No. 13-552

In the Supreme Court of the United States

SCOTT MICHAEL LONG, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may supplement his written plea agreement with an additional term, where both the written agreement and petitioner's sworn statements at his plea hearing disclaimed any other promises or agreements.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, guidelines and rules:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-14a) is reported at 722 F.3d 257.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied on August 2, 2013 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on October 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of

21 U.S.C. 846, 841(a)(1), and 841(b)(1)(A) (2009). Pet. App. 3a. He was sentenced to 235 months of imprisonment, to be followed by five years of supervised release. *Id.* at 9a. The court of appeals affirmed. *Id.* at 2a-14a.

1. Between 2007 and June 2009, petitioner and Kerry Lee Jammer distributed large amounts of cocaine and crack cocaine in Freeport, Texas, and Fort Myers, Florida. Pet. App. 3a; C.A. R.E. 406-409. They used couriers to distribute the narcotics and also sold directly to an established group of customers. C.A. R.E. 407. Petitioner transported an average of half a kilogram of cocaine per month from Texas to Florida and made as much as $20,000 a week from his Florida drug business. *Ibid.*

On July 27, 2009, petitioner, Jammer, and 15 co-conspirators were indicted for their roles in this scheme. Pet. App. 3a. Petitioner was charged with conspiracy to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of crack cocaine, in violation of 21 U.S.C. 846, 841(a)(1), and 841(b)(1)(A) (2009), and with two counts of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). *Ibid.*

2. On January 21, 2011, petitioner pleaded guilty pursuant to a written plea agreement. Pet. App. 5a. The agreement provided that petitioner would plead guilty to the conspiracy charge, cooperate with the government, and waive his right to appeal or collaterally attack his sentence and conviction. *Ibid.* In exchange, the government would dismiss the remaining charges, would not oppose a two-level reduction of petitioner's offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1(a), and

would move for an additional one-level reduction under Section 3E1.1(b). *Ibid.* As to other potential sentencing considerations, the government "reserve[d] the right * * * to set forth or dispute sentencing factors or facts material to sentencing." Plea Agreement 9.

The written plea agreement included a merger or integration clause providing that it "constitute[d] the complete plea agreement between the United States, defendant and his counsel" and that "[n]o other promises or representations have been made by the United States except as set forth in writing in this plea agreement." Plea Agreement 18; see Pet. App. 6a. In response to the district court's questions at his plea hearing, petitioner confirmed under oath that there were no "other or different promises or assurances that were made to [him] in an effort to persuade [him] to plead guilty that did not get written down in the plea agreement" and that "there's no secret agreement out there someplace." C.A. R.E. 384. The district court approved the plea agreement and accepted petitioner's guilty plea. *Id.* at 409-410.

3. The Presentence Investigation Report (PSR) prepared in anticipation of petitioner's sentencing calculated an offense level of 41. PSR ¶ 65.[1] Among other things, that calculation reflected the three-level downward adjustment for acceptance of responsibility contemplated in the plea agreement and a four-level upward adjustment under Sentencing Guidelines § 3B1.1(a) because petitioner was a leader or organizer of criminal activity involving five or more participants. PSR ¶¶ 59, 62.

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[1] Petitioner was sentenced under the 2008 version of the Sentencing Guidelines. PSR ¶ 55.

The government filed a one-page memorandum stating that the "factual content" of the PSR was "accurate" and that the government did not object to the PSR's Guidelines calculation. Pet. App. 8a. Petitioner challenged numerous aspects of the PSR, including the application of the four-level leadership adjustment. In addition, petitioner filed a motion to enforce a purported agreement by the government not to seek a leadership adjustment. Petitioner claimed that the government's promise was memorialized in an exchange of emails several weeks before the plea agreement was signed on January 21, 2011. *Ibid.*

The exchange began on December 23, 2010, when petitioner's counsel emailed the prosecutor to follow up on an oral discussion of a potential plea bargain:

> My recollection of our conversation was that you would not agree to recommending that the career offender status was inappropriate in this case but that you would not argue in favor of it either. You would, however, agree not to seek any statutory enhancements based upon [petitioner's] prior convictions. You would not argue for a manager/supervisor, etc., enhancement. You believe the drug weight would be based on approximately 1/2 kilo of cocaine per month from 2007 to 2009. You would not seek an enhancement based on the gun found in Florida.
>
> With the career offender enhancement, he is still facing a very substantial sentence.
>
> Please let me know if I misunderstood anything we discussed.

