No. 19-11825-HH

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

REPLY 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. *Dalzell, Kathryn M. – Assistant United States Attorney;*
6. Goker, Arda – Appellate counsel for Defendant-Appellant;
7. Greenberg, Benjamin G. – Former United States Attorney;
8. J.W. – Victim of witness-tampering charge;
9. Law Firm of Alan Schlesinger – Trial counsel for Defendant-Appellant;
10. Matthewman, Hon. William – United States Magistrate Judge;
11. *Matzkin, Daniel – Assistant United States Attorney, Appellate Division;*
12. Michael B. Cohen, P.A. – Trial counsel for Defendant-Appellant;
13. Middlebrooks, Hon. Donald M. – United States District Judge;
14. Orshan, Ariana Fajardo – United States Attorney;

15. Rudman, Douglas Jay – Trial counsel for Defendant-Appellant;

16. Schiller, Gregory– Assistant United States Attorney;

17. Schlesinger, Alan – Trial counsel for Defendant-Appellant;

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

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

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

21. Wukoson, Nicholas – Defendant-Appellant;

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

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

September 24, 2019

/s/ Thomas Burns
Thomas A. Burns

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I. The Government breached the plea agreement

Instead of taking responsibility for its own prosecutor's conduct, the Government blames Wukoson because he "did not bargain for hyper-enthusiasm." U.S. Br. 24. Although Wukoson certainly did not bargain for the prosecutor to undermine his recommendation with a wink and a nod, the Government now claims he apparently should have anticipated the prosecutor's bad faith and unfair dealing at sentencing and thus cannot now complain about his "buyer's remorse." U.S. Br. 33.

But the Government's perspective reflects serious confusion about what the prosecutor actually did and why Wukoson claims it was a breach. Wukoson is not complaining about the prosecutor's insufficient enthusiasm or passivity; he is complaining about his active sabotage.

A. The Government mischaracterizes the prosecutor's advocacy against the recommended sentence (U.S. Argument I.B)

Ignoring its sabotage, the Government mischaracterizes the prosecutor's advocacy against the plea agreement's four-year-sentence recommendation as a mandatory and "candid" disclosure of relevant sentencing facts, shirks its responsibility for eliciting the nonvictim witnesses' disparaging comments and recommendations for a maximum or otherwise

lengthy sentence, and disregards binding precedent from this Court and the Supreme Court. These tactics lack merit and should be rejected.

In particular, the Government attempts to justify the prosecutor's advocacy against the four-year sentence in three ways:

- First, it claims his professional duty of candor required him to disclose to the District Court his personal belief that Wukoson's witness tampering had forced the recommendation. *See* U.S. Br. 21-25.

- Second, it asserts that, because the plea agreement allowed him to inform the court of "all facts pertinent to the sentencing process" (Doc. 85 at 13), it was proper for him, pursuant to 18 U.S.C. § 3553(a), to deliver an impassioned plea for adequate deterrence and to highlight the egregiousness of pornography crimes (including production and touching crimes Wukoson never committed). *See* U.S. Br. 25-29.

- Third, it argues he properly submitted letters and elicited live testimony from nonvictim witnesses who impugned Wukoson's character and expressly requested maximum or otherwise lengthy incarceration because those witnesses were not parties bound by plea agreement. *See* U.S. Br. 29-33.

Each contention is mistaken. *See infra* Argument I.A.1-3.

1. The prosecutor's explanation of why he agreed to recommend a four-year sentence went far beyond mere candor toward the tribunal

In defending the prosecutor's representation that he had reluctantly agreed to recommend the four-year sentence solely to spare Wukoson's son from testifying (*see* Doc. 125 at 7), the Government argues he

"had every right to explain why [he] had agreed to recommend [the four-year] sentence." U.S. Br. 21. That is, in the Government's view, the prosecutor was merely "provid[ing] candid information to the court … about how the parties arrived at the recommended sentence" and "would have violated [his] ethical duty of candor to the court" if he were to refrain from blurting out these unprompted comments. U.S. Br. 17-18, 23.

Once again, these assertions demonstrate serious confusion about Wukoson's argument. First of all, this "candor" defense is a red herring. Wukoson's complaint is not that the prosecutor disclosed that *a* reason he accepted a plea and agreed to recommend the sentence was the effect that trial proceedings might have had on Wukoson's son. Rather, the complaint is that the prosecutor falsely stated that was his *only* reason.

