No. 19-11825-F

# In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

*Plaintiff-Appellee*,

v.

NICHOLAS WUKOSON,

*Defendant-Appellant*.

On Appeal from the United States District Court for the Southern District of Florida, West Palm Beach Division
Case No. 9:18-cr-80166, Hon. Donald M. Middlebrooks

## APPELLANT'S BRIEF OF NICHOLAS WUKOSON

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case. Any addition(s) appear(s) in italicized text.

1. Brannon, Hon. Dave Lee – United States Magistrate Judge;
2. Burns, P.A. – Appellate counsel for Defendant-Appellant;
3. Burns, Thomas A. – Appellate counsel for Defendant-Appellant;
4. Cohen, Michael Bruce – Trial counsel for Defendant-Appellant;
5. Goker, Arda – Appellate counsel for Defendant-Appellant;
6. Greenberg, Benjamin G. – Former United States Attorney;
7. *J.W. – Victim of witness-tampering charge;*
8. Law Firm of Alan Schlesinger – Trial counsel for Defendant-Appellant;
9. Matthewman, Hon. William – United States Magistrate Judge;
10. Michael B. Cohen, P.A. – Trial counsel for Defendant-Appellant;
11. Middlebrooks, Hon. Donald M. – United States District Judge;
12. Orshan, Ariana Fajardo – United States Attorney;
13. Rudman, Douglas Jay – Trial counsel for Defendant-Appellant;
14. Schiller, Gregory– Assistant United States Attorney;
15. Schlesinger, Alan – Trial counsel for Defendant-Appellant;

16. Schlessinger, Stephen – Assistant United States Attorney, Appellate Division;

17. Smachetti, Emily M. – Assistant United States Attorney, Appellate Division;

18. The Law Office of Douglas J. Rudman – Trial counsel for Defendant-Appellant;

19. Wukoson, Nicholas – Defendant-Appellant;

20. Zloch, William T. – Assistant United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

July 22, 2019

/s/ Thomas Burns
Thomas A. Burns

## STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant, Nicholas Wukoson, requests oral argument. This appeal concerns a prosecutor's obligation to advocate for, and not against, a written plea agreement's recommended sentence.

Namely, the issue is whether the prosecutor breached the plea agreement when he sabotaged the four-year-sentence recommendation it promised he would make. He did so by emphasizing the offenses' severity, implying it was Wukoson's misdeeds that forced the recommendation, suggesting a four-year sentence was insufficient to deter either Wukoson or others from committing future child pornography offenses, and filing letters and calling witnesses he knew would both attack Wukoson's character and request maximum or otherwise lengthy sentences of incarceration. This determination matters because—for precisely those reasons highlighted by the prosecutor *ad nauseam*—the District Court rejected the prosecutor's supposed recommendation. Instead, it imposed an eight-year sentence that was double the four-year sentence the prosecutor had begrudgingly recommended, then forcefully undercut.

Oral argument will assist the Court.

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## STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Wukoson was charged by information (Doc. 1) and indicted (Doc. 47) for violations of federal criminal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and authority to examine the sentence under 18 U.S.C. § 3742(a) because the District Court entered a final judgment on April 29, 2019 (Doc. 109), which Wukoson timely appealed on May 8, 2019 (Doc. 112).

## STATEMENT OF THE ISSUE

Did the Government breach the plea agreement, which required it to recommend a four-year sentence, when it presented extensive argument and testimony that sabotaged the recommendation and implicitly (or even explicitly) sought a maximum or otherwise severe sentence?

## STATEMENT OF THE CASE

### *Course of proceedings*

Initially, Wukoson pled guilty (*see* Docs. 11; 12; 18; 34) to a one-count information charging him with possession of child pornography involving a prepubescent minor under the age of 12 (Doc. 1).

When he discovered the Government had not turned over a potentially exculpatory video-recorded interview of his teenage son confessing to some of the charged conduct, however, he moved to withdraw that plea. *See* Docs. 27 (stricken); 89. The Government consented to the motion because it concluded Wukoson likely would not have pled guilty if he had been afforded the chance to review the video. *See* Doc. 35 at 5-7. The District Court allowed Wukoson to withdraw his plea. Doc. 36.

Thereafter, a grand jury returned a seven-count superseding indictment. Doc. 47. Counts one through six charged Wukoson with possession

of child pornography involving a prepubescent minor under the age of 12 in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). Doc. 47 at 1-3.[1] Count seven charged him with witness tampering in violation of 18 U.S.C. § 1512(c)(2) for encouraging his son to assume responsibility for the child pornography. *See* Docs. 47 at 3; 86 at 4-5.

Four days before trial (*see* Doc. 46), Wukoson pled guilty (Doc. 121) pursuant to a written plea agreement (Doc. 85). Importantly, the plea agreement required the prosecutor to recommend a four-year sentence. *See* Doc. 85 at 2-3. Nevertheless, the plea agreement reserved the Government's right to inform the District Court and Probation of any facts pertinent to sentencing, including information concerning charged and uncharged offenses and the defendant's background. Doc. 85 at 5.

At sentencing, the prosecutor stated the plea agreement required the Government to recommend a four-year sentence. Doc. 125 at 7. Instead of recommending that sentence by explaining why it would have been appropriate for Wukoson, however, he disclaimed responsibility for

[1] This brief does not recount the conduct underlying the child pornography offenses because it does not bear on the breach-of-plea-agreement issue raised in this appeal. But it was described in the Government's factual proffer. Docs. 86; 121 at 13-17.

the deal he had struck. *See* Doc. 125 at 7-8, 12-16, 18. That is, the prosecutor avoided his responsibility by asserting it was only the defense that had requested the recommendation and that the Government's sole reason for agreeing to it was to avoid the psychological impact testifying at trial would have on Wukoson's son. *See* Doc. 125 at 7-8, 12-16, 18.

The prosecutor then elaborated on the PSR's description of the FBI investigation, noted the pervasiveness of the global child pornography trade, and emphasized the need for courts to impose "substantial prison sentences" to deter "this horrific behavior." Doc. 125 at 18; *see also* Doc. 125 at 8-12, 16-17. Ultimately, despite paying lip service to the plea agreement, the prosecutor never explained to the District Court why a sentence of four years' imprisonment would have been a just sentence (*i.e.*, a sentence sufficient but not greater than necessary to comply with the 18 U.S.C. § 3553 factors).

The prosecutor never filed a witness list. Nevertheless, after presenting his argument, he proceeded to call Wukoson's wife (Karyn Wukoson), a family friend (David Crow), and the mother of Wukoson's son (Leah Trietiak) to testify about how Wukoson's crimes had harmed them and others. *See* Doc. 125 at 19-30. Their testimonies tracked letters they

had filed shortly before sentencing. *See* Docs. 101.1 (requesting maximum sentence); 101.3 (detailing the emotional toll of Wukoson's actions); 105 (suggesting Wukoson was actually guilty of two sexual-battery-of-a-minor counts for which he had been arrested 15 years earlier but never formally charged); *see also* PSR at p.12.[2] While testifying, Trietiak read a letter from her and Wukoson's son, about whom count seven's tampering charge pertained (Doc. 125 at 26-27), and one from her now-adult daughter, who had been the minor about whom the 15-year-old, uncharged sexual battery allegations pertained (*see* Doc. 125 at 27-28).

