CAUSE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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DANIEL LOPEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respectfully submitted,

J. Lance Hopkins
219 W. Keetoowah
Tahlequah, OK 74464
(918) 456-8603
Counsel for Petitioner
Daniel Lopez

a. The Questions Presented for Review Expressed in the Terms and Circumstances of the Case.

Whether the District Court committed plain error by allowing the prosecutor to commit prosecutorial misconduct by breaching the plea agreement. The Tenth Circuit's ruling that such a breach of the plea agreement is not plain error is at odds with rulings in other Circuit Courts of Appeal, a conflict of which must be resolved by the Supreme Court.

b. List of All Parties to the Proceeding.

United States of America vs. Daniel Lopez

c. Table of Contents and Table of Authorities.

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Cases

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Petitioner, by and through his attorney, J. Lance Hopkins, respectfully submits this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. On Petitioner's behalf, counsel has submitted a Motion to Proceed In Forma Pauperis, a Proof of Service, and a copy of the Order and Judgment from the appellate court.

This petition has been arranged in the order specified by Rule 14.1 of this Court. The individual sections have been lettered to correspond with the subparagraphs of Rule 14.1. Pursuant to Rule 39.2 of this Court, ten copies of this petition are being submitted for filing.

d. Reference to the Official and Unofficial Reports of Any Opinions.

United States v. Lopez, 10th Cir. No. 17-1370.

e. Concise Statement of Grounds on Which Jurisdiction of this Court is Invoked.

i. Date of Judgment sought to be reviewed: October 18, 2018

ii. Date of any order regarding rehearing: None

iii. Cross-Petition: None

iv. Statutory Provision Believed to Confer Jurisdiction:

This case involves review of a count of conviction involving a United States Criminal Statute, and this Court has jurisdiction over such interpretation and application of United States Statutes.

f. Constitutional Provisions, Statutes and Rules Which this Case Involves.

i. Constitutional provisions: Right of Due Process pursuant to the Fifth Amendment to the United States Constitution.

ii. Statutes involved:

g. Statement of the Case:

The Petitioner, Daniel Lopez, along with 27 co-defendants, was indicted under Count One, conspiracy to distribute a mixture containing heroin, 500 grams of a mixture containing methamphetamine, five kilograms of a mixture containing cocaine, and 28 grams of a mixture containing cocaine base, pursuant to Title 21 U.S.C. §846, and 841(a)(1) and 841(b)(1)(A)(i), 841(b)(1)(A)(viii), 841(b)(1)(A)(ii)(II) and 841(b)(1)(B)(iii). In the 184-count Indictment, Mr. Lopez also was indicted on 22 other counts.

The Petitioner, entered into a plea agreement wherein he entered into a plea of guilty to Count 1, Conspiracy to Distribute 500 grams of more of a mixture containing methamphetamine,

21 U.S.C Sections 841(a)(1) and 841(b)(1)(A)(viii), with the Government agreeing to dismiss all remaining counts.

The plea agreement contained the following language:

> **"[P]ursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, a sentence of 243 months imprisonment is an appropriate disposition of the case. . . . The parties further agree that if . . . the Court sentences the defendant to more than 243 months in prison, the defendant shall have the right to withdraw his plea of guilty and proceed to defend this case. If . . . the Court sentences the defendant to a term of imprisonment less than that set forth in the motion, the government shall have the right to withdraw from this Plea Agreement and proceed to prosecute the defendant."**

The plea agreement also stated:

> **"*The government further agrees that it will recommend this sentence run concurrent with any other pending or imposed sentence. However, this recommendation will not be binding on the Court.* This Court has the authority to do so under Title 18, United States Code, Section 3584. (See, *Setser v. United States, 132 S. Ct. 1463 (2011)).*"**

Accordingly, under the plea agreement, the parties stipulated to a sentence of 243 months, which would be binding on the Court, and, the Government agreed to recommend to the Court that the sentence run concurrent with any other pending or imposed sentence, with such recommendation not binding on the Court.

The plea agreement was signed by the Petitioner, his previous attorney Adam Tucker, and Assistant U.S. Attorney Kasandra R. Carleton. A review of the transcript of the change of

plea hearing shows that Kasandra R. Carleton also appeared for the Government at the hearing, and that Adam Tucker also appeared for Petitioner. The date of the change of plea hearing was March 9, 2016.

The sentencing hearing was held over a year and a half after the change of plea hearing, on October 4, 2017. A review of the transcript of the sentencing hearing shows that both the Government and Mr. Lopez were represented by different attorneys at the sentencing hearing from those appearing at the change of plea hearing. The Government was represented by Timothy Edmonds at the sentencing hearing, and Mr. Lopez was represented at the sentencing hearing by Thomas Ward. Although under the plea agreement the Government was obligated to recommend that the sentence run concurrent with any other pending or imposed sentence, Mr. Edmonds, on behalf of the Government, made such recommendation in a manner that was more of a recommendation to the Court to run all the of Lopez's convictions consecutive rather than concurrent.