Importantly, the prosecutor never mentioned the problems the Government would have in overcoming Wukoson's defenses (*see* Wukoson Br. 13 n.8), never explained how a four-year sentence for Wukoson would satisfy the seven factors of 18 U.S.C. § 3553(a)(1)-(7), presented letters and testimony from nonvictim witnesses who wanted a heavy or maximum sentence, and went on *ad nauseam* about production and touching crimes that Wukoson never committed to justify the necessity for a

significant sentence (*see* Wukoson Br. 29 n.15). Absent those actions, the prosecutor could have easily reconciled his duty of candor with his duty to recommend a four-year sentence.

And even if the issue were about candor, the Government describes a notion of candor that might exist in an inquisitorial legal system, but cannot possibly exist in an adversarial legal system (or when a prosecutor has promised to make a sentencing recommendation). That is, the Government argues that a lawyer's professional duty of candor toward the tribunal *requires* a prosecutor to voluntarily disclose—without any prompting from a district court—*every* personal reason he may (or may not) have had for agreeing to recommend (or not recommend) a particular sentence regardless of the effect such disclosure might have on the likelihood that a sentencing court would accept the recommendation. *See* U.S. Br. 17-18, 21, 23.

But the Government conflates lawyers' professional duty of candor with some aspiration to confess all personal misgivings so they can have a clear conscience.[1] In that regard, the Government also overlooks the

[1] Relevant here, Florida lawyers (like the prosecutor) are forbidden from "knowingly" making or failing to correct a false statement of fact to a tribunal or "fail[ing] to disclose a material fact to a tribunal when

obvious distinction between volunteering information as part of an affirmative presentation (often not permissible when it undermines one's position) and providing information in response to a court's questions (more likely to be required even if it undermines one's position). *See supra* note 1. To put it bluntly, in an adversarial system, even if it is truthfully a lawyer's personal view, that lawyer is not permitted—and certainly not

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disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Fla. R. Prof'l Conduct 4-3.3(a)(1)-(2). But that does not mean, as the Government apparently and wrongly contends, that lawyers in an adversary proceeding must "present a disinterested exposition" of the facts and law. *Id.* cmt.

Rather, in an adversarial system where lawyers are "officers of the court" who must "avoid conduct that undermines the integrity of the adjudicative process," lawyers of course "must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." *Id.* Ultimately, however, lawyers "ha[ve] an obligation to present the client's case with persuasive force." *Id.*

The prosecutor's statements about his personal reasons for agreeing to make the recommendation (which were obviously intended to *distance* himself from responsibility for making that recommendation) were not required by candor (because those reasons were not "material" to whether the recommended sentence was consistent with § 3553(a)'s factors nor would their omission have "undermined the integrity of the adjudicative process," Fla. R. Prof'l Conduct 4-3.3(a)(2) & cmt.). But they were certainly contrary to the obligation his plea agreement promised he would undertake. *See id.* 4-1.3 cmt. ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). In short, a tribunal is not a confessional, so candor cannot shield sabotage.

required—to sabotage their clients' cases by disclosing their personal hesitations about an issue of fact or law.

Indeed, the Government's "candor" defense cannot be true, because otherwise cases like *United States* v. *Grandinetti*, 564 F.2d 723 (5th Cir. 1977),[2] would have reached opposite results. Indeed, *Grandinetti* held a prosecutor breached a plea agreement when he *candidly* "express[ed] to the sentencing judge reservations over" a recommended sentence's legality and propriety. *Id.* at 724. Notably, *Grandinetti* so held despite ruling the recommended sentence would have been an illegal sentence—as the prosecutor *truthfully* explained at sentencing. *Id.* at 727 n.1.

Hence, *Grandinetti* stands for the proposition that, regardless of prosecutors' sincerity and truthfulness, if their statements to a sentencing court make them "an unpersuasive advocate for the plea agreement" or, "in effect, argue against it," "the defendant d[oes] not receive the benefit of his bargain"—*i.e.*, "a forceful and intelligent recommendation for" the agreed-upon sentence. *Id.* at 727. As such, the truthfulness of the prosecutor's proffered reasons for agreeing to recommend a four-year sentence here by no means converted them into mandatory disclosures that

[2] *See infra* note 4.

allowed him to escape his obligation to "forceful[ly] and intelligent[ly] recommend[]" that sentence. *Id.*

The Government's argument is like the one rejected in *United States* v. *Taylor*, 77 F.3d 368 (11th Cir. 1996). There, at the plea hearing, the Government agreed to recommend a 10-year sentence in exchange for the defendant pleading guilty to possession with intent to distribute more than 100 kilos of marijuana, an offense with a five-year minimum mandatory. *Id.* at 369. The district court asked the prosecutor "to describe the related evidence," and the prosecutor "explained in detail how [the defendant] and several others had intended to smuggle cocaine into the United States, but instead ended up smuggling marijuana because of the drug supplier's concerns about the riskiness of the smuggler's flight." *Id.*