The prosecutor also submitted letters from other individuals who did not testify at sentencing, yet nevertheless attacked Wukoson's character and sought draconian sentences. *See* Docs 100.1 (calling Wukoson a "monster" who "live[s] in the nightmares of children"); 101.2 (requesting maximum sentence); 102.1 (asking District Court to consider "all of the small innocent children out there" when fashioning a sentence); 104.1 (asking District Court to consider "the many lives Mr. Wukoson has

[2] The maximum imprisonment term was 20 years for counts one through six and 20 years for count seven. *See* Doc. 121 at 7; PSR ¶ 98 (citing 18 U.S.C. § 2252(b)(2) and 18 U.S.C. § 1512(c)(2)).

devastated" by his "reprehensible crimes"); 104.2 (requesting 13-year sentence); 104.3 (requesting maximum sentence).

For the defense, Wukoson's mother (Carolyn Holton), sister (Kelly Bradley), and family friend (Joan Holmes) testified on his behalf as character witnesses. Doc. 125 at 34-46. Holton's and Holmes's testimonies tracked their letters. *See* Doc. 97 at 10, 18-19. Other character witnesses also submitted letters in Wukoson's favor but did not testify. *See* Docs. 97 at 6-9, 11-17, 20-22; 98 at 2-3. These letters described Wukoson in a manner consistent with the facts that he had no criminal record and that his current charges were out of character (*see* PSR ¶¶ 45-46). At allocution, Wukoson apologized for his crimes. *See* Doc. 125 at 46-51.

Without objection (*see* Doc. 125 at 5),[3] the District Court adopted the PSR's offense level of 31, criminal history category of I, and guideline range of 108 to 135 months' imprisonment, which was higher than the 97- to 121-month range that had applied before Wukoson withdrew his

[3] Initially, Wukoson objected to PSR ¶ 48, which recounted the details of an incident that led to him being arrested for sexual battery of a minor and charged with felony child abuse. The PSR stated the child abuse charge was *nolle prossed*, and the sexual battery was never charged. PSR ¶ 48. Wukoson withdrew his objection at sentencing. *See* Doc. 125 at 4-5.

first guilty plea (Doc. 125 at 51-52; PSR ¶ 99). Then, considering the parties' statements, the 18 U.S.C. § 3553 factors, and Wukoson's personal characteristics, the District Court rejected the four-year recommendation and sentenced Wukoson to eight years' imprisonment to be followed by 15 years' supervised release. Doc. 125 at 54-55. Wukoson was remanded to custody and is currently incarcerated. *See* Doc. 125 at 58-59.

## *Statement of facts*

### A. The second plea hearing

When the second plea hearing commenced,[4] the District Court immediately asked the prosecutor what motivated him to agree to make the plea agreement's "unusual" four-year recommendation. Doc. 121 at 2.

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[4] After extensive plea negotiations, the prosecutor offered Wukoson a second plea agreement, which offered a four-year sentence recommendation in exchange for Wukoson pleading guilty to Counts 1, 2, and 7. *See* Cohen Aff. ¶ 3 & Ex. A. That evening, Wukoson and his counsel signed the plea agreement. *Id.* ¶ 4. The following morning, however, a few minutes before the second plea hearing, the prosecutor withdrew the second plea agreement (which Wukoson and his attorney had already signed) and compelled Wukoson and his attorney to sign a third plea agreement. *Id.* ¶ 5. This third plea agreement was different from the second plea agreement in that it required a guilty plea as to *all* counts in the indictment. *Id.* ¶ 6. When Wukoson's counsel inquired about the third plea agreement, the prosecutor gave them an ultimatum: either they sign it then and there or they would go to trial in four days. *Id.* ¶ 7.

The withdrawn plea agreement and the facts surrounding this unusual eleventh-hour occurrence described in the previous paragraph of

The prosecutor explained his reason for accepting the plea agreement's terms was his desire to protect Wukoson's teenage son from the psychological harm that would likely occur if he were forced to testify against his father at trial. *See* Doc. 121 at 1-2, 4. In particular, the prosecutor explained he had spoken with the teen, the teen's mother (Trietiak), and prosecutors at varying levels within his office, and they all agreed the plea was in the teen's best interest. Doc. 121 at 1-4. He implied the Government would not have made the plea deal absent considerations for the teenage son. *See* Doc. 121 at 3. Nevertheless, he indicated the facts that Wukoson would be exposed to substantial prison time and have to register as a sex offender provided consolation. *See* Doc. 121 at 3.

Wukoson, in turn, stated the plea agreement resolved the case in a way that was best for everyone. Doc. 121 at 4.

Again noting the four-year provision was unusual, the District Court explained it would normally impose a plea's recommended

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this footnote are set forth in the affidavit that accompanies Wukoson's motion to supplement the record. *See United States* v. *Jefferies*, 908 F.2d 1520, 1523-24 (11th Cir. 1990) (granting motion to supplement record on appeal with "the original draft of the plea agreement and affidavits from their attorneys who attended the plea negotiations" when the government "has not denied these oral agreements and understandings").

sentence. Doc. 121 at 7-8; *see also* Doc. 85 at 2-3. Later during the hearing, it even specifically advised Wukoson it would in fact follow the parties' four-year joint sentencing recommendation. Doc. 121 at 20.[5]

### B. The sentencing hearing

At the 90-minute sentencing, the prosecutor took pains to distance himself from the recommendation the plea agreement required him to make by implying he actually believed four years' incarceration was inadequate. *See* Doc. 125 at 7-18 (argument), 19-30 (testimony).

For instance, the prosecutor explained he had acquiesced to Wukoson's insistence on that sentence solely to protect Wukoson's teenage son from the psychological harm of testifying against Wukoson at trial.[6] He further explained the son's testimony would have been necessary to

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[5] The District Court also confirmed Wukoson understood the plea agreement's appeal waiver provision (*see* Doc. 121 at 9; *see also* Doc. 85 at 5-6), which might have precluded this appeal had it not rejected the four-year sentencing recommendation (*see* Doc. 125 at 54-55).

[6] *See* Doc. 125 at 7 ("I want to first begin by saying that the Government's recommendation of four years … was created out of the request of the Defense."); *id.* ("it became very clear to me, that him testifying in this case, in front of his father, potentially family members would do irreparable harm to the child psychologically"); *id.* ("So that's why the Government agreed to the four-year recommendation by the Defense, and that's why it is in the plea agreement.").

rebut the defense theory that it was the son, not Wukoson, who had downloaded the child pornography. Doc. 125 at 7.

The prosecutor also expanded upon the PSR's description of the FBI investigation and prosecution. *See* Doc. 125 at 7-12. He began by highlighting the pervasiveness of the child pornography crisis and the need for law enforcement and the courts to eradicate it:

> [C]hild pornography remains an epidemic in our country and in the world, and law enforcement does what they can to try to combat the problem. Are we going to stop it? No, but we make a big dent in it every time we get a child pornographer off the street, someone who is possessing, distributing, receiving child pornography.

Doc. 125 at 8.

He then described the FBI's forensic methods and the evidence that would have proven it was in fact Wukoson, not his son, who had downloaded and possessed the child pornography. Doc. 125 at 8-12. Elucidating the tampering charge the Government added after Wukoson withdrew his first plea, the prosecutor drew attention to the facts that Wukoson had encouraged his "then just barely 13-year-old son" to lie and take blame for the child pornography. Doc. 125 at 12-13.