The pertinent pages from the sentencing hearing transcript state the following:

> "(***Mr. Edmonds:) Now, the Court is well aware I did not negotiate this plea agreement, and I am bound by the terms, obviously, under those terms, but that's what I'm bound to do.*** **I would note this individual is getting a very sweet deal, a very sweet deal for the nature of his conduct, kilograms and kilograms for methamphetamine, 42 pounds in one seizure. As I previously noted, even while in prison, using someone he said he loved to facilitate further drug transactions.**
>
> **If this person had put their entrepreneurial spirit to legal use, he might be Bill Gates. I mean, it truly is astronomical, Your Honor.**

Now, with respect to the ultimate sentence imposed, obviously we've agreed to a 243-month sentence. That's what I'm going to recommend. The plea agreement sets out in paragraph 5 of the addendum, and I quote, '[t]he Government further agrees it will recommend the sentence run concurrent with any other pending or imposed sentence.' Obviously, '[h]owever, this recommendation will not be binding on the Court.'

Because of that, I do feel bound to recommend that the 32 months defense counsel spoke about be taken off and the seven other months in the Adams County case that defense counsel referenced also be taken off of the sentence. I feel duty bound to do that. I'm honoring the language of the plea agreement. Whether or not I negotiated that is a different story. Because I am bound by that, that's what I will honor because I never want to be viewed as breaching a plea agreement. I will also make that recommendation it be lessened by 39 months and bring it down to a sentence of 206 months, if my math is correct.

I want the Court to understand the Government's perspective about who sits before them. An individual who has been a committed drug trafficker his entire life, criminal conduct his entire life and, in the Government's view, has not changed. Thank you."

The District Court, as it was bound to under the terms of the plea agreement, sentenced Mr. Lopez to 243 months imprisonment. However, as it was not bound to do under the plea agreement, the District Court imposed the sentence to run consecutively to the two Colorado State sentences, one sentence out of Adams County which he was

currently serving and another sentence which had yet to be imposed as the case was still pending in Jefferson County.

The plea agreement also contained appellate and collateral attack waiver provisions, and exceptions to those provisions.

The exceptions to the waiver provisions for collateral attack stated the following:

> **"This waiver provision does not prevent the defendant from seeking relief otherwise available in a collateral attack on any of the following grounds: (1) the defendant should receive the benefit of an explicitly retroactive change in the sentencing guidelines or sentencing statute; (2) the defendant was deprived of the effective assistance of counsel; or (3)** ***the defendant was prejudiced by prosecutorial misconduct."***

Accordingly, the collateral attack-waiver does not apply in situations of prosecutorial misconduct.

h. Review of the Judgment of a State Court: Not Applicable

i. Review of the Judgment of a Federal Court:

The Petitioner was convicted in the United States District Court for Colorado. The Conviction was affirmed by the United States Court of Appeals for the Tenth Circuit.

j. Direct and Concise Argument Amplifying the Reason Relied on for Allowance of the Writ.

PROPOSITION ONE: *Whether the District Court committed plain error by allowing the prosecutor to commit prosecutorial misconduct by breaching the plea agreement. The Tenth Circuit's ruling that such a breach of the plea agreement is not plain error is at odds with rulings in other Circuit Courts of Appeal, a conflict of which must be resolved by the Supreme Court.*

By stating multiple times that he did not negotiate the plea agreement, and by stating that the Petitioner, Mr. Lopez, was "getting a very sweet deal, a very sweet deal for the nature of his

conduct," the Federal prosecutor effectively advocated that the District Court run the sentence consecutively to Petitioner's Colorado state sentences of imprisonment. The prosecutor effectively told the Court that the plea agreement was not fair, that it was far too lenient, and that it was unfair to the Government and a windfall for Mr. Lopez. Under the plea agreement, the prosecutor was required to recommend, in good faith, that the Court impose the sentence to run concurrently with the Colorado state sentences. The transcript shows that he did not. He imposed so many qualifications in recommending that the Court impose a concurrent sentence that not only was it not a recommendation at all, but was an implicit recommendation to the Court to run the sentence consecutively to the state sentences.

Such is especially true considering that the plea agreement was pursuant to Rule 11(c)(1)(C), and therefore if the Court accepted the plea agreement, the Court was required to impose a sentence of 243 months. The only aspect of the plea agreement which afforded discretion to the District Court was the determination of whether the 243-month sentence would run concurrently with, or consecutively to, Petitioner's state sentences. By continuously attacking the plea agreement as a giveaway to the Petitioner and a miscarriage of justice, the prosecutor was effectively arguing that the Court run the sentence consecutively. In so doing, the prosecutor acted in bad faith, and by acting in bad faith he breached the plea agreement, specifically breaching his obligation to "recommend this sentence run concurrent with any other pending or imposed sentence."

By acting in bad-faith, the Government breached the plea agreement, and therefore the appellate-waiver provisions are not enforceable. And in committing bad-faith, the Government committed prosecutorial misconduct, and therefore the collateral-attack waiver provisions are not enforceable.

The Tenth Circuit erred in finding that the prosecutor's breach of the plea agreement did not violate Petitioner's substantial rights, and therefore was not plain error. This issue was recently adjudicated by the Fifth Circuit in *United States v. Kirkland,* 851 F.3d 499 (5th Cir. 2017).