Pet. App. 19a-20a. On January 6, 2011, after being prompted for a response, the prosecutor replied: "I

believe you have stated everything correctly. Let me know when we can get this done." *Id.* at 18a-19a.

Petitioner contended that this exchange reflected a promise by the government not to seek a leadership adjustment; that this promise remained binding notwithstanding its absence from the subsequent written plea agreement; and that the government breached its promise by representing that the PSR's factual content was "accurate." Pet. App. 8a-9a.[2]

4. The district court heard argument on petitioner's motion at sentencing. The government acknowledged the email exchange but denied making any promises about the leadership adjustment. The prosecutor maintained that "the plea agreement states what the agreement is" and that "[t]here's no way that I would have ever agreed to hold this person not to a leadership role." C.A. R.E. 297-298. The prosecutor added that petitioner "was always the target of our investigation" and that "[h]e's always been considered a leader." *Id.* at 298. The court denied petitioner's motion, finding no enforceable agreement regarding the leadership adjustment because no such promise was included in the written plea agreement. *Id.* at 298-299.[3]

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[2] Before filing the motion, petitioner's counsel sent an email to the prosecutor asserting that the government had agreed not to seek a leadership adjustment. Pet. App. 22a-23a. The prosecutor responded: "Can you send me the email where I agreed not to seek the enhancement for Organizer/manager. I can't remember that email. I'm not saying I never agreed to that, I just don't remember discussing role." *Id.* at 22a. Petitioner's counsel forwarded the original email exchange, but there was no further correspondence on the issue. *Id.* at 8a.

[3] The court also held that even if the email exchange could be considered a binding agreement not to seek the leadership ad-

The district court then turned to the merits of petitioner's argument that his conduct did not warrant a leadership adjustment. The government briefly argued in favor of the adjustment, observing that petitioner directed the activities of five individuals, several of whom acted as drug couriers. C.A. R.E. 301-302. The court overruled petitioner's objection, observing that he was "obviously" a leader or organizer within the meaning of Section 3B1.1(a) and that "the whole [PSR] reflects that." *Id.* at 304.

The district court also overruled petitioner's remaining objections and adopted the PSR's Guidelines calculation, finding a total offense level of 41, a criminal history category of IV, and an advisory Guidelines range of 360 months to life. C.A. R.E. 306. The court then granted the government's motion under Sentencing Guidelines § 5K1.1 for a downward departure based on petitioner's substantial assistance. Following the government's recommendation, the court reduced petitioner's offense level to 35 and sentenced him to 235 months of imprisonment, the bottom of the resulting Guidelines range. *Ibid.*

5. The court of appeals affirmed. Pet. App. 2a-14a. The court observed that petitioner "concede[d] that the terms of the [written] plea agreement did not preclude the Government from seeking a leader/organizer enhancement" and rejected petitioner's argument that "the email exchange is part of the plea agreement because it reasonably induced him to plead guilty." *Id.* at 9a-10a. The court explained that "general principles of contract law" govern the interpretation of plea agreements and that when an agreement

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justment, the government had not breached it by stating that the factual content of the PSR was accurate. C.A. R.E. 298-299.

is unambiguous, "this court generally will not look beyond the four corners of the document." *Id.* at 10a.

The court of appeals acknowledged that some cases have recognized an exception to this rule where the government made an additional promise in a cover letter attached to the plea agreement. Pet. App. 10a-13a & n.3 (citing *United States* v. *Garcia*, 956 F.2d 41, 44 (4th Cir. 1992); *United States* v. *Melton*, 930 F.2d 1096, 1098 (5th Cir. 1991); and *United States* v. *Fields*, 906 F.2d 139, 141 (5th Cir.), cert. denied, 498 U.S. 874 (1990)). But that exception did not apply in this case, where "the e-mail exchange was not attached to the plea agreement, was completed weeks prior to [petitioner's] guilty plea," and was not "transmitted contemporaneously with the plea." *Id.* at 13a.