This prompted the District Court to ask, "Why did you ever agree, though, to allow him to withdraw the plea?" Doc. 125 at 12. The

prosecutor's explanation of the events leading to the plea's withdrawal, including the prosecutor's failure to comply with his own *Brady* obligations by disclosing the son's interview to the defense (*see* Doc. 125 at 12-15), culminated in the following exchange:

> THE COURT: Isn't he then benefiting by what he did? I mean, how do you escape the conclusion that by trying to withdraw his plea and then blaming his son that he has not—if I follow your agreement, that he hadn't benefited?
>
> MR. SCHILLER: I can't argue against that, Judge. I can't; I can't.
>
> THE COURT: Your position simply is you wanted to spare the son the trauma of having to testify.
>
> MR. SCHILLER: Yes, sir.

Doc. 125 at 15.

In concluding his argument, the prosecutor emphasized the harm child pornography causes its victims:

> I consider all of those children. I consider those boys, those girls, some of which the defendant possessed were babies under age five, infants being raped and sodomized in videos and images, and I think about who is standing up for them….
>
> The child doesn't get to say yes or no about how many times they are re-victimized on the internet. The child doesn't get to say "stop," the child doesn't get to say, "Please don't do that anymore," because their pictures and videos can't say that to individuals like the defendant, and that's why we prosecute those cases as heavily as we do.

Doc. 125 at 17-18.

He finished by ensuring the District Court understood its obligation to impose a "substantial prison sentence[]" to adequately deter and "put a stop to this horrific behavior." Doc. 125 at 18.

The prosecutor then presented testimony from several witnesses, including Wukoson's wife and former girlfriend. Doc. 125 at 19-30. Karyn Wukoson testified about the "hell" that ensued after the FBI executed the search warrant, Wukoson being a poor husband and parent, Wukoson's son having to carry around his father's betrayal, her having to wonder whether Wukoson sexually molested their young daughter, and the humiliation his crimes have caused and will continue to cause their family. *See* Doc. 125 at 19-21. Consistent with her letter (Doc. 101.1), she requested the maximum punishment (Doc. 125 at 20).

David Crow testified about Wukoson being physically and verbally abusive toward Karyn and the sense of betrayal he felt when Wukoson told FBI agents he could have been the one who had downloaded the child pornography. *See* Doc. 125 at 22-24. He stated that, although the FBI's investigation had ruled him out as a suspect, it had taken a heavy emotional toll on him. Doc. 125 at 24-25. He asked the District Court to

sentence Wukoson to at least 13 years' imprisonment, the amount of time it would take for Wukoson's daughter to reach 18. Doc 125 at 25-26.

Trietiak testified about the dropped child abuse and sexual battery charges from 15 years ago, falsely claimed neither she nor Karyn were ever involved in a contentious custody battle with Wukoson,[7] and rebuked him for blaming others for his crimes and personal failings. Doc. 125 at 28-30. Additionally, she read a letter she had written with Wukoson's son, which expressed sadness, anger, and unwillingness to forgive Wukoson for attempting to blame the son for the child pornography. Doc. 125 at 26-27. Trietiak also read her daughter's letter, which accused Wukoson of hurting her when she was younger and turning his son (the daughter's half-brother) against Trietiak's family. *See* Doc. 125 at 27-28. It also explained the investigation and prosecution had caused the son to go from being happy to being withdrawn. *See* Doc. 125 at 27-28.

Defense counsel argued the son's confession (*see* PSR ¶¶ 23, 25; Docs. 35 at 7; 89 at 2; 121 at 15-16; 125 at 52) and Crow's access to

[7] In fact, both Trietiak and Karyn had been involved in contentious family law disputes with Wukoson for many years. *See Wukoson* v. *Wukoson*, No. 18-dr-5659 (Fla. 15th Cir. Ct.); *Wukoson* v. *Wukoson*, No. 16-dr-427 (Fla. 15th Cir. Ct.); *Wukoson* v. *Wukoson*, No. 15-dr-3107 (Fla. 15th Cir. Ct.); *Wukoson* v. *Marshall*, No. 10-dr-13584 (Fla. 15th Cir. Ct.).

Wukoson's computers would have created much reasonable doubt,[8] despite the son recanting his confession many months later (apparently under intense pressure from his mother) and the FBI clearing Crow as a suspect (Doc. 125 at 31). As such, he further argued that, given the circumstances, the plea agreement was a fair and just compromise whereby the Government could secure a conviction in exchange for agreeing to a four-year sentence. Doc. 125 at 31-34.

Wukoson's mother, sister, and family friend testified (Doc. 125 at 34-46), and Wukoson allocuted (Doc. 125 at 46-51). Then, considering the parties' statements, the PSR, the plea agreement, and the § 3553 factors,

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[8] To demonstrate reasonable doubt as to the possession counts at trial, Wukoson would have presented several defenses: (1) his son had searched for and downloaded the child pornography; (2) he was not in the house when any of the downloads were taking place (except for one download that occurred shortly before he had a 2 p.m. flight later that day); and (3) he was framed, either independently or in concert, by Crow and Karyn's brother, who was an officer with the Broward County Sheriff's Office and specialized in online sex crimes against children.

His defense to the witness tampering would have been that he had merely encouraged his son to tell the truth. *See, e.g.*, *United States* v. *Brand*, 775 F.2d 1460, 1470 (11th Cir. 1985) (the *actus reus* and *mens rea* evidence in support of a § 1503(a) witness tampering conviction was insufficient because the defendant merely sought to obtain a true witness statement); *accord United States* v. *Harrington*, 267 F. 97, 101 (8th Cir. 1920) ("the mere request for a statement believed to be true does not offend against the statute under which this indictment was drawn, because it is not corrupt conduct").

the District Court rejected the plea agreement's four-year recommendation and imposed an eight-year sentence. *See* Doc. 125 at 52-55.

Like the prosecutor's argument (*see* Doc. 125 at 8-13), the District Court's consideration of the § 3553 factors focused primarily on the seriousness of child pornography offenses and their "tremendous impact on the children" (Doc. 125 at 52-53). Also like the prosecutor's argument (*see* Doc. 125 at 8-13), in considering Wukoson's "personal characteristics," the District Court homed in on the fact that Wukoson had tried to shift blame onto his son (Doc. 125 at 53). Additionally, it explained it rejected the four-year recommendation because, as the prosecutor noted, it was troubled by how Wukoson's witness tampering "ha[d] allowed and forced … the Government to agree to a plea agreement." Doc. 125 at 53-54.

Ultimately, although the District Court believed following plea agreements is important (Doc. 125 at 54) and had expressly told Wukoson at the second plea hearing it would in fact follow the joint sentencing recommendation (*see* Doc. 121 at 20), it concluded a four-year sentence would be insufficient (Doc. 125 at 54). Over Wukoson's objection to the plea agreement not being followed (Doc. 125 at 56-57), it instead imposed an eight-year sentence (Doc. at 54-55; *see also* Doc. 109 at 3).

### *Standard of review*

The legal question "[w]hether the government has breached a plea agreement is" reviewed de novo. *United States* v. *Mahique*, 150 F.3d 1330, 1332 (11th Cir. 1998).

## SUMMARY OF THE ARGUMENT

The prosecutor breached the plea agreement. The prosecutor's promise to recommend a four-year sentence induced Wukoson to accept a plea agreement instead of exercising his constitutional right to trial by jury. At sentencing, however, instead of advocating for the four-year sentence as promised, the prosecutor sabotaged that recommendation by highlighting the severity of Wukoson's offenses, implying his witness tampering had forced the plea agreement, and filing letters and calling witnesses that impugned his character and expressly requested maximum or otherwise lengthy sentences of incarceration. As such, the Government breached the plea agreement's requirement that it recommend and advocate a four-year sentence. Indeed, the prosecutor's breach was so egregious it would also satisfy plain-error review.