Thereafter, probation prepared a PSR that determined the defendant had intended and attempted to import 500 kilos of cocaine, which qualified as relevant conduct under the guidelines. *Id.* Based on that determination, probation calculated a guideline range that far exceeded the 10-year sentence the government had agreed to recommend. *Id.* The defendant objected to the inclusion of his cocaine-related conduct in the guideline calculation, but the government responded by stating it "'was

prepared to prove beyond a reasonable doubt that this defendant conspired to import cocaine'" and "'to prove the same by a preponderance of the evidence'" at sentencing. *Id.* Despite the government technically recommending the 10-year sentence at the sentencing hearing, the district court sentenced the defendant pursuant to the PSR's guideline calculation. *Id.* at 370.

On appeal, this Court reversed. *Id.* at 371. The Government had breached the plea agreement because:

> It was entirely reasonable for [the defendant] to understand the government's promise to recommend a ten-year sentence as including a promise not to advocate that the court adopt a position that would require a sentence longer than ten years. Indeed, that is the only reasonable interpretation. Advocacy of a position requiring a greater sentence is flatly inconsistent with recommendation of a lesser sentence.

Id. Hence, under *Taylor*, the government breaches a plea agreement—as here—when it voluntarily discloses or adopts facts and circumstances that undermine its express sentencing recommendation, regardless of their accuracy and relevance to sentencing.[3]

[3] Other cases are in accord. *See United States* v. *Boatner,* 966 F.2d 1575, 1578 (11th Cir. 1992) (although "solemnization of a plea agreement does not preclude the government from disclosing pertinent information to the sentencing court," prosecutors "can enter into a binding agreement with a defendant to restrict the facts upon which the substantive offense

Moreover, the Government's attempt to hide behind the prosecutor's duty of candor toward the tribunal to justify the dereliction of his obligations under the plea agreement contravenes the covenant of good faith and fair dealing implied in all plea agreements. *See, e.g.*, *United States* v. *Cruz-Mercado*, 360 F.3d 30, 41 (1st Cir. 2004) ("'Technical compliance [with plea agreements] 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.'" (citations omitted)). Of course, a plea agreement's recommendation would be

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is based"); *United States* v. *Rewis*, 969 F.2d 985, 987 (11th Cir. 1992) (prosecutor technically complied with plea agreement by not expressly recommending a sentence but breached it by disparaging the defendant's character and highlighting the need to "establish a wide ranging deterrent"); *United States* v. *Jefferies*, 908 F.2d 1520, 1527 (11th Cir. 1990) (government cannot contradict plea agreements' stipulated facts); *United States* v. *Tobon-Hernandez*, 845 F.2d 277, 280 (11th Cir. 1988) (same); *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"); *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"); *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 his serious problems with it); *see also* 11th Cir. R. 36-2 (unpublished decisions like *Haber* "may be cited as persuasive authority").

meaningless if the prosecutor's factual disclosures and argument make it extremely unlikely or even impossible for a sentencing court to accept it.

To support its "mandatory disclosure" argument, the Government relies on *United States* v. *Block*, 660 F.2d 1086 (5th Cir. Unit B Nov. 12, 1981).[4] *See* U.S. Br. 23 (if the prosecutor had explained "48 months was 'a just or reasonable compromise in light of the weaknesses in the government's case,'" he would have "'withh[e]ld relevant factual information from the court,'" thereby violating his "'duty to the court'" (quoting *Block* at 660 F.2d at 1092, and Wukoson Br. 39)). Yet *Block* involved a much different situation.

There, pursuant to a plea agreement, the defendant pled guilty to willfully failing to file corporate excise tax returns. *Block*, 660 F.2d at 1087. In exchange, the government agreed to take no position on the sentence to be imposed. *Id.* On appeal, the defendant argued, "the Government took a position as to the sentence by informing the court that he

[4] 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). *Block* ordinarily would not qualify as binding precedent in this Court because it was a panel decision issued on November 12, 1981. *See id.* But because it was decided by a Unit B panel, it is binding. *See Stein* v. *Reynolds Secs., Inc.*, 667 F.2d 33, 33 (11th Cir. 1982).

had not filed corporate income tax returns for a number of years." *Id.* at 1087-88. *Block* held this disclosure did not constitute a breach of the plea agreement. *Id.* at 1092-93.

