish the circumstances at hand with those of defense counsel simply erroneously "guess-timating" the potential guidelines. While courts may tend to find that defendants are not entitled to withdraw their guilty pleas merely because their attorneys wrongly predicted a sentence, that just isn't the situation presented here. *Cf. United States v. Sweeney*, 878 F.2d 68, 70 (2d Cir. 1989); *see also Sessoms v. United States*, No. 14-CV-06658-FB, 2017 U.S. Dist. LEXIS 103574, at *9 (E.D.N.Y. June 23, 2017) (unpublished). Situations involving estimates by defense counsel can't be compared to circumstances where the *government* induces a guilty plea by estimating a certain sentencing range—and implicitly suggesting it will not advocate for more.

The evolution of case law in this area underscores this distinction. Earlier this year, the Second Circuit upheld a plea agreement when that agreement clearly provided for the sentencing advocacy pursued by the government. In *United States v. Helm*, 58 F.4th 75, 84 (2d Cir. 2023), the court emphasized the plea agreement's express provision for the government to take the very actions the defense, on appeal, characterized as a breach of that

agreement. The plea agreement in that case "disclaimed any substantive limitations on the information the government could raise at sentencing," and the defendant acknowledged having the opportunity to consult with counsel about the specific issue (which dealt with relevant-conduct guideline calculations). *See Helm*, 58 F.4th 84. Taken "[t]ogether, these provisions ensured that there was no unfair surprise when the government raised the 50 kg of cocaine at sentencing as 'relevant conduct,'" so the court rejected the defendant's "argument that he reasonably expected the government to refrain from raising the 50 kg of cocaine at sentencing based on the text of the agreement." *Id.* Nor did the defendant "have a reasonable expectation that the government would not raise the 50 kg of cocaine at sentencing based on the government's behavior." *Id.*

Even in so ruling, however, the *Helm* court still recognized the importance of considering, and honoring, a defendant's expectations related to a plea agreement. The court admonished that the government may be found to have breached a defendant's reasonable expectations when it deviates from the plea agreement in a way that produces serious unfairness for the defendant. *Id.* at 84-85. In its discussion, the *Helm* court cited *Wilson*.

Finally, in considering what this case does *not* involve, one must acknowledge that it does not involve analyzing what the parties *should* have agreed to. The court in *Murray* distinguished actual agreements from what *should* have been done: "But the question before us is what the parties clearly agreed to, not what they should have agreed to in order to effectuate their

unspoken understanding." *Murray*, 897 F.3d at 307-08. At sentencing here in Mr. Rupp's case, as already discussed, the defense cited the government's clear estimate of the guidelines and Mr. Rupp's definite reliance on that estimate.

The decisions discussed here allowing plea withdrawal support plea negotiations and the purposes they serve within the criminal-justice system. For example, this Court has long pointed out the interests of judicial economy served by fair, reliable plea bargaining. "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello*, 404 U.S. at 260. When properly administered, such bargaining represents something for courts to encourage. *Id.* Otherwise, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.*

The benefits of negotiating guilty pleas does "presuppose fairness in securing agreement between an accused and a prosecutor." *Id.* at 261. And the process requires respect for a defendant's rights and the applicable procedures, such as the right to counsel, the need to have a factual basis for the plea established on the record, the requirement that the plea occur voluntarily and knowingly, and (if the plea was induced by promises) the need to have the essence of any promises "in some way be made known." *Id.* at 261-62.

Vitally, "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." *Id.* at 262. Even an *inadvertent* prosecutorial breach of an agreement cannot stand. *Id.* For almost a hundred years, at least, this Court has recognized the gravity of guilty pleas and the role *fairness* absolutely *must* play in any taking of a plea. In *Kercheval v. United States*, 274 U.S. 220, 223 (1927), this Court highlighted that, "[o]ut of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." Only when someone so pleads may they "be held bound." *See id.* at 223-24. If a defendant makes a "timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence." *Id.* at 224. Such allowance does not revolve around questions of guilt or innocence. *Id.* The critical consideration is the *process* and the fairness of that process. *See id.* at 223-24.