## ARGUMENT AND CITATIONS OF AUTHORITY

### I. The Government breached the plea agreement when, instead of advocating for the four-year-sentence recommendation it had promised to make, the prosecutor sabotaged it

When a prosecutor promises to recommend a sentence in a plea agreement, his obligation requires more than a conspiratorial wink and a nod. That is, a prosecutor cannot roll his eyes or cross his fingers while technically stating a recommendation, then doing everything within his power to sabotage that recommendation. Rather, both his express promises and the implied covenant of good faith and fair dealing, which animates all such promises in plea agreements, forbid prosecutors from sabotaging their sentencing recommendations.

Here, the prosecutor sabotaged the four-year sentence recommendation by highlighting the severity of Wukoson's offenses, implying his witness tampering had forced the plea agreement, and filing letters and calling witnesses that impugned his character and expressly requested maximum or otherwise lengthy sentences of incarceration. Ergo, the appellate remedy is to vacate the sentence and remand for resentencing before a different district judge.

### A. The Government breached the plea agreement by sabotaging it

The prosecutor's argument and advocacy at sentencing fatally undermined and sabotaged the four-year-sentence recommendation.

#### 1. Prosecutors must fulfill all material promises they make in plea agreements, which includes compliance with both express promises and the implied covenant of good faith and fair dealing

"A plea agreement is, in essence, a contract between the Government and a criminal defendant." *United States* v. *Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999). Like any contract, the interpretation and enforcement of a plea agreement "is governed generally by the principles of contract law, as [courts] have adapted it for the purposes of criminal law." *United States* v. *Pielago*, 135 F.3d 703, 709 (11th Cir. 1998).

"This analogy, however, should not be taken too far." *United States* v. *Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990). Indeed, a plea agreement, unlike most other contracts, is unique in at least one sense: the prosecutor who enters into the plea agreement on behalf of the Government is no "ordinary party." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Rather, prosecutors always have special duties and obligations:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose

> obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Id.* As explained below, *Berger*'s principles apply with equal force when the Government makes sentencing promises in a plea agreement.

In light of the Government's special status and the prosecutor's special role, when construing a written plea agreement, courts should not accept "a 'hyper-technical reading'" or "'a rigidly literal approach.'" *United States* v. *Rewis*, 969 F.2d 985, 988 (11th Cir. 1992) (quoting *Jefferies*, 908 F.2d at 1523). Instead, they should view the agreement in the negotiations' context and should not interpret it "to 'directly contradict[t] [an] oral understanding.'" *Id.* (alterations in original).

Moreover, ambiguous plea agreements "'must be read against the government.'" *Id.* That is "because plea agreements' constitutional and supervisory implications raise concerns over and above those present in the traditional contract context." *United States* v. *Cook*, 607 Fed. App'x

497, 500 (6th Cir. 2015). As such, "in interpreting such agreements," courts "hold the government to a greater degree of responsibility than the defendant ... for imprecisions or ambiguities in the plea agreement." *Id.* Ultimately, it is imperative that courts "strictly adhere[] to" this interpretive method to ensure the defendant was "adequately informed of" the consequences of his plea agreement, which "constitutes a waiver of 'substantial constitutional rights.'" *Rewis*, 969 F.2d at 988.

The Government is "bound by any material promises it makes to a defendant as part of a plea agreement that induces [him] to plead guilty." *United States* v. *Taylor*, 77 F.3d 368, 370 (11th Cir. 1996). For instance, in *Santobello* v. *New York*, the Supreme Court held the government breached a plea agreement when one prosecutor had promised not to recommend any particular sentence, but a different prosecutor from the same office later went ahead, notwithstanding that promise, and recommended the maximum sentence. 404 U.S. 257, 262 (1971).

Additionally, the Government must also comply with the implied covenant of good faith and fair dealing. Ordinarily, since the latter half of the nineteenth century, the common law has held all contracts contain an implied covenant of good faith and fair dealing. *E.g.*, *Kirke La Shelle*

*Co.* v. *Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933) ("in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing"); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

That implied covenant commands all parties to a contract to act in good faith and deal fairly with one another without breaking their word, using shifty means to avoid obligations, or denying what the other party obviously understood:

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: *evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance*, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

RESTATEMENT, *supra*, § 205 cmt. d. (emphasis added).

In the criminal context, when the Government enters into a plea agreement, sister circuits have held the same covenant is implied in all plea agreements.[9] *E.g.*, *United States* v. *Cruz-Mercado*, 360 F.3d 30, 41 (1st Cir. 2004) (acknowledging "the implied obligation of good faith and fair dealing that guides the relationship of the parties in a plea agreement"); *United States* v. *Khan*, 920 F.2d 1100, 1105 (2d Cir. 1990) (applying "implied obligation of good faith and fair dealing" to plea agreement); *United States* v. *Jones*, 58 F.3d 688, 692 (D.C. Cir. 1995) ("Like all contracts, [a plea agreement] includes an implied obligation of good faith and fair dealing."); *see also United States* v. *Doe*, 170 F.3d 223, 226 (1st Cir. 1999) (Bownes, J., concurring) ("Plea agreements because they are contracts, impose on each party a duty of good faith and fair dealing."). But, given the Government's special status and the prosecutor's special role,

[9] Similarly, at least one former judge of this Court believed that all plea agreements contained an implied covenant of good faith and fair dealing. *United States* v. *Forney*, 9 F.3d 1492, 1508 (11th Cir. 1993) ("I would apply traditional contract principles and impose upon the government the duty of good faith and fair dealing.") (Clark, J., dissenting). The majority in *Forney* did not reject the notion that plea agreements contain an implied covenant of good faith and fair dealing; rather, it merely held that the Government's exercise of its prosecutorial discretion to withhold the filing of a substantial assistance motion was not subject to judicial review for good faith. *Id.* at 1503-04.

*see Berger*, 295 U.S. at 88, it is as if that good-faith-and-fair-dealing obligation is on steroids:

> When it enters into a plea agreement, the government must carry out the obligations it undertakes at least with the diligence it would bring to any contract. *Technical compliance is not enough*; "[o]ur case law prohibits 'not only explicit repudiation of the government's assurances, but must in the interests of fairness be read to forbid end-runs around them.'"

*Cruz-Mercado*, 360 F.3d at 39 (emphasis added) (citations omitted).

Whether the government has breached a plea agreement "is judged according to the defendant's reasonable understanding at the time he entered his plea." *Taylor*, 77 F.3d at 370 (11th Cir. 1996). That is because he cannot be deemed "to have been aware" of his plea's consequences unless a court enforces his "reasonable understanding of the plea agreement." *Rewis*, 969 F.2d at 988. And if the government disputes the defendant's understanding, the agreement's terms are determined "according to objective standards." *Id.*

The Government's failure to fulfill its promise is a breach that—regardless of a district court's reasons for imposing a particular sentence—warrants automatic reversal without regard to harmless-error analysis. *See, e.g.*, *United States* v. *Hunter*, 835 F.3d 1320, 1329 (11th Cir. 2016). That is because appellate courts "are not concerned with whether

the district court was influenced by the government's recommendation (or lack thereof)," but rather with the prosecutor's compliance with his agreement. *Id.* (collecting cases). Put otherwise, although a plea agreement does not bind a district court, and even if the government's breach may not have affected a judge's sentencing determination, vacating such a sentence best serves "the interests of justice" and recognizes a prosecutor's duty to fulfill the "promises made" during plea negotiations. *Santobello*, 404 U.S. at 262-63.