The court of appeals also noted that any claim that petitioner relied on the emails was contradicted by his statements under oath that his plea was not induced by any promises outside the written plea agreement. Pet. App. 14a. The court gave "great weight" to these sworn declarations, which "'carry a strong presumption of verity.'" *Ibid.* (quoting *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977)). The court also noted that it would have been unreasonable for petitioner to rely on the emails "in light of the plea agreement's merger clause," which expressly disclaimed the existence of other agreements. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-29) that he is entitled to enforce the purported agreement reflected in the email exchange that preceded his written plea agreement and that the courts of appeals are divided over the circumstances in which extrinsic evidence may be used to supplement or contradict the terms of a writ-

ten plea agreement. Both contentions lack merit. The court of appeals correctly rejected petitioner's claim as foreclosed by the plea agreement's unambiguous terms and by petitioner's own sworn statements at his plea hearing. And though the lower courts have sometimes used differing formulations to describe the governing law, the decisions petitioner seeks to portray as a developed circuit conflict instead are explained by the differing facts and circumstances of individual cases. Petitioner does not identify any decision granting relief in circumstances comparable to those present here. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's attempt to use extrinsic evidence to supplement his written plea agreement with an additional, inconsistent promise that was disclaimed by the agreement's integration clause and by petitioner's own sworn statements at his plea hearing.

a. "Although the analogy may not hold in all respects, plea bargains are essentially contracts." *Puckett* v. *United States*, 556 U.S. 129, 137 (2009); see *Ricketts* v. *Adamson*, 483 U.S. 1, 9 & n.5 (1987). It is thus "well-established that the interpretation of plea agreements is rooted in contract law, and that each party should receive the benefit of its bargain." *United States* v. *Dawson*, 587 F.3d 640, 645 (4th Cir. 2009) (internal quotation marks omitted). "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). But it is equally axiomatic that "the government is held only to those promises that it actually made, and the government's duty in carrying

out its obligations under a plea agreement is no greater than that of fidelity to the agreement." *Dawson*, 587 F.3d at 645 (internal quotation marks omitted); see also, *e.g.*, *United States* v. *Jones*, 209 F.3d 991, 996-997 (7th Cir. 2000).

To determine whether the government breached a plea agreement, courts apply an objective test, asking whether its conduct was "consistent with the parties' reasonable understanding of the agreement." *United States* v. *Williams*, 510 F.3d 416, 425 (3d Cir. 2007) (citation and internal quotation marks omitted); accord *United States* v. *Brumer*, 528 F.3d 157, 158 (2d Cir. 2008). "[T]he most persuasive evidence of what a defendant reasonably appreciated as his bargain is found in the plain language of the court-approved agreement." *United States* v. *Phibbs*, 999 F.2d 1053, 1081 (6th Cir. 1993), cert. denied, 510 U.S. 1119 (1994).

In this case, the plea agreement contained no language precluding the government from seeking a leadership adjustment. To the contrary, aside from the government's promises regarding a downward adjustment for acceptance of responsibility, the agreement expressly "reserve[d]" the government's right "to set forth or dispute sentencing factors." Plea Agreement 9. It also unambiguously disclaimed any other agreements or promises, providing that "[t]his written plea agreement * * * constitutes the complete plea agreement" and that "[n]o promises or representations have been made by the United States except as set forth in writing in this plea agreement." *Id.* at 18.