Agreements or understandings regarding the sentencing guidelines occur all the time during plea negotiations. The parties will often discuss their guideline estimates and understandings and reach informal, off-the-record concurrence. The informal nature of these agreements makes it difficult for counsel to cite cases, but when the probation office reaches a different guideline calculation, parallel objections by *both* parties arise.

One can see situations involving such objections in various district-court matters. *See, e.g.*, *United States v. Kennedy*, No. 1:21-CR-37 (W.D. Mich. Nov. 2, 2021) (record entry 51, sentencing memo, at pageID 314: "Both the government and the defense agree that Mr. Kennedy should not receive a guideline enhancement for leadership."); *see also United States v. Cottrell*, No. 1:22-CR-75 (W.D. Mich. Jan. 11, 2023) (record entry 74, defendant's objections to initial presentence report, at pageID 387: "Mr. Cottrell objects to application of the enhancement for maintaining a drug house. Paralleling the government's own objection on this point, Mr. Cottrell does not believe the evidence in this case can support such an enhancement.").

At times, the probation office will see the situation for what it is and "correct" its position with regard to a sentencing enhancement neither party anticipated of finds supported. *See, e.g.*, *Cottrell*, No. 1:22-CR-75 (W.D. Mich. Mar. 8, 2023) (record entry 88, amended final presentence report, at pageID 514: noting resolution of the objection both parties had raised). In some cases, obviously, a plea agreement may address certain possible sentencing enhancements or considerations. *See, e.g.*, *United States v. Garcia*, No. 1:21-CR-20022 (E.D. Mich. Feb. 4, 2021) (record entry 18, plea agreement, at pageID 57: addressing factual stipulations relevant to sentencing). But many cases do *not* involve such memorialization. Yet they do still involve informal negotiations that the government honors leading up to, and at, sentencing.

Interestingly, the Second Circuit has encouraged the government to provide pleading defendants with the "likely range" of sentences that a plea authorizes under the guidelines (known in that circuit as a "*Pimentel* estimate" after *United States v. Pimentel*, 932 F.2d 1029, 1034 (2d Cir. 1991)). *See Wilson*, 920 F.3d at 163. This approach, the circuit believes, can help reduce defense claims that the government blindsided it unfairly later on. *See id.*

Essentially here in Mr. Rupp's case, as in *Palladino*, Mr. Rupp's guilty plea was not knowing or voluntary. Mr. Rupp entered into that plea based on a guideline calculation the government presented to induce that plea—and the prosecution then advocated for markedly higher guidelines at sentencing. The government breached the plea agreement by so advocating. *Compare Wilson*, 920 F.3d 158. As in *Palladino*, in these circumstances, Mr. Rupp "had a reasonable expectation that the Government would not press the Court for an enhanced offense level in the absence of new information." *Compare Palladino*, 347 F.3d at 34. Courts should, and do, consider these expectations in considering the validity of a guilty plea. *See id.* (noting that allegations of breached plea agreements depend on what the defendant reasonably understood and expected with regard to the sentence for which they had bargained).

Mr. Rupp's entry into the agreement could not have been knowing and voluntary when he expected the sentencing parameters the government presented to induce the plea, and the government then contravened his reasonable expectations and advocated for a higher sentence. By upholding the

guilty plea (and also allowing the government's breach to stand), the Sixth Circuit ran afoul of significant precedent, including this Court's seminal case law, and split with the Second Circuit (and other circuits).

CONCLUSION

In failing to consider due process and the rights Rule 11 affords defendants, and failing to honor this Court's precedent or give weight to other circuits' approaches to the issue of guilty pleas, the Sixth Circuit split with cogent authority on the issue of withdrawing guilty pleas entered unknowingly and involuntarily.

The Sixth Circuit's approach ignores logical, well-reasoned case law from other circuits, constitutional concerns, the plain language of Rule 11, and this Court's precedent. Mr. Rupp asks this Honorable Court to grant this petition for a writ of certiorari, vacate the judgment of the Sixth Circuit Court of Appeals, and remand for reconsideration of his case.

Respectfully submitted,

Scott Graham
Counsel of Record
SCOTT GRAHAM PLLC
1911 West Centre Avenue, Suite C
Portage, Michigan 49024-5399
269.327.0585
sgraham@scottgrahampllc.com

Date: April 24, 2023