No. 13-552

IN THE
Supreme Court of the United States

SCOTT LONG,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

If Petitioner had been prosecuted by the United States in the Third or Fourth Circuits, the parol evidence rule would not have prevented him from offering extrinsic evidence to show the United States promised to forgo a sentencing enhancement. Those Circuits have held squarely that "the parol evidence rule should not be rigidly applied to bar evidence which would aid the trial court in properly construing the plea agreement." *United States v. Swinehart*, 614 F.2d 853, 858 (3d Cir. 1980); *accord United States v. Garcia*, 956 F.2d 41, 44-45 (4th Cir. 1992). The Government insists these precedents "are explained by the differing facts involved in each case." Opp'n 13. But their holdings, which extend to oral as well as written promises, would clearly require admission of the Government's promise to Petitioner.

By contrast, had Petitioner sought to enforce the Government's promise in the Ninth or Tenth Circuits, he would have been barred—as he was below in the Fifth Circuit—from attempting to establish an extrinsic plea promise. These Circuits have strictly applied parol evidence principles to bar "extrinsic evidence [offered] to contradict or add to the terms of a binding and completely integrated [plea] agreement." *United States v. Reyes Pena*, 216 F.3d 1204, 1212 (10th Cir. 2000); *accord United States v. Pacheco-Osuna*, 23 F.3d 269, 271 (9th Cir. 1994).

This case squarely raises, then, the recognized split among the Circuits on the question presented. *E.g.*, *United States v. Ajugwo*, 82 F.3d 925, 928 (9th Cir. 1996); *United States v. White*, 366 F.3d 291, 309 (4th Cir. 2004) (Williams, J., dissenting); *State v. Hill*, No. 97143, 2008 WL 440687, at *3-4 (Kan. Ct.

App. Feb. 15, 2008) (unpublished). The need to resolve that split is underscored by the disarray in the remaining Circuits, which, the Government concedes, have adopted "differing formulations" on the question presented. Opp'n 8. The stakes for defendants like Petitioner could not be higher, not only because of the fundamental rights implicated by their pleas, but also because the Government's recommendations matter. For Petitioner, the AUSA's decision to urge a four-level role enhancement, in contravention of their email agreement, meant a recommended Sentencing Guidelines range of 235-293 months (level 35) instead of 151-188 months (level 31).

In response, the Opposition emphasizes the plea agreement's integration clause and Petitioner's disclaimer of other promises in his guilty-plea colloquy. Opp'n 8-12. But these circumstances are insufficient in the Third and Fourth Circuits to bar a defendant from offering evidence of an extrinsic promise. The reason is one the Government elides in its Opposition: the duty of the United States to "live[] up to its commitments," which "is the essence of liberty under law." *United States v. Peglera*, 33 F.3d 412, 414 (4th Cir. 1994) (Wilkinson, J.).

I. The Circuits Are Divided

1. In the Third and Fourth Circuits, Petitioner could have introduced evidence that the Government agreed to forgo seeking a leadership enhancement at sentencing.

a. In *United States v. Baird*, the Government promised the defendant, by letter, that it would not use his cooperation against him at sentencing. 218 F.3d 221, 229 (3d Cir. 2000). That promise was omitted from a later written plea agreement, which

included an integration clause. *Id.* at 230. The Third Circuit held that the question was "whether the government's *conduct* was inconsistent with what was reasonably understood by defendant when entering the plea of guilt." *Id.* at 229 (emphasis added). In answering that question, the court examined Baird's evidence of the earlier written promise. *Id.* at 230. Recognizing that contract principles might command a different result, the court held that the plea agreement's integration clause had "no effect" given the "special due process concerns in the criminal arena." *Ibid*.

The Fourth Circuit has similarly held that "courts ought not rigidly apply commercial contract law to all disputes concerning plea agreements." *Garcia*, 956 F.2d at 44. Consistent with these principles, the Fourth Circuit has permitted defendants to introduce a cover letter setting out a term omitted from the written plea agreement, even though "[s]trict application of the parol evidence rule might bar consideration of the cover-letter promise." *Ibid.* And it has applied the same principle where the defendant sought to show that the Government had orally promised to agree to a conditional guilty plea. *White*, 366 F.3d at 292-93. The *White* majority arrived at this holding over Judge Williams' pointed argument, in dissent, that "if the parol evidence rule applies, it would bar consideration of [defendant's] sworn allegations [of a promise]." *Id.* at 310.