Under any objectively reasonable interpretation of the plea agreement (*see* Doc. 85 at 2-3), the prosecutor was required to advocate for, not undermine or sabotage, the four-year recommendation. *See infra* Argument I.A.2-3.

**2. Prosecutors breach a plea agreement's express terms and implied covenant of good faith and fair dealing when they fail to advocate, undermine, or otherwise sabotage a sentencing recommendation**

Under this Court's prior panel precedent, the Government breaches both the express terms and the implied covenant of good faith and fair dealing of a plea agreement when, as here, it agrees to recommend a particular sentence and either fails to "forceful[ly] and intelligent[ly] recommend[]" that sentence or, "in effect, argue[s] against it." *United States* v.

*Grandinetti*, 564 F.2d 723, 727 (5th Cir. 1977) (a prosecutor "is expected to be an advocate for the sentence set forth in the plea agreement").[10]

In *Grandinetti*, this Court held "the government breached a plea agreement by expressing to the sentencing judge reservations over" the agreement's terms. *Id.* at 724. A grand jury had returned a three-count indictment charging the defendant, who was already on probation for a drug offense, with counterfeiting U.S. obligations. *Id.* at 725. He entered into a plea agreement whereby he would plead guilty to the counterfeiting in exchange for the government recommending five-year concurrent sentences for *both* the pending counterfeiting *and* the probation violation charges. *Id.*

Each case proceeded before a different judge, with a different prosecutor representing the government in each proceeding. *Id.* The prosecutor who had negotiated the plea agreement handled the counterfeiting sentencing, which came first, and a new prosecutor handled the probation violation sentencing. *Id.* The breach occurred during this latter

[10] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

proceeding and was founded on the new prosecutor's "less than enthusiastic support of the plea agreement." *Id.*

At the probation violation sentencing, the new prosecutor stated that, although the plea agreement had "'locked-in'" the government to recommend five-year concurrent sentences, he was "'not too sure'" about the recommendation's "'legality'" or "'propriety.'" *Id.* Following that commentary, the district court unsurprisingly rejected the prosecutor's tepid recommendation. *Id.* On appeal, *Grandinetti* vacated the defendant's sentence, holding the prosecutor "was not only an unpersuasive advocate for the plea agreement, but [had], in effect, argued against it." *Id.* at 727.[11]

[11] A myriad of other cases in this Court have applied *Grandinetti*'s principle to hold the government breached a plea agreement. *See, e.g.*, *United States* v. *Taylor*, 77 F.3d 368, 370-71 (11th Cir. 1996) (government breached plea agreement's 10-year recommendation by advocating PSR's facts, which were incompatible with the recommendation); *United States* v. *Haber*, 299 Fed. App'x 865, 868 (11th Cir. 2008) (government breached plea agreement by questioning its propriety and not making "'a forceful recommendation for' a within-guideline sentence").

Cases from other circuits are in accord. *See, e.g.*, *United States* v. *Canada*, 960 F.2d 263, 268 (1st Cir. 1992) (breach occurred when prosecutor "informed the court of the agreement [to] recommend only 36 months" but "never herself affirmatively recommended a 36 month sentence and her comments *seemed to undercut* such a recommendation" (emphasis added)); *United States* v. *Brown*, 500 F.2d 375, 377-78 (4th Cir. 1974) (prosecutor breached plea agreement when he made promised recommendation but, in response to court's inquiry, explained he had serious problems with the sentence).

### 3. The prosecutor breached both express and implied promises in the plea agreement when he sabotaged instead of advocated the four-year-sentence recommendation

Like *Grandinetti*, the prosecutor here expressed reservations over the plea agreement (ironically, unlike in *Grandinetti*, in this case it was the prosecutor's *own* plea agreement) by implying Wukoson's witness tampering had forced him to agree to recommend an insufficient sentence. *See* Doc. 125 at 7-8, 12-16, 18. Indeed, the prosecutor repeatedly asserted he had succumbed to Wukoson's insistence on a four-year term solely to protect the son's wellbeing, not because it was a just sentence or a reasonable compromise in light of the weaknesses in the government's case. *See* Docs. 121 at 1-4; 125 at 7-8, 12-16, 18. Furthermore, the prosecutor expressly refused to argue against the notion that imposing a four-year sentence would essentially allow Wukoson to benefit from blaming his son. Doc. 125 at 15.

These remarks alone show the prosecutor failed to make the "forceful and intelligent recommendation" for which Wukoson had bargained.

*Grandinetti,* 564 F.2d at 727. But they also represent only a fraction of the prosecutor's advocacy *against* a four-year sentence.[12]

In that regard, *United States* v. *Rewis*, 969 F.2d 985 (11th Cir. 1992), is particularly instructive. There, through a written plea agreement, the prosecutor promised "'not to recommend what sentence should be imposed.'" *Id.* at 987 (emphasis in opinion). The agreement also stated the defendant was not obligated to cooperate with the government. *Id.*

After the plea hearing, the government filed a vitriolic "diatribe" of a sentencing memorandum that asserted the defendant's refusal to cooperate showed he was an unrepentant, irredeemable "'second generation smuggler.'" *Id.* Importantly, it asked the district court to consider the extent of the defendant's crimes and "establish a wide ranging deterrent for those who follow in" his "illegal footsteps." *Id.*

*Rewis* explained the government's "diatribe" about how the defendant's conduct "must be deterred to stave off the encroaching criminal element" effectively "suggested a harsh sentence." *Id.* at 988. For that

[12] Regarding *Haber*, *see supra* note 11, unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

reason, it held the government breached the plea agreement's requirement that it refrain from recommending any sentence. *Id.*[13]

Similarly, although the prosecutor here acknowledged the plea agreement recommended a four-year sentence, his comments suggested a much higher sentence. Indeed, he emphasized the need for district courts to impose "substantial prison sentences" to deter child pornography possessors and distributers, to deter "people around the community and country," and "to put a stop to this horrific behavior." Doc. 125 at 18. He also urged the District Court to consider the child pornography victims, nine of whom had come forward for restitution, and to contemplate (*i.e.*, avenge) the horror of "infants being raped and sodomized in [the] images and videos" Wukoson possessed.[14] *See* Doc. 125 at 17.

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[13] *Rewis* also held the government breached the agreement by belaboring the defendant's noncooperation, because it had agreed "not to emphasize evidence not related to the offenses." *Id.*

[14] Had the prosecutor's vociferous diatribe occurred during a closing argument, it likely would have been a golden rule violation that, if it affected the defendant's substantial rights, may have required this Court to vacate the conviction. *E.g.*, *United States* v. *Durham*, 659 Fed. App'x 990, 994 (11th Cir. 2016) ("A prosecutor makes an improper 'Golden Rule' argument by asking the jurors to place themselves in the victim's place or imagine the victim's pain and terror."); *United States* v. *Hunte*, 559 Fed. App'x 825, 833 (11th Cir. 2014) ("There is no doubt that these 'golden rule' remarks were improper, as they directly suggested that the jurors

Furthermore, before the sentencing hearing, the prosecutor filed letters from witnesses against Wukoson that either expressly requested a sentence exceeding four years or described him in a way that strongly implied lengthy incarceration—*i.e.*, far more than four years—was necessary. For example, some described him as a "monster" who "live[s] in the nightmares of children" (Doc. 100.1) and asked the District Court to consider "all of the small innocent children out there" (Doc. 102.1) and "the many lives" he "has devastated" by his "reprehensible crimes" (Doc. 104.1).[15] Others requested the maximum sentence (*i.e.*, 20 years if concurrent, 40 if consecutive) (Docs. 101.1; 101.2; 104.3) or a 13-year

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had personal stakes in the outcome of the case and they placed the prosecution together with the jury in a joint effort to combat fraud.").