Kirkland pleaded guilty to attempting to use a means of interstate commerce to persuade, induce, entice, or coerce a minor to engage in sexual activity for which any person can be charged with a criminal offense, in violation of 18 U.S.C. §2422(b). The plea was pursuant to a plea agreement that required the Government to recommend a sentence at the low end of the applicable guidelines range of 262–327 months. Under the agreement, the Government was required to recommend that Kirkland receive "a sentence of imprisonment at the low end of the guideline[s] range." The Government also reserved the right to set forth its version of the facts at sentencing, dispute the relevant provisions of the guidelines, and to be released from its obligations under the agreement if Kirkland committed any additional crimes after signing the agreement.

At sentencing, the district court asked several times for the Government's recommended sentence. Despite its obligation under the plea agreement to recommend the low end of the guidelines range, the Government recommended the high end, 327 months of imprisonment. When the district court and Kirkland discussed what sentence was appropriate, Kirkland focused somewhat angrily on the Government's request for a sentence at the high end of the range and equated the requested 327-month term to a life sentence. Kirkland's counsel argued on his behalf for a below-guidelines sentence of 151 months. However, Kirkland and his counsel did not object to the Government's apparent breach of its obligation to recommend the low end of the guidelines range.

The district court sentenced Kirkland to 300 months of imprisonment as to the §2422(b) offense, stating, "That is midpoint in the guideline range. It also happens to be the recommended sentence from the United States Probation Office, which, frankly, happens to coincide with my own independent decision." The district court explained its reasons for the sentence, including Kirkland's criminal history, the instant offense conduct, and the need to protect the public.

On appeal to the Fifth Circuit, Kirkland challenged only the Government's breach of the plea agreement. Because Kirkland failed to object to the Government's breach before the district court, his challenge was reviewed for plain error. The Government conceded that it erred by breaching the plea agreement and that the error was clear or obvious. However, the Government disputed that such error affected Kirkland's substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. The Fifth Circuit disagreed, finding that Kirkland made a sufficient showing as to both of those requirements, and therefore vacated Kirkland's sentence and remanded for resentencing before a different judge.

The Fifth Circuit stated the following:

> **In the context of sentencing, "[a]n error affects an appellant's substantial rights when there is a reasonable probability that, but for the error, he would have received a lesser sentence."** ***United States v. Williams*****, 821 F.3d 656, 657–58 (5th Cir.) (internal quotation marks omitted),** ***reh'g denied*****, 833 F.3d 449 (5th Cir. 2016). The Government's breach of its promise to recommend a lesser sentence affects a defendant's substantial rights unless the record indicates that that the district court would have imposed the same sentence regardless of the Government's breach.** ***See, e.g., id.*** **at 658 (Government's breach of plea agreement affected defendant's substantial rights where there was no indication that the district court would have imposed the same sentence had Government complied with the agreement);** ***United States v. Bellorin-Torres*****, 341 Fed.Appx. 19, 20–21 (5th Cir. 2009) (similar);** ***United States v. Villarreal-Rodriguez*****, 356 Fed.Appx. 759, 761 (5th Cir. 2009) (similar). This principle reflects both the applicable legal standard, under which a defendant need only show a "reasonable probability" that the breach affected his sentence,** ***see Williams*****, 821 F.3d 656, 657–58, and the common sense understanding of the important role the Government's recommendation plays in sentencing,** ***cf. United***

> ***States v. Navarro*, 817 F.3d 494, 500 (7th Cir. 2016) ("[T]he Supreme Court long ago recognized the importance of the government's recommendation on the sentence imposed." (citing *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971))).**

United States v. Kirkland, supra, at 503.

Comparing the above-language to the matter at bar, in the case at bar there is certainly a reasonable probability that the prosecutor's breach of the plea agreement affected the sentence, especially considering the common sense understanding of the important role the Government's recommendation plays in sentencing.

The Fifth Circuit also stated:

> **[T]he Government did not merely remain silent, in breach of its promise to urge a low-end sentence; rather, the Government aggressively argued for the high end of the guidelines range. Thus, we must consider not only the possibility that the district court *would have been* influenced by the Government's recommendation for a low-end sentence but also the possibility that the district court *was* influenced by the Government's recommendation of, and argument for, a high-end sentence.**

United States v. Kirkland, supra, at 504.

In the case at bar, by continuing to tell the District Court that he did not negotiate the plea agreement and that Petitioner was getting a very "sweet deal", the prosecutor basically told the District Court that the plea agreement was too lenient and a windfall for the Petitioner. The Tenth Circuit erred by failing to consider the possibility that the District Court was influenced by the prosecutor's criticism of the plea agreement and therefore decided to run Petitioner's 243-month federal sentence consecutively to his state sentences.