Were these holdings applied here, the judgment would be vacated and the case remanded to allow Petitioner to offer evidence of the Government's promise not to press for a role enhancement. Here, as in *Baird*, *Garcia*, and *White*, Petitioner seeks to introduce evidence of a promise he relied upon in

pleading guilty, but which was omitted from his plea agreement. Not only was the evidence in writing, but it included an exchange that, on its face, confirmed the Government's negotiated agreement to "not argue for a manager/supervisor, etc., enhancement." Pet. App. 20a.

b. That some of the facts surrounding the Government's promise are different from those presented in the Third and Fourth Circuit precedents (Opp'n 15) changes neither the broad rule those Circuits follow nor the different result it would have produced if applied here.

In each of these cases, the defendant pled guilty under a plea agreement with an integration clause, and subject to a mandatory Rule 11(c) plea colloquy. *See White*, 366 F.3d at 293; *id.* at 304 (Williams, J., dissenting); *Baird*, 218 F.3d at 229-30; *Garcia*, 956 F.2d at 44; Br. Appellee, *Garcia*, at 5. In each of these cases, a straightforward application of the parol evidence rule would have barred the evidence of an extrinsic plea promise. And in each of these cases, the court of appeals rejected the parol evidence bar and admitted the extrinsic evidence.

The points of distinction identified by the Government are either wrong or immaterial. The Government argues that the Third Circuit's *Baird* decision and the Fourth Circuit's *White* decision are distinguishable because the written plea agreements did not "'contradict[]'" the alleged extrinsic promise (Opp'n 15 (quoting *White*, 366 F.3d at 297-98)), making them "'consistent[] with each other'" (*id.* at 14 (quoting *Baird*, 218 F.3d at 230)). But the same is true of this case. Petitioner's plea agreement is silent on whether a leadership-role enhancement is applicable, just as the plea agreements in *White* and

Baird included no provisions addressing the subject matter of the extrinsic promise (conditional plea and non-cooperation, respectively). Nor does it matter that the plea agreement in *Baird* "d[id] not contain language purporting to supersede" the earlier written agreement. *Id.* at 14 (quoting 218 F.3d at 230)). Like Petitioner's agreement, Baird's agreement included an integration clause, but the Third Circuit deemed it "obvious boilerplate" and gave it "no effect in this context." 218 F.3d at 230.

c. The Government points to other Third and Fourth Circuit cases purportedly applying parol evidence principles. Opp'n 13-16. None of those cases, however, obscure the clarity of those Circuits' broad extrinsic evidence rule.

The first category of cases is inapposite, for they do not involve efforts to introduce evidence of Government promises omitted from a written plea agreement. In *United States v. Gebbie*, 294 F.3d 540 (3d Cir. 2002), the defendant offered extrinsic evidence to construe ambiguous terms in a plea agreement. *Id.* at 551-52. The court admitted extrinsic evidence to interpret an ambiguous term in the written plea agreement. *Ibid.* Because the defendant did not seek to establish an omitted promise, the court had no reason to test the boundaries of the parol evidence rule. *Gebbie* therefore hardly contradicts *Baird*'s holding that parol evidence is admissible where necessary to enforce an extrinsic Government promise. The same is true of *United States v. Fentress*, 792 F.2d 461 (4th Cir. 1986), where the defendant "ha[d] never suggested that the prosecution articulated any [extrinsic] representations" amounting to a promise. *Id.* at 464. That contract principles disposed of a

defendant's *ipse dixit* regarding the meaning of a particular term in the written agreement says nothing about whether they bar proof of an outside Government promise.