Petitioner signed the agreement and a separate addendum representing that he had "read and carefully reviewed every part of this plea agreement with

[his] attorney." Plea Agreement 21; see also *id.* at 20 (addendum signed by petitioner's attorney representing that he had "carefully reviewed every part of this plea agreement with [petitioner]"). Even assuming that the government's email to petitioner's counsel could be construed as a promise not to seek a leadership adjustment if petitioner pleaded guilty, the court of appeals correctly concluded that any reliance on that promise "would be unreasonable in light of the plea agreement's merger clause." Pet. App. 14a. That conclusion is consistent with the established principle of contract interpretation—sometimes called the parol evidence rule—providing that "evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term" of an integrated written agreement. Restatement (Second) of Contracts § 215 (1981); see also *id.* § 213(b) ("A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.").

b. Petitioner contends (Pet. 27-29) that the parol evidence rule should not apply to plea agreements because of the government's bargaining power and the constitutional dimensions of a guilty plea. But the special procedures designed to ensure that criminal defendants fully understand their plea agreements and that guilty pleas are not induced by unrecorded promises protect against any overreaching or misapprehension. Federal Rule of Criminal Procedure 11 vests the district judge presiding over the plea with direct and personal responsibility for assessing the defendant's understanding of the proceeding and the conditions under which he is entering the plea. When a plea agreement is involved, the agreement must be

disclosed (ordinarily in open court), and the judge must review its terms and then accept or reject it. See Fed. R. Crim. P. 11(c). Before accepting a plea, the court is also required to "determine that the plea is voluntary" and that it "did not result from force, threats, or promises (other than promises in a plea agreement)." Fed. R. Crim. P. 11(b)(2).

This process was scrupulously followed in this case. Most importantly for present purposes, the prosecutor summarized the terms of the written plea agreement and petitioner acknowledged that the prosecutor's statement was "fair and accurate." C.A. R.E. 384. While under oath, see *id.* at 377, petitioner informed the district court that there were no "other or different promises or assurances" that were not contained in the plea agreement and that there was no "secret agreement" between the parties, *id.* at 384.

These "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977). Even in a case that did not involve "commendable procedures" like those set forth in Rule 11 and followed here, *id.* at 79, this Court emphasized that a defendant's statement that his plea has not been induced by undisclosed promises is ordinarily conclusive. Drawing an analogy to "[t]he parol evidence rule," *Blackledge* suggested that a court should look behind such a statement only in cases of "misunderstanding, duress, or misrepresentation by others." *Id.* at 75 & n.6.

Petitioner has identified no such ground here. He has given no reason why, if his plea was induced by the purported promise in the email exchange, neither he nor his counsel sought to include that promise in the written plea agreement. Nor has he explained

why he denied the existence of any other promises or agreements at his plea hearing. That provides sufficient reason to reject his claim. As then-Judge Roberts explained, an integration clause in a written plea agreement "argues strongly against the existence of any unwritten promises," and "[i]nferring such promises is virtually foreclosed where, as here, the district court has also conducted a flawless plea proceeding at which the defendant was made fully aware of, and assented to, the important terms of the agreement." *United States* v. *West*, 392 F.3d 450, 456 (D.C. Cir. 2004) (Roberts, J.); see also *United States* v. *Peterson*, 414 F.3d 825, 827 (7th Cir.) ("[A] motion that can succeed only if the defendant committed perjury at the plea proceedings may be rejected out of hand unless the defendant has a compelling explanation for the contradiction."), cert. denied, 546 U.S. 995 (2005).

2. Petitioner contends (Pet. 9-27) that the courts of appeals are divided over the circumstances in which parol evidence may be used to supplement or contradict the terms of an unambiguous written plea agreement. But every court of appeals that hears criminal cases has held that parol evidence is generally inadmissible in those circumstances.[4] Petitioner correctly

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[4] See *United States* v. *Alegría*, 192 F.3d 179, 185-186 (1st Cir. 1999); *United States* v. *Fagge*, 101 F.3d 232, 234 (2d Cir. 1996); *United States* v. *Gebbie*, 294 F.3d 540, 551 (3d Cir. 2002); *United States* v. *Fentress*, 792 F.2d 461, 464 (4th Cir. 1986); *United States* v. *Ballis*, 28 F.3d 1399, 1410 (5th Cir. 1994); *Baker* v. *United States*, 781 F.2d 85, 90 (6th Cir.), cert. denied, 479 U.S. 1017 (1986); *United States* v. *Given*, 164 F.3d 389, 395-396 (7th Cir.), cert. denied, 528 U.S. 852 (1999); *United States* v. *Leach*, 562 F.3d 930, 935-936 (8th Cir. 2009); *United States* v. *Ajugwo*, 82 F.3d 925, 928-929 (9th Cir. 1996), cert. denied, 519 U.S. 1079 (1997); *United States* v. *Rockwell Int'l Corp.*, 124 F.3d 1194, 1199-1200 (10th Cir.