The sequential circumstances in which the government made that disclosure are crucial to understand *Block*'s holding. At sentencing, the district court asked defense counsel whether "the excise tax receipts had been included in the corporation's gross income and corporate income taxes paid on the amount," and "[a]fter receiving an affirmative response, the district court judge asked how much the corporate income taxes reduced the excise tax." *Id.* at 1092. Inaccurately, defense counsel stated, "the income tax reduced the excise tax 'very modestly'" and the corporate income tax returns had been timely filed. *Id.* In rebuttal, the prosecutor corrected those misstatements by "informing the court that the returns [actually] had not been filed and that no taxes had been paid." *Id.*

On those facts, *Block* held the government was "obligated to disclose defendant's failure to file the returns in order to enable the court to determine an appropriate sentence" and therefore did not breach its agreement not to recommend a particular sentence. *Id.* at 1093. In so holding, *Block* reasoned that if a prosecutor "is aware that the Court

lacks certain relevant factual information or the court is laboring under mistaken premises, [he] has the duty to bring the correct state of affairs to the attention of the court." *Id.* at 1091. In other words, *Block* ruled, "the Government does not have a right to make an agreement to stand mute in the face of factual inaccuracies or to withhold relevant factual information from the court," and "[s]uch an agreement [would] violate[] a prosecutor's duty to the court." *Id.* at 1092.

Block's holding, however, has no bearing here because the prosecutor's advocacy against the recommended sentence did not involve the correction of any misstatements or factual inaccuracies. Rather, the prosecutor volunteered the statements during his initial presentation without any prompting from the District Court.

In fact, *Block* actually undermines the Government's position. Citing *United States* v. *Avery*, 589 F.2d 906 (5th Cir. 1979), and *United States* v. *Crusco*, 536 F.2d 21 (3d Cir. 1976), *Block* clarified that, despite the rule requiring the Government to correct factual misstatements, "an agreement to stand mute or take no position prohibits the Government from attempting to influence the sentence by presenting the court with conjecture, opinion, or disparaging information already in the court's

possession."[5] *Block*, 660 F.2d at 1091. And that is the exact type of prohibited conduct in which the prosecutor engaged here.

For example, the nonvictim witnesses' disparaging character testimony and requests for lengthy and maximum incarceration were already in the court's possession because their letters (which should not have been filed in the first place) already included that same information.[6] Also, *before* the District Court agreed during the plea hearing to impose the four-year sentence, the prosecutor had already explained the circumstances that led to the sentencing recommendation. *See* Doc. 121 at 1-4, 20. His *unsolicited* introductory remarks at sentencing that he believed

[5] *Avery* held that if a prosecutor had repeated "in open court" the PSR's statements that described a defendant as being no stranger to criminal activity, he would have breached his "promise to make no recommendation" and to "say nothing to the judge that would influence the sentencing decision." 589 F.2d at 908. Similarly, *Crusco* held that "only a stubbornly literal mind would refuse to regard the Government's commentary," which noted the defendant was heavily involved in organized crime and a danger to the community, "as [improperly] communicating a position on sentencing." 536 F.2d at 26.

[6] *Compare, e.g.*, Docs. 101.1 at 3 (Karyn's letter requesting maximum sentence), 101.3 (Crow's letter disparaging Wukoson's character and discussing the harm he caused), *with* Doc. 125 at 21 (Karyn requesting maximum sentence), 25 (Crow requesting 13-year sentence); *see also* Docs. 101.2 (letter from non-testifying witness requesting maximum sentence); 104.3 (same); 104.2 (letter from non-testifying witness requesting 13-year sentence).

Wukoson's misdeeds had forced the recommendation (*see* Doc. 125 at 7) did not merely reiterate what had already been discussed at the plea hearing (*see* Doc. 121 at 1-4), but *emphasized* it.

Additionally, his description at sentencing of the details and egregiousness of Wukoson's crimes (*see* Doc. 125 at 16-18), including production and touching crimes he did not commit, also repeated information that was contained in the plea agreement's factual statement (*see* Doc. 121 at 13-17), which was already part of the record. This inflammatory and redundant presentation surely did, or could have, influenced the District Court's ultimate decision to reject the "recommended" sentence, so it was improper under *Block*.

Furthermore, to support its position that the prosecutor had every right to explain the reasons why it had agreed to recommend the four-year sentence, the Government cites the Fourth Circuit's decision in *United States* v. *Obey*, 790 F.3d 545 (4th Cir. 2015). U.S. Br. 21-22. But *Obey* is easily distinguished.

There, the defendant argued the prosecutor *passively* "violated the plea agreement by failing to provide reasons to support the sentence recommendation." *Id.* at 547. Here, on the other hand, Wukoson argues the

prosecutor *actively* sabotaged the four-year-sentence recommendation by highlighting the severity of the offense conduct, suggesting Wukoson's witness tampering had forced the recommendation, and submitting letters and calling nonvictim witnesses who vilified Wukoson and requested sentences well above the recommended sentence. *See, e.g.*, Wukoson Br. 15. These differences render *Obey* inapposite.