In the second category of cases, the Government cites to unpublished Third and Fourth Circuit cases purportedly adhering to the parol evidence rule. Of course, neither Circuit treats these non-precedential cases as reflecting the "law in this area," as the Government contends (Opp'n 14 n.5). *See Jamison v. Klem*, 544 F.3d 266, 278 n.11 (3d Cir. 2008); *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 433 n.6 (4th Cir. 2012). In any event, the result in *United States v. Moody*, 485 Fed. App'x 521 (3d Cir. 2012), is consistent with the Third Circuit's broad extrinsic evidence rule, for the Court ultimately considered and analyzed whether the disputed emails constituted a promise to move for a downward departure for cooperation. *Id.* at 523-24. The Third Circuit reasoned that the defendant could not reasonably read them as a promise, because the emails reserved "the discretion to determine whether [he] 'cooperated,'" and that discretion was reconfirmed in the plea agreement's cooperation terms. *Ibid.*; *see also United States v. Bigler*, 278 Fed. App'x 193, 196-97 (3d Cir. 2008) (examining an unanswered pre-plea letter from defense counsel and finding it "d[id] not demonstrate an understanding between the two sides").

Similarly, the Fourth Circuit in *United States v. Morgan*, 284 Fed. App'x 79 (4th Cir. 2008), examined the defendant's extrinsic evidence and concluded that the specific plea agreement provisions represented the Government's binding obligations on the subject. That holding hardly suggests the Fourth Circuit has

abandoned its clear rule, repeatedly applied in *published* authorities, rejecting wooden application of the parol evidence rule to extrinsic promises.

2. The Government concedes that the Ninth and Tenth Circuits 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.'" Opp'n 18 (quoting *Ajugwo*, 82 F.3d at 928-29). This rule sets those Circuits in direct conflict with the Third and Fourth Circuits. It would produce a result opposite to those courts, and in line with the Opinion below.

The Government attempts to minimize the conflict by offhandedly asserting that one case in each of the Ninth and Tenth Circuits "suggested the possibility of [parol evidence] exceptions." Opp'n 19 (citing *United States v. Gamble*, 917 F.2d 1280, 1282 (10th Cir. 1990); *Chizen v. Hunter*, 809 F.2d 560, 561-63 (9th Cir. 1986)). Those cases say nothing of the sort.

In *Chizen*, a habeas petitioner challenged his state court conviction on the ground that his guilty plea was involuntary because it was based on a breached *oral* plea agreement *with the trial judge*. 809 F.2d at 560-61. The Ninth Circuit therefore had no occasion in *Chizen* to opine on the application of the parol evidence rule to a *written* agreement *with the Government*.

Gamble actually confirms the Tenth Circuit's strict parol evidence rule. In *Gamble*, the defendant claimed that the AUSA breached a promise omitted from his written plea agreement. The Tenth Circuit emphasized that "[i]t is a fundamental rule of contract law that the terms of a clear and unambiguous written contract cannot be changed by

parol evidence." 917 F.2d at 1282. After alluding to the possibility of a "*Blackledge* exception [for fraud or duress]," the court held that no such exception applied because "Gamble's belated claim is negated *in toto* by the plea agreement itself," which was "clear and unambiguous and completely negate[d] Gamble's belated claim that he was not to receive a sentence in excess of four years." *Ibid.* By rejecting any "*Blackledge* exception" in the face of a "clear and unambiguous" writing, *Gamble* highlights the Tenth Circuit's rigid application of the parol evidence rule.

3. The range of tests in between the Third and Fourth Circuits' broad extrinsic evidence rule, and the Ninth and Tenth Circuits' strict application of the parol evidence rule, only confirms that this Court's intervention is needed.

The First, Second, Fifth, Sixth, and Seventh Circuits apply the parol evidence rule to plea agreements, but relax the rule in circumstances—often ill-defined—that vary from Circuit to Circuit. *See* Pet. 16-20. The Government says that the cases in this intermediate group involved different facts, but does not dispute that they have formulated different exceptions to the parol evidence rule. Opp'n 16.

Whether Petitioner "could not prevail" under the law of these Circuits (*id.* at 19) is beside the point. What matters is that the ability of defendants to prove extrinsic promises is uncertain and varies from Circuit to Circuit. That uncertainty exacerbates the direct conflict identified above, for it confirms that whether the Government is held to an extrinsic promise or may ignore it turns on the Circuit of prosecution. And to the extent the Government suggests that Petitioner's claim would have failed in

all of these middle-ground Circuits (*id.* at 16), it is wrong. The First Circuit, for example, has allowed the possibility of "unusual" circumstances justifying a departure, but has not clearly delimited the scope of that exception. *See Bemis v. United States*, 30 F.3d 220, 222-23 (1st Cir. 1994). Whether an agreement to sentencing terms in an extrinsic, written exchange meets that standard is simply unclear.