[15] These comments were especially damaging because, in these types of cases, there is a danger of conflating the mere possession of child pornography with far more serious categories of offenses that involve production of child pornography or the physical touching of children. *See, e.g.*, *Barnhill* v. *State*, 140 So. 3d 1055, 1061 (Fla. 2d DCA 2014) (en banc) (trial court fundamentally erred by refusing to consider a downward departure based not on the case's facts but on "the general nature of the [child pornography] crimes involved and the potential for defendants charged with these types of crimes to progress into crimes involving 'hands-on' contact with children"); *Goldstein* v. *State*, 154 So. 3d 469, 476 (Fla. 2d DCA 2015) (trial court fundamentally erred by "expressly consider[ing] and rel[ying] upon its own generalized fears of greater future offenses for any person who possesses child pornography").

sentence (Doc. 104.2).[16] Moreover, Trietiak's letter suggested Wukoson was actually guilty of sexual battery for which he had been arrested 15 years earlier but never formally charged. Doc. 105.

The prosecutor's blitzkrieg against any chance the District Court would keep its commitment to follow the plea agreement (*see* Doc. 121 at 20) continued during the one-and-a-half hour sentencing with live testimony from witnesses the prosecutor never disclosed. The son's letter, read aloud by Trietiak, expressed anger and feelings of betrayal. *See* Doc. 125 at 26-27. Trietiak's daughter's letter, also read aloud, brought up the dropped abuse charge and painted Wukoson as a liar. Doc. 125 at 27-28. Trietiak herself asserted Wukoson kept failing to take responsibility for his actions. Doc. 125 at 28-30.

The prosecution's testimony did not stop there. Crow made spousal abuse allegations and asked for a 13-year sentence because, according to him, Wukoson's toddler daughter could not be safe around Wukoson until she reached adulthood. Doc. 125 at 22, 25-26. Karyn's testimony described Wukoson as a manipulator, described the trauma of putting their

[16] This 13-year recommendation was uniquely persuasive because it came from an attorney licensed in Pennsylvania, New Jersey, and the District of Columbia. *See* Doc. 104.2 at 1-2.

toddler daughter through psychological testing to determine if he had abused her, and asked for the maximum sentence. *See* Doc. 125 at 19-21.

Ultimately, the prosecutor's impassioned request for specific and general deterrence, his description of the plea agreement as a forced consequence of Wukoson's witness tampering, the letters, and the testimony effectively begged the District Court to reject the four-year sentence. Accordingly, the Government breached the plea agreement. Indeed, holding otherwise would require the Court to renounce its prior panel precedent (*e.g.*, *Grandinetti* and *Rewis*).[17]

#### 4. No binding precedents from the Supreme Court or this Court contradict Wukoson's position that the Government breached the plea agreement

Cases such as *United States* v. *Benchimol*, 471 U.S. 453 (1985), and *United States* v. *Horsfall*, 552 F.3d 1275 (11th Cir. 2008), do not contravene *Grandinetti* and its progeny, nor do they ratify the prosecutor's conduct here.

[17] That the District Court initially asked the prosecutor why he had allowed Wukoson to withdraw the plea (*see* Doc. 121 at 2) is no excuse for the breach. *See Rewis*, 969 F.2d at 988 ("It is not our function to determine if the government made a wise choice in entering into such an agreement, we must merely ensure that plea agreements are followed.").

*Benchimol* involved a plea agreement that required the government to recommend probation with restitution. *Id.* at 454. The PSR incorrectly stated the government would make no recommendation. *Id.* at 454. At sentencing, defense counsel clarified the government would recommend probation and restitution. *Id.* In response, the prosecutor simply stated, "'That is an accurate representation.'" *Id.* at 455.

The district court rejected this recommendation and sentenced the defendant to six years' treatment and supervision. *Id.* at 454. He was released after 18 months but soon violated his parole conditions. *Id.* After an arrest warrant for the parole violation issued but before the defendant's arrest, he sought to withdraw his plea under 28 U.S.C. § 2255. *Id.*

Although the district court denied collateral relief, the Ninth Circuit reversed, holding that "'when the government undertakes to recommend a sentence pursuant to a plea bargain, it has the duty to state its recommendation clearly to the sentencing judge and to express the justification for it.'" *Id.* (citation omitted).

*Benchimol* rejected the Ninth Circuit's attempt to read into the plea agreement a commitment by the government to "enthusiastically" recommend and justify a sentence of only probation and restitution. *Id.* at 455.

In reversing the Ninth Circuit, however, it expressly endorsed the Old Fifth Circuit's decision in *Grandinetti* and the Fourth Circuit's decision in *Brown* (*i.e.*, cases on which Wukoson relies for his breach argument, *see supra* Argument I.A.2-3 & note 11).

Namely, *Benchimol* explained both *Grandinetti* and *Brown* were distinguishable because those prosecutors had, during the sentencing hearing, "expressed personal reservations about the agreement to which the Government had committed itself." *Id.* at 456. It reasoned that such equivocal prosecutorial commentary presents "quite a different proposition than [a collateral] appellate determination from a transcript of the record made many years earlier that the Government attorney had 'left an impression with the court of less-than-enthusiastic support for leniency.'" *Id.* (citation omitted).

Here, to the contrary, the prosecutor's on-the-record statements about his reservations and doubts regarding the plea agreement and his outright advocacy against the four-year-sentence recommendation places this case within the purview of *Grandinetti* and *Brown*, *see supra* Argument I.A.2-3, not *Benchimol*.

Like *Benchimol*, this Court's decision in *Horsfall*, which involved child pornography, is also easily distinguished. There, the defendant argued the government breached its agreement not to recommend an upward departure when it called his daughter to testify and introduced victim impact statements at sentencing. 552 F.3d at 1282. This evidence focused on "the dramatic and long-lasting effects of sexual abuse" and "how viewing child pornography incentivized its production." *Id.*

Affirming the defendant's convictions and sentence, *Horsfall* reasoned "the government did not expressly violate its obligation not to recommend an upward departure, … but was rather presenting the evidence in order to support a sentence at the high-end of the applicable guideline range." *Id.* On that basis, it held "the government does not breach a plea agreement where the agreement authorizes the government to provide certain factual information [pertinent to sentencing and the defendant's background], and the government does not expressly violate another one of its obligations." *Id.* at 1284.[18] In other words, cases like *Horsfall*

[18] *Horsfall* derived this principle from *United States* v. *Carrazana*, 921 F.2d 1557 (11th Cir. 1991), and *United States* v. *Levy,* 374 F.3d 1023 (11th Cir. 2004), *cert. granted, judgment vacated*, 545 U.S. 1101 (2005), *reinstated*, 416 F.3d 1273 (11th Cir. 2005). *See Horsfall*, 552 F.3d at 1283-84. In *Carrazana*, this Court held a prosecutor's characterization of a

involve scenarios where the government had an otherwise legitimate reason for presenting the testimony and evidence that would not have undermined or sabotaged the recommendation itself.