Indeed, in *Obey*, the prosecutor repeatedly urged the district court "no fewer than three times" to accept the plea agreement's recommended sentence and highlighted the "significant amount" of impeachment evidence that would render a trial risky. *Id.* at 548. Here, the prosecutor blamed Wukoson for forcing him to agree to recommend what he implied was too lenient a sentence and declined to explain the weaknesses in his case that made a four-year sentence a just and reasonable compromise. Hence, the prosecutor's conduct in *Obey* was nowhere near as egregious as the prosecutor's conduct in this case.

Moreover, in holding the prosecutor had not breached the plea agreement, *Obey* expressly distinguished its facts from those in *Grandinetti* and *Brown*, 790 F.3d at 548, two cases that are materially similar to Wukoson's (*see* Wukoson Br. 24-27 & n.11). Thus, the Court should

distinguish *Obey* and apply *Grandinetti* (this Court's prior panel precedent) and *Brown*.

The Government further attempts to justify the prosecutor's behavior at sentencing by arguing "defense counsel affirmatively concurred with the government's representation as to the parties' rationale for resolving the case under the terms of the plea agreement, belying Wukoson's claim that the explanation was somehow improper." U.S. Br. 23-24. That defense counsel stated he knew the prosecutor to be a man who generally tries to do right and that he did not want Wukoson's son to have to testify (*see* Doc. 125 at 32), however, does not mean he concurred with the prosecutor's implication that Wukoson's misdeeds forced the plea agreement. Rather, counsel was simply explaining the defense had worked hard to resolve the case without a trial, so *the Government* would not unnecessarily traumatize the son by making him testify in an attempt to prove a case that was wrought with reasonable doubt.

In other words, defense counsel asserted the Government's insistence on prosecuting forced Wukoson into the plea agreement, not the other way around. Of course, it was permissible for defense counsel to take that position, whereas the prosecutor could not take the opposite

position against Wukoson, because Wukoson, unlike the Government, made no promise to advocate for a particular sentence.

Additionally, the Government misconstrues Wukoson's argument by stating, "At bottom, Wukoson's complaint is that the government made its sentencing recommendation with insufficient enthusiasm." Then, citing *United States* v. *Benchimol*, 471 U.S. 453 (1985), it argues "even if Wukoson were correct, … the government need not express utmost enthusiasm for the terms of a plea agreement unless the defendant bargains for the government to do so." U.S. Br. 24.

That argument strays far from the mark, however, because Wukoson is not arguing the prosecutor breached the plea agreement by failing to enthusiastically recommend the four year sentence. Rather, he is arguing that, "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." Wukoson Br. 15 (emphasis added). And in any case, *Benchimol* is inapposite. *See* Wukoson Br. 31-33

(explaining how this case falls within the purview of *Grandinetti* and *Brown*, not *Benchimol*).

2. The prosecutor's advocacy against the four-year recommended sentence cannot properly be characterized as mere discussion of relevant sentencing facts

The Government argues, "This Court has held that the government does not breach a plea agreement, in which it reserves the right to present facts relating to sentencing, by subsequently commenting on the defendant's conduct." U.S. Br. 25. For that proposition, it cites *United States* v. *Carrazana*, 921 F.2d 1557 (11th Cir. 1991). But Wukoson's case is unlike *Carrazana*.

There, the prosecutor called the defendant the organization's "kingpin." *Id.* at 1569. Unlike here, where the prosecution witnesses expressly asked for sentences that were several times longer than the four-year recommendation (*see* Docs. 101.1; 101.2; 104.2; 104.3; 125 at 21, 25), the *Carrazana* prosecutor's description of the defendant's role in the conspiracy did not recommend a particular sentence that contravened the plea agreement. *See* 921 F.2d at 1569. Therefore, *Carrazana* is inapposite.

The Government further asserts the prosecutor's emphasis on the offense conduct and plea for adequate deterrence were proper because he

"had every right to argue the applicability of the 18 U.S.C. § 3553(a) sentencing factors, particularly since the court had discretion to impose an even lower sentence than the 48 months that the government recommended." U.S. Br. 18, 27. But the record belies that argument.