II. The Parol Evidence Rule Should Not Bar Evidence of an Omitted Plea Promise

1. Plea agreements are not ordinary commercial contracts. In a plea negotiation, the prosecution almost always has the better cards, if not *all* the cards. Because of the Government's unequal bargaining power, and because "[a] guilty plea operates as a waiver of important rights," *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005), this Court has demanded "fairness in securing agreement between an accused and a prosecutor," *Santobello v. New York*, 404 U.S. 257, 261 (1971).

These concerns "'require holding the Government to a greater degree of responsibility than the defendant'" for omissions as well as "'imprecisions or ambiguities in plea agreements.'" *Garcia*, 956 F.2d at 44 (citation omitted). The Government therefore should not be permitted to invoke the parol evidence bar where, as here, the defendant seeks to introduce evidence of a promise that induced his or her plea. *Ibid.*

The Government places heavy weight on the plea colloquy required by Rule 11(c), arguing that it suffices to "protect against any overreaching or misapprehension" of the plea agreement's terms. Opp'n 10. Yet, the Circuits routinely confront the question of what to do with promises not raised at

guilty-plea hearings. And, as noted, the fact that a defendant has entered his guilty plea following a Rule 11(c) colloquy does not foreclose the enforcement of an extrinsic promise in the Third and Fourth Circuits.

The reason is conspicuously absent from the Government's brief, but not from the case law. It is that prosecutors, and especially AUSAs, have an independent obligation to honor their promises. An AUSA "in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law.'" *Singer v. United States*, 380 U.S. 24, 37 (1965) (citation omitted). Like the United States itself, an AUSA's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 79, 88 (1935). It is in part because "'the honor of the government'" and "'public confidence in the fair administration of justice'" are at stake that the Third and Fourth Circuits allow defendants to offer extrinsic evidence of omitted promises. *Garcia*, 956 F.2d at 43 (citation omitted); *accord Baird*, 218 F.3d at 229.

The Government contends that allowing defendants to offer evidence of omitted promises would undermine the "'[s]olemn declarations'" attending a Rule 11(c) colloquy. Opp'n 11 (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). That argument, however, rests on a false dichotomy between the constitutional and fairness concerns supporting a parol evidence exception, and the integrity and finality of the guilty plea process. As illustrated by the Third Circuit and Fourth Circuit's approaches, these competing interests can be balanced in crafting a parol evidence rule that allows defendants to bind the Government to demonstrable

promises without opening up the floodgates to frivolous plea challenges.

2. The Government suggests this case is a poor vehicle because the deal on the role enhancement was too nascent to establish "a final and enforceable promise." Opp'n 21. These arguments go to the merits of whether Petitioner's evidence establishes an enforceable promise, not to the threshold question of whether he should be allowed to make that showing. In any event, the Government's characterization is belied by the emails' content and circumstances, which confirm the Government promised to forgo the role enhancement.

Defense counsel underscored his desire to "make sure I understand [the Government's] position" because he did not "want to give [his] client any incorrect information, especially since he is still having a lot of difficulty with his son's death." Pet App. 19a-20a. The AUSA confirmed the terms set out, including the Government's agreement to "not argue for a manager/supervisor, etc., enhancement." *Id.* at 20a. When the AUSA asked defense counsel to retransmit the exchange, defense counsel sent it and said: "[l]et me know if you need anything else." *Id.* at 18a. The AUSA sent nothing further, and then urged the enhancement at sentencing.[1]

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[1] The Government suggests the email exchange "contemplated further negotiations" because it did not address acceptance-of-responsibility credit. Opp'n 21. But it would have been superfluous to discuss such adjustments, which are generally included in a pre-trial plea agreement. *See* U.S.S.G § 3E1.1 cmt. 3, 6.

Nor can the Government minimize the gravity of the Fifth Circuit's ruling by invoking the harmless error doctrine. As the Government acknowledges (Opp'n 22 n.7), *Santobello* held that plea-related errors require automatic reversal, and the Circuits have faithfully applied that holding. *E.g.*, *United States v. Thorne*, 153 F.3d 130, 133-34 (4th Cir. 1998).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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