Here, although the plea agreement allowed the Government to inform the District Court and Probation of any facts pertaining to sentencing and the defendant's background (*see* Doc. 85 at 5), the prosecutor's submission of the letters, his advocacy at sentencing, and the witness testimony still violated the plea agreement by undermining or sabotaging the recommendation.

Indeed, three of these letters asked the District Court to impose the maximum sentence (Docs. 101.1, 101.2, 104.3), and one asked for a 13-year sentence (Doc. 104.2). Similarly, while testifying at sentencing, Karyn requested the maximum sentence (Doc. 125 at 21), and Crow

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defendant as the conspiracy's kingpin and other expressions of disbelief at the leniency of the 20-year sentence did not breach the government's obligation not to recommend a particular sentence, because the government had "expressly reserved in the plea agreement the right to inform the court and the probation department of all facts relevant to the sentencing process." 921 F.2d at 1569. *Levy* similarly held a prosecutor's begrudging remarks about a plea agreement's recommended sentence and his submission of damaging factual information to probation did not constitute a breach of the plea agreement. 552 F.3d at 1030-32. Both *Carrazana* and *Levy* are distinguishable for the same reasons as *Horsfall*. *See infra* Argument I.A.4.

requested a 13-year sentence (Doc. 125 at 25). These witnesses' recommendations were not "facts pertinent to the sentencing process" within the plea agreement's meaning. *See* Doc. 85 at 5. Rather, they were an end-run around the Government's obligation to recommend a four-year sentence that provided cover to disguise its clandestine sabotage.

Likewise, the prosecutor's impassioned plea for adequate specific and general deterrence, his emotional appeal to retributive justice on behalf of the "infants being raped and sodomized," and his reservations about the plea agreement's recommendation itself cannot be construed as argument in favor of the four-year sentence recommendation, which was much lower than the 108- to 135-month guideline range. *See* Doc. 125 at 51-52. Instead, the prosecutor's argument can only be properly interpreted as an attempt to convince the District Court to relieve the Government from the bargain it had struck by rejecting the very lenient four-year sentence in favor of a much more severe one.

Additionally, unlike in *Horsfall*, none of the people who requested a particular sentence in their letters or during their testimonies at sentencing were victims within the meaning of the Crime Victims' Rights Act, 18 U.S.C. § 3771 ("CVRA"). As such, the Government cannot absolve

itself of responsibility for submitting their letters or calling those witnesses to testify at sentencing because none of those people had any right to be heard at sentencing. *See id.* § 3771(a)(4).

The CVRA defines "[c]rime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense." *Id.* §§ 3771(e)(2)(A)-(B). It affords such people, and the legal guardians of child victims, *id.* § 3771(e)(2)(B), "[t]he right to be reasonably heard at … sentencing," *id.* § 3771(a)(4).[19]

"The requirement that the victim be 'directly and proximately harmed' encompasses the traditional 'but for' and proximate cause analyses." *In re McNulty*, 597 F.3d 344, 350 (6th Cir. 2010) (citation omitted). Furthermore, "that the harm must be 'direct' requires that the harm to the victim be closely related to the conduct inherent to the offense, rather than merely tangentially linked." *Id.* at 352.[20] And "for purposes of the

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[19] Like the CVRA, the Mandatory Victims Restitution Act ("MVRA") requires a "victim" to have been "directly or proximately harmed by the defendant's criminal conduct." 18 U.S.C. § 3663(a)(2). Here, the witnesses who testified against Wukoson had nothing to do with the crime of possession of child pornography. No such victims came forward to testify. Rather, all these witnesses had self-serving alternative agendas. *See supra* note 7.

[20] Nevertheless, "a party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as

CVRA definition of 'crime victim,' the only material federal offenses are those for which there is a conviction or plea." *Id.* at 352 n.9 (citing *Hughey* v. *United States,* 495 U.S. 411, 418 (1990)).

Interpreting the Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C. § 2259, the Sixth Circuit in *United States* v. *Gamble* explained that, "[f]or harms to be 'proximately' caused by the criminal conduct, they must be 'reasonably foreseeable.'" 709 F.3d 541, 549-50 (6th Cir. 2013) (citation omitted). And although it is very difficult to capture that limitation's scope, "[g]enerally if the injury is the type that the [criminal] statute was intended to prohibit, it is more likely to be proximately caused" by the defendant's offense. *Id.* at 549.

Some illustrations clarify the distinction. "[F]or instance, even if a child pornography victim suffers very unusual psychosomatic injuries as a result of knowing that her mistreatment and humiliation are being viewed by others, those injuries are still part of the harm that the laws against child pornography are trying to avoid." *Id.* at 550. On the other hand, "if a child pornography collector's computer, used solely for that

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a result of the crime's commission." *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008); *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1239 (11th Cir. 2014) (same).

purpose, transmits a computer virus that damages another person's computer, that harm is not what Congress was trying to prevent by making the collection of child pornography illegal." *Id.*

Here, none of the witnesses who asked for harsh sentences suffered the type of harm Congress intended to prohibit when it enacted the child pornography and witness tampering statutes under which Wukoson was convicted. Nor did those witnesses otherwise directly or proximately suffer harm from Wukoson's offenses.[21] Accordingly, they were not crime victims under the CVRA.

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[21] *Compare In re McNulty*, 597 F.3d at 352 (employee who was fired and blackballed for refusing to participate in employer's conspiracy was not victim under CVRA), *and In re Rendon Galvis,* 564 F.3d 170, 172 (2d Cir. 2009) (mother was "not a crime victim under the CVRA because the harm to her [murdered] son was not a direct and proximate result of conspiring to import cocaine into the United States, which [was] the crime of conviction"), *with United States* v. *McElroy*, 353 Fed. App'x 191, 193-94 (11th Cir. 2009) (victim impact statements were properly submitted at sentencing under the CVRA because they were written by minors or parents of minors who had been depicted in the child pornography), *In re Stewart*, 552 F.3d at 1289 (mortgage borrowers were CVRA victims of wire fraud conspiracy where bank officer and co-conspirator caused them to pay excess fees that defendant pocketed), *United States* v. *Washington*, 434 F.3d 1265, 1266-70 (11th Cir. 2006) (police department and another property owner were MVRA victims when fleeing bank robber damaged police car and other property), *and Moore* v. *United States,* 178 F.3d 994, 1001 (8th Cir. 1999) (bank customer was MVRA victim when attempted bank robber had pointed a sawed-off shotgun at him from six feet away).

And even if they were victims within the CVRA's meaning, their live and written testimony still would have been improper because (1) the Government never filed a witness list informing the defense that Karyn, Trietiak, and Crow would testify at sentencing, and (2) a victim-witness's "right to be heard" does not include the right to recommend a specific sentence, especially not through live testimony. *See, e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 835 n.1 (1991) (Souter, J., concurring) ("a sentencing authority should not receive … information concerning a victim's family members' characterization of and opinions about the crime, the defendant, *and the appropriate sentence*" (emphasis added)); *In re Brock*, 262 Fed. App'x 510, 512 (4th Cir. 2008) (unpublished) (victim-witness's CVRA right to be "reasonably heard" at sentencing did not include a right to make arguments about the defendant's guideline calculation); *United States* v. *Marcello*, 370 F. Supp. 2d 745, 748 (N.D. Ill. 2005) ("[b]eing 'reasonably heard' in the ordinary legal and statutory meaning typically includes consideration of the papers alone").

Accordingly, the Government cannot now disclaim responsibility for its breach by arguing it was statutorily required to submit letters and

witness testimonies that sought draconian punishments and otherwise undermined the four-year sentence recommendation.