notes that some cases have made, or allowed for the possibility of, exceptions to this rule in unusual circumstances. But even in the commercial context the parol evidence rule is subject to narrow exceptions. See *Blackledge*, 431 U.S. at 75 n.6. And the decisions petitioner cites do not establish a developed circuit conflict because they are explained by the differing facts involved in each case. Moreover, any disagreement among the lower courts is not implicated here because petitioner fails to identify any decision granting relief in comparable circumstances.

a. Petitioner argues (Pet. 12-14) that the Third and Fourth Circuits routinely allow defendants to offer extrinsic evidence to vary the terms of integrated written plea agreements. Neither court's precedents support this broad characterization.

The Third Circuit has stated that "the first step" in construing a plea agreement "is to decide whether the plea agreement is ambiguous or unambiguous." *United States* v. *Gebbie*, 294 F.3d 540, 551 (2002). A court should look to extrinsic evidence only if "faced with an ambiguous plea agreement." *Ibid.* (citing *United States* v. *Clark*, 218 F.3d 1092, 1095 (9th Cir.), cert. denied, 531 U.S. 1057 (2000)). The two Third Circuit cases on which petitioner relies are not to the contrary. The first merely stated that extrinsic evidence may be considered if it "sheds light on the meaning of a pertinent word or phrase in an 'integrated' plea agreement." *United States* v. *Swinehart*, 614 F.2d 853, 858 (3d Cir.), cert. denied, 449 U.S. 827 (1980).

1997), cert. denied, 523 U.S. 1093 (1998); *United States* v. *Al-Arian*, 514 F.3d 1184, 1192-1193 (11th Cir.) (per curiam), cert. denied, 555 U.S. 887 (2008); *United States* v. *Ahn*, 231 F.3d 26, 36-37 (D.C. Cir. 2000), cert. denied, 532 U.S. 924 (2001).

Here, petitioner seeks to use parol evidence to supplement his written plea agreement rather than to interpret its terms. Petitioner's second case held that a signed proffer agreement remained enforceable because a subsequent plea agreement "d[id] not contain language purporting to supersede the [proffer agreement]" and because "the two documents may be read consistently with each other." *United States* v. *Baird*, 218 F.3d 221, 230 (3d Cir. 2000). In this case, in contrast, the written agreement made clear that it "constitute[d] the complete plea agreement" between the parties, Plea Agreement 18, and the additional promise petitioner seeks to enforce is inconsistent with the agreement's express reservation of the government's right "to set forth or dispute sentencing factors," *id.* at 9.

A recent Third Circuit decision confirms that petitioner's claim would not succeed in that court. In *United States* v. *Moody*, 485 Fed. Appx. 521 (2012)—a case relied upon by the decision below, see Pet. App. 14a n.5—the defendant sought to enforce a purported promise reflected in an email exchange between his counsel and the government. The Third Circuit rejected that claim, explaining it would have been "unreasonable" for the defendant to rely on the email exchange because "the plea agreement's merger clause made clear that the plea agreement represented the complete and only agreement to which the parties would be held." 485 Fed. Appx. at 523-524.[5]

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[5] See also *United States* v. *Bigler*, 278 Fed. Appx. 193, 197 (3d Cir. 2008) (defendant was "bound by * * * the integration clause specifying that the plea agreement superseded any other agreements"). Although these unpublished decisions are not

The Fourth Circuit has also recognized that, in general, "a fully integrated [plea] agreement * * * may not be supplemented with unmentioned terms." *United States* v. *Fentress*, 792 F.2d 461, 464 (1986). Petitioner identifies two Fourth Circuit cases that made exceptions to this rule, but both involved highly unusual facts not present here. In the first, there was no dispute that an additional promise had been made and was not intended to be extinguished by the integration clause; that promise was reflected in a cover letter attached to the plea agreement; and the cover letter incorrectly suggested that the promise was included in the agreement itself. See *United States* v. *Garcia*, 956 F.2d 41, 42-44 (4th Cir. 1992).