Here, given guidelines calculation of 108-135 months—and especially given the District Court's commitment at the plea hearing to impose the four-year sentence (*see* Doc. 121 at 20)—it is unreasonable for the Government to argue the prosecutor needed to impugn Wukoson's character through argument and witnesses to prevent the District Court from imposing a sentence of less than four years pursuant to its § 3553 discretion. Indeed, the District Court specifically indicated at the plea hearing that it would not impose a sentence of less than four years. *See* Doc. 121 at 20 ("I mean the guidelines were, in the PSI for one count, were 97 to something months, so it is going to be hard to get below the four years."). And Wukoson never requested a sentence below four years.

Furthermore, the Government misguidedly attempts to distinguish *United States* v. *Rewis*, 969 F.2d 985 (11th Cir. 1992), because that plea agreement expressly forbade a prosecutor from "'emphasiz[ing] evidence not related to the offenses,'" *Rewis*, 969 F.2d at 988, whereas Wukoson's

plea agreement allowed the prosecutor to inform the District Court "of all facts pertinent to the sentencing process" (Doc. 85 at 13). *See* U.S. Br. 28-29. But that argument improperly conflates *Rewis*'s two-part holding and focuses on the inapposite part while ignoring the part that controls this case's outcome.

First, *Rewis* held the government breached a plea agreement by "dwelling on [a defendant's] noncooperation" because "the government through its plea agreement was bound not to emphasize evidence not related to the offenses." 969 F.2d at 988. In other words, *Rewis*'s first holding concluded the government's comments breached the portion of the plea agreement that forbade the government from bringing out facts unrelated to the offenses of conviction. *Id.* This part of *Rewis*'s holding, on which the Government appears to rely, is inapposite because Wukoson's plea agreement did not contain the same limiting language.

The *Rewis*'s second holding, however, held the government's comments *also* breached its promise not to recommend a particular sentence, which was a plea agreement term separate from its promise not to bring out or emphasize facts unrelated to the offenses of conviction. *Id.* In that regard, *Rewis* explained, "the government's 'diatribe' about [the

defendant's] noncooperation and how noncooperation must be deterred to stave off the encroaching criminal element" improperly "suggest[ed] an elevated sentence." *Id.* This part of *Rewis*'s holding, which the Government tries to avoid, most certainly applies here because the prosecutor here similarly breached his promise to recommend a four-year sentence.

Again relying on the plea agreement's reservation of the prosecutor's right to discuss pertinent sentencing facts, the Government, in passing, attempts to distinguish *Grandinetti*, this Court's prior panel precedent. U.S. Br. 29. But that provision of the plea agreement is immaterial to *Grandinetti*'s applicability here. As explained at length in Wukoson's appellant's brief (*see* Wukoson Br. 23-27), under *Grandinetti*, the government breaches a plea agreement when 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," 564 F.2d at 727. This rule remains in full force and effect even when a plea agreement allows a prosecutor to discuss pertinent sentencing facts.

3. The prosecutor used witnesses to circumvent his obligation to recommend a four-year sentence

Citing *United States* v. *Horsfall,* 552 F.3d 1275 (11th Cir. 2008), the Government asserts its use of nonvictim witnesses to recommend

sentences the plea agreement prohibited the prosecutor from recommending was not an end-run around its plea agreement obligations. U.S. Br. 29-30. But *Horsfall* is distinguishable. *See* Wukoson Br. 34-37.

Indeed, the victim impact evidence in *Horsfall* had a legitimate, authorized purpose: *i.e.*, it supported a sentence at the guidelines' high end, whereas the plea agreement only prevented the government from requesting an upward departure. 552 F.3d at 1282. Here, the witness letters and testimony expressly requested sentences that were both above the 108-135 month guidelines range and, more importantly, several times as long as the four-year sentence the prosecutor was required to recommend. *See* Docs. 101.1; 101.2; 104.2; 104.3; 125 at 21, 25. Moreover, unlike any of the nonvictim witnesses here, the witnesses who testified in *Horsfall* were victims within the meaning of the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, and therefore had a right to testify. *Horsfall*, 552 F.3d at 1282.

Furthermore, citing *Beasley* v. *Stewart*, 28 Fed. App'x 641, 643 (9th Cir. 2001) (unpublished), *Clement* v. *McCaughtry*, 1993 WL 513886 (7th Cir. 1993) (unpublished), and *United States* v. *Bullcoming*, 579 F.3d

1200, 1206 (10th Cir. 2009), three out-of-circuit decisions,[7] the Government argues the prosecutor could not have breached the plea agreement by calling witnesses to contradict the recommended sentence because those witnesses were not parties to the plea agreement. U.S. Br. 30-33. That the witnesses were not parties to the agreement (and how could any nonvictim witness be a *party* to a plea agreement between a defendant and the United States?), however, is irrelevant to the prosecutor's breach, and the cases on which the Government relies do not suggest otherwise.