The Fifth Circuit also noted:

> **The Government argues that the record in this case indicates that its breach did not affect the district court's sentence, and it points in support to the district court's consideration of the PSR, the guidelines range, the various recommendations the court received, and the relevant sentencing factors. The Government also highlights the district court's statement that the 300-month sentence it imposed was the "midpoint in the guideline range" and "also happens to be the recommended**

> **sentence from the United States Probation Office, which, frankly, happens to coincide with [the court's] own independent decision." On this basis, the Government asserts that there is sufficient evidence that the district court would have imposed the same exact sentence regardless of the Government's breach. We cannot accept this contention.**
>
> **It is certainly true that the district court considered the relevant circumstances and did not consider itself bound by the Government's recommendation. After all, the court did not adopt the Government's recommendation for a high-end sentence but, instead, imposed a midrange sentence. The district court also showed that it was willing to sentence above any recommendation where it deemed fit, as it did with regard to the revocation of Kirkland's supervised release. However, the fact that the court exercised independent judgment—which it must do in every case—does not mean that the court did not also consider and give weight to the Government's recommendation. Indeed, the district court asked the Government for its recommendation several times.**

United States v. Kirkland, supra, at 504.

Comparing the above language to the matter at bar, while the Tenth Circuit found that the District Court would have imposed the same sentence as to Petitioner even absent the prosecutor's negative comments about the plea agreement, that assumption was erroneous, as the District Court certainly considered and gave weight to the prosecutor's negative comments.

The Fifth Circuit further stated:

> **Moreover, the Government did not merely recommend a high- end sentence but also strongly argued and presented testimony in support of that recommendation, recounting in great detail the graphic and sexually explicit facts involved in Kirkland's offense of conviction and a prior offense and emphasizing his criminal history and his violation of the conditions of his supervised release. The testimony and argument by the Government filled more than nine pages of the sentencing transcript. Therefore, the district court may have been influenced not only by the Government's recommendation, but also by Government's passionate emphasis of aggravating factors in support of that recommendation, which brought public safety concerns to the forefront.**

United States v. Kirkland, supra, at 504-505.

The prosecutor in the matter at bar passionately emphasized aggravating factors similar to the prosecutor in *Kirkland*. The prosecutor said "I **would note this individual is getting a**

very sweet deal, a very sweet deal for the nature of his conduct, kilograms and kilograms for methamphetamine, 42 pounds in one seizure. As I previously noted, even while in prison, using someone he said he loved to facilitate further drug transactions. If this person had put their entrepreneurial spirit to legal use, he might be Bill Gates. I mean, it truly is astronomical, Your Honor." Accordingly, the District Court may have been influenced not only by the prosecutor's criticism of the plea agreement, but also by the Government's passionate emphasis of aggravating factors.

As to whether the plain-error seriously affected the fairness, integrity, or public reputation of judicial proceedings, the Fifth Circuit stated the following:

> **In the fourth prong of the plain-error analysis, we ask whether the forfeited error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Molina-Martinez,* 136 S.Ct. at 1343. This prong is not automatically satisfied once the other three prongs are met. *United States v. Escalante-Reyes,* 689 F.3d 415, 425 (5th Cir. 2012) (en banc). "However, the Supreme Court has instructed that 'the discretion conferred by Rule 52(b) should be employed in those circumstances in which a miscarriage of justice would otherwise result.'" *Id.* (quoting *United States v. Olano,* 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). Whether a plain error would lead to a miscarriage of justice if left uncorrected is determined "on a case-specific and fact-intensive basis." *Puckett v. United States,* 556 U.S. 129, 142, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). Nevertheless, the courts have recognized that the Government's breach of a plea agreement constitutes a particularly egregious error that, in the absence of strong countervailing factors, seriously affects the fairness, integrity, or public reputation of judicial proceedings. . . . This rebuttable presumption that the Government's meaningful breach of a plea agreement satisfies the fourth prong of the plain-error test appears to be based, in large part, on the inherent unfairness involved in the Government's inducement of the defendant's waiver of important constitutional rights by making promises that it ultimately does not keep. . . . We find no similarly strong countervailing factors in the instant case. . . . [W]e believe that denying Kirkland the benefit of his bargain would be manifestly unjust and therefore conclude that the Government's breach of the plea agreement satisfies the fourth prong of the plain-error test.**

United States v. Kirkland, supra, at 505-507.

Applying the above language to the matter at bar, the Government's breach of a plea agreement constitutes a particularly egregious error that seriously affects the fairness, integrity, and public reputation of judicial proceedings. It is inherently unfair for the Government to induce a waiver of a defendant's constitutional rights by making promises that it ultimately does not keep. And the denial to Petitioner of the benefit of his bargain is inherently unjust. Accordingly, in the matter at bar the Government's breach of the plea agreement satisfies the fourth prong of the plain-error test.