The second case also involved "unique factual circumstances." *United States* v. *White*, 366 F.3d 291, 300 (4th Cir. 2004). The court held that an alleged oral promise by the government that the defendant could conditionally plead would qualify as "evidence of 'government overreaching' or 'fraud in the inducement,' admissible without running afoul of the parol evidence rule." *Id.* at 295 (citing *Blackledge*, 431 U.S. 74-75 & n.6). But it did so because the defendant's lawyer had assured him that his plea was conditional and "neither the written plea agreement nor any aspect of the plea colloquy contradicted" that assurance. *Id.* at 297-298. No similar circumstances exist here. And, like the Third Circuit, the Fourth Circuit has recently rejected a claim more closely analogous to petitioner's. See *United States* v. *Morgan*, 284 Fed. Appx. 79, 85 (2008) (holding that "to the extent [a letter from the prosecutor] reflects any promise made

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themselves binding precedent, they do refute petitioner's characterization of Third Circuit law in this area.

by the government, the subsequent plea agreement supercedes it" by virtue of the agreement's integration clause).

b. Petitioner also contends (Pet. 16-20) that the First, Second, Fifth, Sixth, Seventh, and Eleventh Circuits do not strictly apply the parol evidence rule and have adopted inconsistent approaches. Petitioner is correct that those courts have held or suggested that the parol evidence rule is "subject to exception in unusual cases." *Bemis* v. *United States*, 30 F.3d 220, 222 (1st Cir. 1994). But the results reached in the cases he cites appear to reflect differing facts rather than a developed circuit conflict. More importantly, petitioner identifies no case making an exception in circumstances like those present here.

As an initial matter, many of the cases on which petitioner relies are irrelevant because they did not actually consider parol evidence, but merely left open the possibility of exceptions to the parol evidence rule in other circumstances. See *United States* v. *Cieslowski*, 410 F.3d 353, 361 (7th Cir. 2005), cert. denied, 546 U.S. 1097 (2006); *United States* v. *Sandoval*, 204 F.3d 283, 286 n.1 (1st Cir. 2000); *United States* v. *Alegría*, 192 F.3d 179, 185 (1st Cir. 1999); *In re Altro*, 180 F.3d 372, 376 (2d Cir. 1999); *Doe* v. *United States*, 51 F.3d 693, 702 (7th Cir.), cert. denied, 516 U.S. 876 (1995); *Baker* v. *United States*, 781 F.2d 85, 90 (6th Cir.), cert. denied, 479 U.S. 1017 (1986). Other cases are distinguishable because they relied on parol evidence to interpret an ambiguous written agreement, not to contradict or supplement an agreement's unambiguous terms. See *United States* v. *Rewis*, 969 F.2d 985, 987-988 (11th Cir. 1992); *United States* v. *Jefferies*, 908 F.2d 1520, 1524-1525 (11th Cir. 1990).

Another group of petitioner's cases involved promises made in cover letters attached to plea agreements. The Fifth Circuit—like the Fourth Circuit, see *Garcia*, 956 F.2d at 44—has enforced an additional promise contained in such a cover letter, reasoning that in these circumstances the two documents must be "read together." *United States* v. *Melton*, 930 F.2d 1096, 1098 (5th Cir. 1991) (quoting *United States* v. *Fields*, 906 F.2d 139, 142 (5th Cir.), cert. denied, 498 U.S. 874 (1990)). But as petitioner concedes (Pet. 17), these cases provide him no assistance because the email exchange on which he seeks to rely took place well before his plea agreement was reduced to writing and was not attached to or otherwise associated with the written plea agreement.