In that regard, *Beasley* is distinguishable because there, the prosecutor called a victim to testify *only* because he was under the impression that the witness would recommend the minimum sentence; that the witness requested the maximum sentence while testifying was beyond the prosecutor's control and therefore did not constitute a breach of the plea agreement. 28 Fed. App'x at 642-43. Here, unlike *Beasley*, the prosecutor knew the sentence Karyn would recommend from the stand because her

[7] Unpublished decisions from sister circuits, such as *Beasley* and *Clement*, have even less persuasive force than published decisions from sister circuits. *See, e.g.*, *Upton* v. *Day & Zimmerman NPS*, 2018 WL 465979, at *3 (N.D. Ala. Jan. 18, 2018) (declining to decide issue "based on an out-of-circuit unpublished case," even "in the absence of any citation to a case from the Eleventh Circuit").

letter (which the prosecutor should not have filed) had already done so. *See* Doc. 101.1. Accordingly, the prosecutor's conduct, unlike the conduct in *Beasley*, was unjustifiable.

Clement involved a district court that customarily solicited victim-impact statements regardless of prosecutors' willingness to call such witnesses. *See* 12 F.3d at 1-2. Here, there is no evidence the district court had such a practice. And even if it did, the witnesses who recommended sentences here were not victims with any statutory right to be heard at sentencing.[8] *See* Wukoson Br. 36-41.

Bullcoming is distinguishable because the witness there, as a tribal representative, testified on behalf of the victims. 579 F.3d at 1205-06. Additionally, there was no indication the prosecutor knew beforehand her testimony would negate his recommendation for an acceptance-of-responsibility reduction. *Id.*

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[8] Also, *Beasley* and *Clement* are inapplicable here because both were 28 U.S.C. § 2254 appeals involving much more deferential standards than involved here. *E.g.*, *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011) (to prevail, a habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"). Additionally, *Beasley* and *Clement* are nonbinding, unpublished, out-of-circuit cases. *See supra* note 7.

Furthermore, the Government argues, "because the CVRA in no way narrows the factors or evidence district courts can consider at sentencing, its applicability has no bearing on the propriety of the testimony presented to the district court." U.S. Br. 33. This assertion distorts Wukoson's argument.

True, it was the plea agreement, not the CVRA, that narrowed the scope of evidence the prosecutor could have properly presented at the sentencing hearing. And Wukoson never argued otherwise. Rather, he simply asserted the Government could not cite the CVRA as an escape hatch to absolve itself of responsibility for calling witnesses who requested lengthy or maximum incarceration. That is because those witnesses were not victims under the CVRA, so they had no statutory right to be heard at sentencing. *See* Wukoson Br. 36-41. As such, "the Government [thus] cannot now disclaim responsibility for its breach by arguing it was statutorily required to submit [these] letters and witness testimonies." Wukoson Br. 40-41.

B. The standard of review is de novo, not plain error (U.S. Argument I.C)

Contrary to the Government's assertions (*see* U.S. Br. 17, 18, 20, 33-36), this Court should review the breach-of-plea-agreement issue de

novo. During the sentencing hearing, Wukoson reserved "*all* written and oral objections that the Court has mentioned and that we raised *with regard to* the recommended sentence not being accepted by the Court." Doc. 125 at 57 (emphases added). As Wukoson has argued throughout this appeal, the primary reason why the plea agreement's recommendation was not "accepted by the Court" was the prosecutor's breach. Hence, the issue was adequately preserved for this Court's review.[9]

That is especially apropos here, because any further specification of the objection's basis would have been pointless and meaningless. *See* Fed. R. Crim. P. 51(a) ("Exceptions to rulings … are unnecessary."). The

[9] *In re Home Depot Inc.*, 931 F.3d 1065, 1086 (11th Cir. 2019) ("issue was not waived" for appellate review given "difference between raising new issues and making new arguments on appeal" because appellant had made "the same request, albeit for different (and contradictory) reasons"); *Sec'y, U.S. Dep't of Labor* v. *Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017) ("[p]arties can most assuredly waive positions and issues on appeal, but not individual arguments—let alone authorities"; instead, "[o]ffering a new argument or case citation in support of a position advanced in the district court is permissible—and often advisable" to improve "the quality and depth of argument ... on appeal"); *Reider* v. *Philip Morris USA, Inc.*, 793 F.3d 1254, 1260 (11th Cir. 2015) ("we do not require that a litigant vocalize an objection 'with polished lucidity,' or utter certain magic words" (citation omitted)); *United States* v. *Zinn*, 321 F.3d 1084, 1089 (11th Cir. 2003) ("Counsel's statement during sentencing that polygraph testing is 'not a proper condition' of supervised release, though perhaps imprecise, adequately conveyed the nature of his objection so as to preserve it for appeal.").