The Fourth Circuit also addressed this issue in *U.S. v. Dawson*, 587 F.3d 640 (4th Cir. 2009). Dawson was charged in one count of a six-count indictment. Count one of the indictment alleged that twenty-five individuals, including Dawson, engaged in a conspiracy to distribute fifty grams or more of crack cocaine and five kilograms or more of powder cocaine. Dawson and the Government entered into a written plea agreement. The terms of the plea agreement included a provision wherein the government agreed to recommend at sentencing a two-level minor participant reduction in Dawson's offense level pursuant to *U.S. Sentencing Guidelines Manual* (USSG) §3B1.2(b). The presentence report did not include a two-level reduction for minor participant. At sentencing, Dawson's counsel argued that he was not a leader or organizer or a critical component of the conspiracy. In response, rather than arguing that Dawson should receive a minor participant reduction in his offense level, the Assistant United States Attorney (AUSA) for the government argued in direct contradiction to the stipulation in the plea agreement. The AUSA argued that Dawson was an "important," "critical" component of the conspiracy, and that another member of the conspiracy needed Dawson to perform his cocaine distribution activities.

On appeal, Dawson contended that the government breached the plea agreement by not arguing for a two-level reduction on the basis of a minor-participant. Since there was no objection at sentencing or previously before the district court, the Fourth Circuit reviewed the issue for plain error. The government conceded that it breached the plea agreement, but argued that the breach did not affect Dawson's substantial rights, and did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. The Fourth Circuit did not agree with the government's contention, found that the breach of the plea agreement constituted plain error, and remanded the matter for resentencing before a different judge.

The Fourth Circuit stated the following:

> **[N]othing occurred after the plea agreement was signed that undermined the government's firm and unequivocal belief that Dawson was entitled to the minor participant reduction. Rather, after its extensive and thorough pre-plea agreement investigation, the government determined that Dawson was a minor participant, and the parties entered into the plea agreement with the understanding that the minor participant reduction was warranted, subject of course to the district court's discretion. Nothing occurred after the plea agreement was signed that altered the government's view of Dawson's role in the offense. Given these facts, we are troubled that the government argued on appeal to this court that Dawson was not entitled to the reduction (perhaps even from the get-go), instead of placing before this court the circumstances it believed warranted the minor participant reduction at the outset. The failure to explain this about-face certainly brings into play the integrity of the plea bargaining process."**

United States. v. Dawson, supra, at 646.

Similar to the situation in *Dawson*, in the matter at bar nothing happened after the plea agreement was signed that undermined the Government's belief that Petitioner was entitled to having his Federal sentence run concurrently with his state sentences. Nothing occurred after the plea agreement was signed that altered the Government's view of Lopez's role in the offense. There is nothing to justify the about-face by the Government, wherein the prosecutor at sentencing spoke ad nauseam about Petitioner's aggravating factors, that Petitioner got an incredibly "sweet deal", and effectively criticized the plea agreement by telling the sentencing judge multiple times that he did not negotiate it.

The case at bar is an example of how the Tenth Circuit has failed to apply the plain-error standard to prosecutorial breaches of plea agreements in the same manner as the Fourth Circuit, Fifth Circuit, and other Circuit Courts of Appeal. The Petitioner is a victim of a breach of his plea agreement by the Government, similar to the defendants in *United States v. Kirkland,* supra, and *United States v. Dawson,* supra. However, while the Fourth and Fifth Circuits found plain error in *Kirkland* and *Dawson,* the Tenth Circuit erroneously did not find plain error in the matter at bar, and the Government has gotten away with breaching its plea agreement with Petitioner agreement. This conflict among the circuits in the application of plain-error review must be resolved by the United States Supreme Court.

k. Appendix:

i. Opinion delivered upon the rendering of judgment by the Tenth Circuit Court of Appeals, which is the subject of this Petition:

United States v. Daniel Lopez, 10th Cir. No. 17-1370, opinion dated October 18, 2018.

ii. Any other opinions rendered in the case necessary to ascertain the grounds of judgment: None

iii. Any order on rehearing: None

iv. Judgment sought to be reviewed other than opinion referenced in (1):

None

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari issue for review of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit in *United States v. Daniel Lopez,* 10th Cir. No. 17-1370 (10th Cir., October 18, 2018).

Respectfully submitted,

BY: _/s/ J. Lance Hopkins_____

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Counsel for Petitioner
Daniel Lopez

CERTIFICATE OF COMPLIANCE

As required by Fed.R.App. P.32(a)(7)(C), I certify that this petition for certiorari is proportionally spaced and contains 4,481 words. I relied on Microsoft Word count to obtain word count, and I used Times New Roman, 12 pt.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

_/s/ J. Lance Hopkins
J. Lance Hopkins

FILED
United States Court of Appeals
Tenth Circuit

November 2, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL LOPEZ, a/k/a Droopy,

Defendant - Appellant.

No. 17-1370
(D.C. No. 1:15-CR-00272-REB-12)
(D. Colo.)

ORDER

Before **TYMKOVICH**, Chief Circuit Judge.

This matter is before the court on attorney Thomas R. Ward's *Motion to Withdraw as Counsel*, which motion includes a request that the court appoint appellate counsel for Daniel Lopez pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. The district court has made the requisite finding of Mr. Lopez's eligibility for the appointment of counsel.