**5. The Court should remand this case for specific performance of the plea agreement before a different judge and order the sentencing transcript to be sealed**

"There are two remedies available" to an appellate court when the government breaches a plea agreement. *Rewis*, 969 F.2d at 988-89; *accord United States* v. *Taylor*, 77 F.3d 368, 371 (11th Cir. 1996). First, a court can "remand the case for resentencing according to the terms of the agreement before a different judge." *Rewis*, 969 F.2d at 989. Second, a court can "permit the withdrawal of the guilty plea." *Id.* The choice of remedies "lies within [the appellate court's] judicial discretion." *Id.*

To ensure Wukoson gets the benefit of the bargain he struck, the Court should remand this case for "specific performance of the agreement" before a different district judge.[22] *Rewis*, 969 F.2d at 989.

[22] Reassigning a different district judge for resentencing in such circumstances does not require litigants or courts to impugn or "question the … judge's actual ability, integrity, or impartiality." *United States* v. *Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989). Rather, it is necessary because "it is not merely of some importance but is of *fundamental* importance that justice should not only be done, but should manifestly and undoubtedly *be seen* to be done." *United States* v. *White*, 846 F.2d 678, 696 (11th Cir. 1988) (emphases in original and punctuation omitted).

Additionally, the Court should also order the sentencing transcript to be sealed; otherwise, "the breaching statements would still be a part of the record" and would likely influence "the [successor] judge on remand." *Taylor*, 77 F.3d at 372 (citation omitted).

### B. The Court should reverse even if it reviews the breach issue for plain error

Wukoson preserved the breach issue for appellate review. Still, the Government's breach was so egregious that Wukoson's argument would also satisfy plain-error review.

#### 1. Wukoson preserved the breach issue through contemporaneous objection, so this Court should consider it de novo

As an initial matter, the Court should review the Government's breach de novo, not for plain error, because Wukoson preserved this issue by contemporaneously objecting (*see* Doc. 125 at 56-57, 58) that the plea agreement was not being followed. *See United States* v. *Romano*, 314 F.3d 1279, 1281 (11th Cir. 2002) (plain-error review applies to the government's breach of a plea agreement only if "the appellant failed to raise this issue before the district court"). These objections adequately put the District Court on notice that Wukoson was challenging not only the District Court's refusal to impose the four-year sentence set forth in the

written plea agreement, but also the prosecutor's failure to advocate for a four-year sentence.[23]

### 2. The Government's breach would still warrant reversal even under the plain-error standard

Even under plain-error review, however, the Government's breach would still warrant reversal. "Under plain error review, there must be (1) an error, (2) that is plain, (3) that affects the defendant's substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *De La Garza*, 516 F.3d 1266, 1269 (11th Cir. 2008).

Prongs one and two of the plain-error standard are met here because the Government's breach was plain under decades of precedent from the Supreme Court (*e.g.*, *Santobello*), the Old Fifth Circuit (*e.g.*, *Grandinetti*), and this Court (*e.g.*, *Rewis*). *See supra* Argument I.A.2-3.

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[23] *See United States* v. *Robinson*, 505 F.3d 1208, 1215 n.9 (11th Cir. 2007) (challenge to jury instruction was preserved where "[d]efendants repeatedly made clear to the district court their position as to the appropriate definition of a 'navigable water' under the" Clean Water Act); *United States* v. *Casanova*, 677 Fed. App'x 545, 550 (11th Cir. 2017) (although defendant "did not use the term variance in the district court," his argument—that the government had proved two unrelated conspiracies and that he was being convicted of a different crime than what he was indicted for—was sufficient to preserve the claim for appeal).

Regarding prong three, an error prejudicially affects the defendant's substantial rights if it "'affect[s] the outcome of the district court proceedings.'" *De La Garza*, 516 F.3d at 1269 (quoting *United States* v. *Olano,* 507 U.S. 725, 734 (1993)). Put differently, there must be a "reasonable probability of [a] different result" that is "'sufficient to undermine confidence in the [proceedings'] outcome.'" *United States* v. *Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005) (citation omitted).

In the breach-of-plea-agreement context, this means the defendant must show that, but for the Government's breach, his sentence would have been less severe. *See Romano*, 314 F.3d at 1281-82 (plain-error review satisfied where Government's breach resulted in district court sentencing under a higher guideline range); *United States* v. *Forney*, 9 F.3d 1492, 1503-04 (11th Cir. 1993) (defendant's substantial rights were not affected because the alleged breach did not alter sentence).

Here, there is a clear causal relationship between the Government's breach and the District Court's imposition of double the tepidly recommended sentence. At the second plea hearing, the District Court expressly stated, "I will follow the … recommendation, although … an unusual set of circumstances led to it, I'm sure." Doc. 121 at 20. At the

sentencing hearing, the District Court declined to follow through on its express commitment only after considering the letters, the witness testimony, and the prosecutor's argument. *See* Doc. 125 at 54-55.

Notably, the District Court explained it was rejecting the plea agreement's recommendation primarily because (1) child pornography offenses have a "tremendous impact" on the children, and (2) Wukoson's witness tampering "ha[d] allowed and forced … the Government to agree to a plea agreement." Doc. 125 at 52-53. Coincidentally, these considerations also happened to be the central themes of the prosecutor's tirade against Wukoson. *See* Doc. 125 at 7-8, 12-18. Accordingly, the Government's breach prejudicially affected Wukoson's substantial rights.

Furthermore, in this context, there is no doubt that the prosecutor's conduct "seriously affected the fairness, integrity, or public reputation of the proceedings." *Romano*, 314 F.3d at 1282. Indeed, *Romano* found it "obvious" that a prosecutor's breach, which involved endorsing the PSR's application of enhancements for a count that would be dismissed, met the fourth prong of plain-error review. *Id.* That was because the prosecutor knew application of those enhancements "would constitute error," knew he "was breaching the plea agreement then and there," and "must have

known that because he was an officer of the court, who regularly appeared before the court as an attorney for the United States, the court might be inclined to accept his representations as reliable, as constituting a correct statement of the law, and act accordingly." *Id.* at 1281.

And *Romano*'s result makes sense because "[i]t is in the best interests of the government, as well as the system as a whole, that defendants be able to count on the government keeping the promises it makes in order to secure guilty pleas." *Taylor*, 77 F.3d at 372; *see also Berger*, 295 U.S. at 88 (describing sovereign's special status and prosecutor's special role). Indeed, "[t]hose broader interests, as well as each individual defendant's interest in receiving the benefit of his bargain, require that courts stand ready and willing to hold the government to its promises." *Taylor*, 77 F.3d at 372. If they do not—that is, if prosecutors cannot be trusted to abide by their solemn, written promises—the entire criminal justice system, which now is essentially "a system of pleas, not a system of trials," would come to a grinding halt. *Lafler* v. *Cooper*, 566 U.S. 566 U.S. 156, 170 (2012) (guilty pleas produce 97% of federal convictions).

Under these principles, Wukoson was entitled to the benefit of the bargain he struck, but the prosecutor broke his word. To remedy this

breach, this Court should require the Government to fulfill its promise of recommending and advocating for a four-year sentence.

## CONCLUSION

The Court should vacate the judgment, remand for specific performance of the plea agreement at resentencing before a different district judge, and seal the sentencing transcript.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 10,200 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

July 22, 2019

/s/ Thomas Burns
Thomas A. Burns

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 22d day of July, 2019, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 22d day of July, 2019, to:

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