Petitioner identifies only two other cases that relied on parol evidence to supplement or vary the terms of a written plea agreement. Both found that unusual circumstances not present here reasonably would have led the defendant to rely on the additional promise. In *United States* v. *Graves*, 374 F.3d 80, 82 (2004), the Second Circuit concluded that an additional term might be read into the plea agreement where the written agreement itself was silent as to the possibility of a downward departure under Sentencing Guidelines § 5K1.1 but where the prosecutor and the judge told the defendant during his plea colloquy that "there was a '5K aspect to the plea agreement'" and that if he provided substantial assistance "then the government will move for a downward departure under Rule 5K." And in *Bemis*, both the prosecutor and defense counsel advised the defendant that the government's promise to secure his entry into the Witness Protection Program did not need to be included in the

agreement or mentioned at the plea hearing. 30 F.3d at 223. The First Circuit concluded that the case might come within the exception recognized in *Blackledge* allowing a court to look behind a defendant's representations at a plea hearing in cases of "misunderstanding, duress, or misrepresentation by others." *Id.* at 222 (quoting *Blackledge*, 431 U.S. at 75).

No similar circumstances exist here, and the decisions petitioner characterizes (Pet. 23) as being "too vaguely defined to make any confident prediction" about how this case would be resolved in other circuits have in fact consistently rejected attempts to vary the terms of integrated written plea agreements based on alleged promises made earlier in the plea bargaining process. For example, in *Alegría*, the First Circuit rejected an attempt "to supplement [a written plea agreement] by engrafting onto it the oral representation allegedly made by the United States Attorney during pre-plea negotiations." 192 F.3d at 185-186. The court explained that the defendant's argument "fl[ew] in the teeth" of the plea agreement's "unqualified integration clause" and "would turn the change-of-plea colloquy into a farce." *Ibid.*; see also, *e.g.*, *Baker*, 781 F.2d at 89-90.

c. Finally, petitioner contends (Pet. 14-16) that the Ninth and Tenth Circuits apply an inflexible rule against considering parol evidence. Those courts have stated that they will not "consider parol evidence for the purpose of adding terms to or changing the terms of an integrated plea agreement." *United States* v. *Ajugwo*, 82 F.3d 925, 928-929 (9th Cir. 1996), cert. denied, 519 U.S. 1079 (1997); accord *United States* v. *Rockwell Int'l Corp.*, 124 F.3d 1194, 1199-1200 (10th Cir. 1997), cert. denied, 523 U.S. 1093 (1998). But

both courts have also suggested the possibility of exceptions to this rule. See *United States* v. *Gamble*, 917 F.2d 1280, 1282 (10th Cir. 1990) (leaving open the possibility of a "*Blackledge* exception"); *Chizen* v. *Hunter*, 809 F.2d 560, 561-563 (9th Cir. 1986) (considering extrinsic evidence even though the defendant signed a form disclaiming the existence of other promises or inducements). In any event, even assuming that the Ninth and Tenth Circuits take a stricter approach than some other courts, any such variation would not be implicated in this case because petitioner could not prevail even under the purportedly more lenient standard applied by other courts of appeals.[6]

3. In addition to the absence of any conflict implicated by this case, further review is unwarranted for two additional reasons.

a. Petitioner would not be entitled to relief even if the parol evidence on which he seeks to rely were

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[6] The state cases on which petitioner relies (Pet. 20-22) do not contribute to his claimed split. "[T]he construction of [a] plea agreement [entered in state court] and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." *Adamson*, 483 U.S. at 5 n.3. In any event, petitioner cites no state case relying on extrinsic evidence to alter the terms of an unambiguous, fully integrated plea agreement. See *Craig* v. *People*, 986 P.2d 951, 962 (Colo. 1999) (enforcing "the parties' unambiguous agreement"); *Cuffley* v. *State*, 7 A.3d 557, 566 (Md. 2010) (holding that the decision below erred in considering extrinsic evidence); *Cox* v. *State*, 974 So. 2d 474, 476 (Fla. Dist Ct. App. 2008) (finding a written plea agreement insufficient to refute a defendant's claim that his plea was induced by additional promises, but only because the record did not indicate whether the trial court had conducted the plea procedures required by state law). Finally, petitioner's reliance on intermediate state appellate courts is unavailing for the additional reason that a conflict involving such courts would not warrant certiorari. See Sup. Ct. R. 10.

considered. Petitioner's claim rests on the assertion that the government promised that it would not seek a leadership enhancement if he pleaded guilty and that this promise was not superseded by the written plea agreement. As the party asserting a breach, petitioner bore "the burden of demonstrating the underlying facts that establish breach by a preponderance of the evidence." Pet. App. 10a (quoting *United States* v. *Roberts*, 624 F.3d 241, 246 (5th Cir. 2010)).