Upon consideration, the court grants the motion. Pursuant to 18 U.S.C. § 3006A, the court appoints Mr. Ward as Mr. Lopez's counsel, effective *nunc pro tunc* to the date on which Mr. Lopez filed his notice of appeal, and terminates that appointment with the entry of this order. Mr. Ward shall have no continuing obligations in this appeal except to: (1) ensure that he has made appropriate arrangements through the district court's eVoucher system for payment of the transcripts he ordered on November 1 2017; and

(2) forward to substitute counsel any materials in his possession that are pertinent to this appeal.

The court now appoints Jimmy Lance Hopkins to represent Mr. Lopez. *See* 18 U.S.C. § 3006A. Mr. Hopkins' contact information is:

Jimmy Lance Hopkins
219 West Keetoowah
Tahlequah, OK 74464
Direct: 918-456-8603
Email: lance.hopkins@LunaLunaLLP.net
Fax: 918-456-1407

Within 7 days from the date of this order, Mr. Hopkins shall enter an appearance in this appeal on behalf of Mr. Lopez.

Mr. Ward filed a designation of record and a transcript order form for purposes of this appeal. If warranted, Mr. Hopkins shall file a supplemental designation of record and/or a supplemental transcript order form **within 21 days** of the date of this order.

Mr. Lopez's opening brief will be due 40 days from the date the record on appeal is filed in this court. *See* Fed. R. App. P. 31; 10th Cir. R. 11.2(A).

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Lisa A. Lee
Counsel to the Clerk

FILED
United States Court of Appeals
Tenth Circuit

October 18, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL LOPEZ, a/k/a Droopy,

Defendant - Appellant.

No. 17-1370
(D.C. No. 1:15-CR-00272-REB-12)
(D. Colorado)

ORDER AND JUDGMENT*

Before **BRISCOE**, **KELLY**, and **McHUGH**, Circuit Judges.

Daniel Lopez pleaded guilty to conspiring to distribute methamphetamine. In exchange, the government agreed, among other things, that it would recommend his federal sentence run concurrently with Mr. Lopez's state sentences. Mr. Lopez claims he was deprived of the benefit of that bargain. Although the prosecutor at his sentencing hearing nominally recommended that Mr. Lopez's sentence run concurrently to any other sentences, the recommendation was unenthusiastic, at best.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and 10th Circuit Rule 32.1.

Mr. Lopez now appeals, asserting—for the first time—that the prosecutor's tepid recommendation breached the plea agreement. Because he failed to make this argument to the district court, we review only for plain error. And because Mr. Lopez is unable to show there is a reasonable probability that, but for the alleged error, the result of the proceeding would have been different, he cannot prevail under a plain error analysis. Therefore, we affirm the district court's judgment.

I. BACKGROUND

The facts are not in dispute. Mr. Lopez is a career drug dealer who has accrued five felony drug convictions. In this case, he pleaded guilty to conspiring to distribute methamphetamine. The government agreed to a 243-month sentence in a Rule 11(c)(1)(C) plea agreement. The government agreed to "recommend this sentence run concurrent[ly] with any other pending or imposed sentence." ROA vol. 3, at 9.

The district court accepted Mr. Lopez's guilty plea at a March 2016 change-of-plea hearing. For reasons not apparent from the record, the sentencing hearing was not held until October 2017, and a different attorney appeared on behalf of the government.

At the sentencing hearing, the district court asked whether the government wished to be heard on the appropriate sentence. The new prosecutor chose to make a statement. In the course of doing so, he cast aspersions on the parties' plea deal—making sure to distance himself from his predecessor's agreement—but at least nominally recommended that Mr. Lopez's sentence run concurrently with any other pending or imposed sentence:

> Now, the Court is well aware I did not negotiate this plea agreement, and I am bound by the terms, obviously, under those terms, but that's what

> I'm bound to do. I would note this individual is getting a very sweet deal, a very sweet deal for the nature of his conduct. . . .
>
> . . . .
>
> Now, with respect to the ultimate sentence imposed, obviously we've agreed to a 243-month sentence. That's what I'm going to recommend. The plea agreement sets out in paragraph 5 of the addendum, and I quote, 'The Government further agrees it will recommend the sentence run concurrent with any other pending or imposed sentence. Obviously, however, this recommendation will not be binding on the Court.'
>
> Because of that, I do feel bound to recommend that the 32 months defense counsel spoke about be taken off and the seven other months in the Adams County case that defense counsel referenced also be taken off of the sentence. I feel duty bound to do that. I'm honoring the language of the plea agreement. Whether or not I negotiated that is a different story. Because I am bound by that, that's what I will honor because I never want to be viewed as breaching a plea agreement. I will also make th[e] recommendation it be lessened by 39 months and bring it down to a sentence of 206 months, if my math is correct.
>
> I want the Court to understand the Government's perspective about who sits before them. An individual who has been a committed drug trafficker his entire life, criminal conduct his entire life and, in the Government's view, has not changed. Thank you.

ROA vol. 4, at 19–20.

Mr. Lopez's counsel did not object to the prosecutor's comments. And at no time did Mr. Lopez or his counsel argue to the district court that the prosecutor breached the plea agreement. The district court sentenced Mr. Lopez to 243 months' imprisonment. Notwithstanding the government's recommendation, the court ordered that the federal sentence would run consecutively to any previously imposed sentences. Once again, Mr. Lopez did not object.