District Court had already imposed sentence, and no district judge would conclude—mere seconds after he or she had imposed sentence—that the sentence just imposed was not only improper, but that recusal from further proceedings was necessary.[10]

C. Even under plain-error review, the Government's breach would still require reversal (U.S. Argument I.C)

Under any standard of review, the Government's breach would still require reversal because it was a plain error that prejudicially affected Wukoson's substantial rights.

The Government argues the prosecutor's breach could not be a *plain* error because "[n]either this Court nor the United States Supreme Court has held that the government breaches a plea agreement—in which it agrees to recommend a particular sentence and reserves the right to inform the district court of relevant sentencing facts—by explaining the justification for the recommended sentence, arguing the § 3553(a) factors, or failing to persuade the court not to hear permissible witness

[10] The Supreme Court recently granted certiorari in *Holguin-Hernandez* v. *United States*, No. 18-7739. The issue there is: "Whether a criminal defendant who argues in the district court for a lower sentence must formally object after pronouncement of his sentence to preserve a claim for appeal that his sentence is substantively unreasonable." *Holguin-Hernandez*'s outcome may be relevant to this preservation issue.

testimony." U.S. Br. 33-34. But that argument distorts the issue raised here—*i.e.*, whether the Government breached the plea agreement when the prosecutor undermined and advocated against the recommended sentence—in an apparent attempt to evade binding authority.

An error is plain if "it is contrary to explicit statutory provisions or to on-point precedent in this Court or the Supreme Court." *United States* v. *Schultz*, 565 F.3d 1353, 1357 (11th Cir. 2009). In other words, to be considered plain, the error must be "'clear'" or "'obvious,'" *United States* v. *Olano*, 507 U.S. 725, 734 (1993), under "precedent from the Supreme Court or this Court directly resolving" the issue, *United States* v. *Lejare-Rada*, 319 F.3d 1288, 1290 (11th Cir. 2003).

As Wukoson's appellant's brief argued, the prosecutor's conduct constituted a clear and obvious breach of the plea agreement under *Santobello* v. *New York*, 404 U.S. 257, 262 (1971), *United States* v. *Grandinetti*, 564 F.2d 723 (5th Cir. 1977), and *United States* v. *Rewis*, 969 F.2d 985 (11th Cir. 1992). *See* Wukoson Br. 19-20, 23-31. All those cases are on-point binding precedents delineating the circumstances under which a prosecutor's statements and conduct during sentencing proceedings breach a plea agreement. Therefore, the Government's assertion that the

prosecutor's breach could not be plain error due to a lack of precedent from the Supreme Court or this Court is wrong.

Lastly, the Government argues that, even if the error were plain, Wukoson cannot establish it affected his substantial rights because he cannot show a reasonable probability his sentence would have been more lenient absent the breach. *See* U.S. Br. 34-36. Actually, he can.

Indeed, the Government's argument ignores two facts that the District Court (1) stated at the plea hearing that it would impose the plea agreement's recommended four-year sentence (*see* Doc. 121 at 20) and (2) declined to follow that recommendation only after considering the letters, the witnesses' testimony, and the prosecutor's argument at sentencing (*see* Doc. 125 at 54-55). This sudden, on-the-record change of heart reveals a clear causal connection between the Government's breach and the District Court's imposition of a sentence that was twice as long as the plea agreement's recommended sentence.

In other words, this causal connection shows there is at minimum at least a reasonable probability that, absent the prosecutor's breach of the plea agreement, the District Court would have accepted the four-year recommended sentence instead of imposing an eight-year sentence.

Strickland v. *Washington*, 466 U.S. 668, 694 (1984) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). The prejudicial impact of the prosecutor's breach cannot simply be swept under the rug.

D. The appellate remedy is simple and imposes minimal administrative costs

Lastly, it is important to emphasize how simple the appellate remedy is and how minimal are its administrative costs. Because this is "a simple case with which a different judge could quickly become familiar," *United States* v. *Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989), any potential loss of efficiency or economy in remanding for resentencing before a different district judge would either "pale[] in comparison," *Johnson* v. *Sawyer*, 120 F.3d 1307, 1334 (5th Cir. 1997), or "not [be] out of proportion to the gain in preserving the appearance of fairness," *United States* v. *Gapinski*, 422 Fed. App'x 513, 522 (6th Cir. 2011). All Wukoson requests is to receive the benefit of his bargain and for the prosecutor to keep his word. That is not too much to ask.

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 6,454 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.

September 24, 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 24th day of September, 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 24th day of September, 2019, to:

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