Even in the unusual cases in which courts have considered parol evidence, they have demanded a substantial showing before permitting such evidence to contradict or supplement a written agreement. Indeed, many of the cases on which petitioner relies did not actually grant relief, but merely remanded for an evidentiary hearing at which the defendant would be given an opportunity to use parol evidence to prove the existence of an additional term. See *Graves*, 374 F.3d at 84-85; *White*, 366 F.3d at 302; *Bemis*, 30 F.3d at 222-223. But petitioner did not seek such a hearing here, and the only evidence he offered in the district court was the email exchange. See Mot. to Enforce Agreement 1-3. Aside from the prosecutor's denial that any additional agreement existed, C.A. R.E. 297-298, the record contains no evidence about the context of that exchange or the subsequent negotiation and drafting of the written agreement.

Particularly when considered in light of the written agreement's integration clause and petitioner's sworn statements at the plea hearing, the email exchange is insufficient to carry petitioner's burden of establishing that the government made an enforceable promise about the leadership enhancement. Petitioner's counsel emailed the prosecutor to confirm the govern-

ment's "position" on a potential plea bargain. Pet. App. 19a-20a. The email is phrased in conditional terms, describing counsel's understanding of what the government "would" and "would not" agree to in a plea bargain. *Ibid.* The exchange thus appears to have contemplated further negotiations and the reduction of the final agreement to writing.

Moreover, the record indicates that the parties' bargain continued to evolve in the weeks between the email exchange and the execution of the written agreement. The agreement, like the email, states that petitioner was responsible for half a kilogram of cocaine per month. See Pet. App. 20a; Plea Agreement 16. But the agreement differed from the bargain outlined in the email in other respects. For example, the email made no mention of a reduction of petitioner's offense level for acceptance of responsibility, but the government ultimately agreed not to oppose petitioner's request for a two-level downward adjustment on that basis and to move for an additional one-level adjustment. Plea Agreement 8-9. Under the circumstances, petitioner could not carry his burden of demonstrating that the parties reasonably understood the email exchange as a final and enforceable promise rather than a step in ongoing plea negotiations.

b. Moreover, even if petitioner could establish that the government breached a binding agreement by arguing in favor of a leadership adjustment, that breach would have been harmless error. See Fed. R. Crim. P. 52(a). The probation office independently concluded that the leadership adjustment was appropriate and declined to modify that conclusion in response to petitioner's objections, explaining that "post-arrest statements of [petitioner] and co-conspirators, debriefings

of co-conspirators, surveillance, and wire intercepts established that [petitioner] and Jammer conspired together to operate a drug trafficking organization" in which petitioner directed the activities of others. Second Addendum to PSR 7. The district court likewise dismissed petitioner's objection as groundless, explaining that he "obviously" qualified as a leader. C.A. R.E. 304. The record thus indicates that the court would have imposed the same enhancement even if the government had remained silent on the issue.

To be sure, *Santobello* found that the prosecution's breach of a plea agreement provision governing its sentencing recommendation entitled the defendant to relief without regard to the breach's effect on his ultimate sentence. See 404 U.S. at 262-263.[7] But *Santobello* was a state case in which Rule 52(a) did not apply, and more recently this Court has expressly reserved the question "whether *Santobello*'s automatic-reversal rule has survived [the Court's] recent elaboration of harmless-error principles." *Puckett*, 556 U.S. at 141 n.3. In this case, the facts provide strong reason to believe that the harmless-error rule precludes relief.

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[7] The government did not pursue a harmless-error argument below because it was foreclosed by circuit precedent applying *Santobello*. See Gov't C.A. Br. 21 (citing *United States* v. *Harper*, 643 F.3d 135, 139 (5th Cir. 2011)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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