This appeal followed. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's judgment under plain error review.

II. ANALYSIS

A. *Standard of Review*

"Where the government obtains a guilty plea predicated in any significant degree on a promise or agreement with the prosecuting attorney, such a promise must be fulfilled to maintain the integrity of the plea." *United States v. Hand*, 913 F.2d 854, 856 (10th Cir. 1990). Generally, "[w]hether government conduct has violated a plea agreement is a question of law which we review de novo." *United States v. Brye*, 146 F.3d 1207, 1209 (10th Cir. 1998) (quotation marks omitted). "To determine whether a breach has, in fact, occurred, we apply a two-step process: (1) we examine the nature of the government's promise; and (2) we evaluate this promise in light of the defendant's reasonable understanding of the promise at the time the guilty plea was entered." *Id.* at 1210. "The government owes the defendant a duty to pay 'more than lip service' to a plea agreement." *United States v. Cachucha*, 484 F.3d 1266, 1270 (10th Cir. 2007) (quoting *United States v. Saxena*, 229 F.3d 1, 6 (1st Cir. 2000)). "We will not allow the government to rely upon a rigidly literal construction of the language of the agreement to escape its obligations under the agreement." *Brye*, 146 F.3d at 1210 (internal quotation marks omitted). "A plea agreement may be breached when '[t]he government's attorney . . . [i]s not only an unpersuasive advocate for the plea agreement, but, in effect, argue[s] against it.'" *Cachucha*, 484 F.3d at 1270 (alterations in original) (quoting *United States v. Grandinetti*, 564 F.2d 723, 727 (5th Cir. 1977)).

Because Mr. Lopez's counsel did not object to the alleged breach of the plea agreement, "appellate-court authority to remedy the error . . . is strictly circumscribed," *Puckett v. United States*, 556 U.S. 129, 134 (2009), and we review only for plain error, *United States v. Bullcoming*, 579 F.3d 1200, 1205 (10th Cir. 2009). "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Mendoza*, 698 F.3d 1303, 1309 (10th Cir. 2012) (quotation marks omitted). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (quoting *United States v. Dominguez Benitez*, 524 U.S. 74, 83 n.9 (2004)).

B. *Discussion*

1. Waiver

Mr. Lopez's opening brief requested de novo review. In response, the government principally argues that "[b]y failing to argue for plain error review, [Mr.] Lopez has waived the issue that he raises on appeal." Appellee's Br. at 3. Alternatively, the government argues Mr. Lopez is unable to meet the first three prongs of plain error review.

"Generally, the failure to argue for plain error and its application on appeal marks the end of the road for an argument for reversal not first presented to the district court." *United States v. Kearn*, 863 F.3d 1299, 1313 (10th Cir. 2017) (internal quotation marks omitted), *cert. denied*, 138 S. Ct. 2025 (2018). Although normally arguments not made in an opening brief are deemed waived, we have said that a criminal defendant's "advancement of a plain error argument in [a] reply brief is sufficient to permit us to

consider the argument under plain error review." *United States v. Chavez-Morales*, 894 F.3d 1206, 1214 (10th Cir. 2018).

Mr. Lopez filed an optional reply brief, in which he addressed the standard of review in the first paragraph:

> Even under a plain-error review standard, the result is the same as it would be under a de novo standard: the Government breached the plea agreement. The District Court's allowance of the Government to breach the plea agreement was [1] an error, [2] an error which was plain, [3] it affected Mr. Lopez' substantial rights including his due process rights and right to a jury trial, and [4] the Government's obvious breach of the plea agreement with its deprivation of Mr. Lopez' rights had a clear and serious adverse impact on the fairness, integrity and public reputation of judicial proceedings.

Appellant's Reply Br. at 1. This formulaic recitation of the four prongs of plain-error review is nearly the entirety of Mr. Lopez's plain-error argument. His reply brief does not use the words "plain" or "substantial" again until the last paragraph of his argument:

> Regardless of the standard of review, whether de novo or plain error, the result is the same. The Government [1] breached the plea agreement, and in so doing the Government [3] violated Mr. Lopez' substantial rights including his constitutional rights. The breach violated Lopez' due process rights under the Fifth Amendment to the United States Constitution, and given the fact that Lopez waived his right to a jury trial under the plea agreement, the Government's breach thereof violated [Mr.] Lopez' Sixth Amendment right to a jury trial.

Id. at 6–7.

We are unconvinced Mr. Lopez managed to sufficiently "argue for plain error *and its application*," even in his reply brief. *Kearn*, 863 F.3d at 1313 (emphasis added); *see also United States v. Mejia-Rios*, ___F. App'x ___, 2018 WL 3385373, at *5 (10th Cir. July 11, 2018) (holding that appellant waived his arguments on appeal where plain-error review applied and that he did not "adequately address[ ] all four plain-error prongs").

But even if Mr. Lopez had adequately briefed his plain error argument, he cannot prevail on the merits.

2. Plain-Error

To prevail on plain error review, Mr. Lopez must meet each prong of the plain error analysis: that there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. In the absence of any one of these factors, his claim fails. *See United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012) ("Because all four requirements [of plain error] must be met, the failure of any one will foreclose relief and the others need not be addressed."). Here, we need not decide whether the government plainly violated Mr. Lopez's plea agreement (thus satisfying prongs one and two), because Mr. Lopez is unable to "show that this breach violated his substantial rights." *Mendoza*, 698 F.3d at 1310.

"An error only affects substantial rights when it is prejudicial, meaning that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *Id.* (quotation marks omitted). Mr. Lopez asserts the alleged breach affected his "substantial rights including his due process rights and right to a jury trial." Appellant's Reply Br. at 1. Later, he clarifies that the government's conduct "violated [Mr.] Lopez' due process rights under the Fifth Amendment . . . , and given the fact that [he] waived his right to a jury trial under the plea agreement, the Government's breach thereof violated [his] Sixth Amendment right to a jury trial." *Id.* at 7–8. Mr. Lopez's arguments, however, fail to address the relevant issue—whether in the absence

of the challenged error, "the result of the proceeding would have been different." *Mendoza*, 698 F.3d at 1310. By invoking the Sixth Amendment, Mr. Lopez appears to suggest that, had the district court concluded the government breached the plea agreement, he would have been relieved of his guilty plea and may have exercised his right to a jury trial. But that argument misapprehends the focus of our inquiry. "[T]he question with regard to prejudice is not whether [the appellant] would have entered the plea had he known about the future violation. When the rights acquired by the defendant relate to sentencing, the 'outcome' he must show to have been affected is his sentence." *See Puckett*, 556 U.S. at 142 n.4 (citation omitted). Mr. Lopez's argument is also inconsistent with his request for relief—that we reverse his sentence and remand for resentencing.

Here, the appropriate question under prong three of the plain error analysis is whether "there is a reasonable probability that, but for the error claimed," *Mendoza*, 698 F.3d at 1310, Mr. Lopez's sentence would have been lower. Mr. Lopez has not even attempted to make that showing. Nor could he, for the record belies any "reasonable probability" that the sentencing court would have imposed "a lesser sentence absent the government's breach." *Id.* The sentencing court expressly and emphatically explained that it viewed the sentence imposed as barely acceptable, even with the federal and state sentences imposed to run consecutively:

> I struggled about whether or not to approve this plea agreement. 243 months[1] for this crime committed by this criminal? *The sentence is almost criminal*. . . .
>
> Well, I'm going to approve the plea agreement, and I'm going to impose a sentence of 243 months as the parties negotiated, as the parties agreed, *and I'll hold my nose as I do that*. . . .
>
> . . . .
>
> Here, the sentence has to focus on the seriousness of the offense at issue. *243 months barely satisfies that statutory requirement and need*. . . .
>
> . . . .
>
> So in terms of punishing the seriousness of the offense, promoting respect for the law, protecting the public from additional crimes of Mr. Lopez, which is both predicted and predictable, in deterring not only Mr. Lopez, but others who are similarly situated and inclined, and to avoid sentencing disparities within this case itself because I've now sentenced over a dozen of the other co-defendants in this case, I've listened to the evidence presented during the trial of defendant No. 13, Mr. Jorge Loya-Ramirez. For that, I exercise my discretion to impose a sentence of 243 months consecutively to any previously imposed sentence . . . . Only a total sentence of 243 months comes close to satisfying and vindicating the important needs and requirements of the federal sentencing statute at 18 U.S.C. Section 3553(a). *Even a day less is an insult to that federal sentencing statute*.

ROA vol. 4, at 24–26 (emphases added).

For Mr. Lopez to prevail, we must be convinced there exists a "reasonable probability" that Mr. Lopez would have received a lower sentence from this judge had the prosecutor not breached the plea agreement. "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1138 (10th Cir. 2017) (en banc) (quotation marks

[1] Mr. Lopez's guideline range was 324 to 405 months.

omitted). On this record there is no reasonable probability that Mr. Lopez would have received a lower sentence had the district court heard a more enthusiastic recommendation for concurrent sentences from the government. *See Mendoza*, 698 F.3d at 1310 (holding that there was no reasonable probability of a lesser sentence where the sentencing court "was quite clear that it considered [the sentence imposed] to be 'a bargain, relatively speaking'"). Where, as here, the challenged error "did not 'affec[t] substantial rights,' the Court of Appeals ha[s] no authority to correct it." *United States v. Olano*, 507 U.S. 725, 741 (1993). Mr. Lopez's challenge fails on the third prong of plain-error review.

III. CONCLUSION

For the above reasons, we uphold the district court's acceptance of Mr. Lopez's plea and AFFIRM its judgment.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

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October 18, 2018

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RE: 17-1370, United States v. Lopez
Dist/Ag docket: 1:15-CR-00272-REB-12

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40, any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. If requesting rehearing en banc, the requesting party must file 6 paper copies with the clerk, in addition to satisfying all Electronic Case Filing requirements. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

cc: Timothy D. Edmonds
J. Bishop Grewell

EAS/at