No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

FAUSTO BECERRA – PETITIONER

v.

UNITED STATES OF AMERICA – RESPONDENT

_____

PETITION FOR WRIT OF CERTIORARI

_____

FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Because the stipulation in the plea bargain which limited the amount and type of drugs was not followed or advocated by the Government, Mr. Becerra was sentenced beyond the maximum punishment for the conduct of being "accountable" for 19.99 kilograms of marijuana.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Fausto Becerra, Petitioner.

2. United States of America, Respondent.

3. Counsel for Petitioner:
Roel R. Trevino, Marjorie A. Meyers, Lila Michelle Garza and Armando Cavada (in district court), and Ed Stapleton (on appeal).

4. Counsel for Respondent:
United States Attorney Kenneth Magidson; and Assistant United States United States Attorney Kenneth Magidson; and Assistant United States Attorneys Amanda Lee Gould (in district court), and Carmen Castillo Mitchell (on appeal).

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to this petition and is unpublished.

The opinion of the United States district court appears at Appendix B to this petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided Mr. Becerra case was January 11, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date February 15, 2018, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves issues pursuant to 5th Amendment and 6th Amendment.

STATEMENTOF THE CASE

A. The offenses and plea.

Mr. Becerra, a citizen of Mexico, was charged on March 9, 2016 by the

Federal Grand Jury in Corpus Christi, Texas. Mr. Becerra was charged with the following:

> COUNT 1: Did knowingly and intentionally conspire to possess with intent to distribute approximately 14.97 kilograms of a mixture or substance containing a detectable amount of cocaine, a schedule II controlled substance. In violation of Title 21, USC, Sec. 846, 841(a)(1) and 841 (b)(1)(A).

On March 14, 2016 Mr. Becerra entered his plea of not guilty. On May 16, 2016, Mr. Becerra was re-arraigned before United Stated District Judge John D. Rainey and plead guilty to count 1.

B. Statement of the Facts.

The Government and Mr. Becerra entered into a plea agreement that contained a stipulation: "The Government and the Defendant stipulate the Defendant shall be accountable for 19.99 kilograms of marijuana." This agreement was signed by Mr. Becerra, his Attorney Mr. Cavada and, on May 15, 2016, by Assistant United States Attorney Amanda L. Gould on behalf of Kenneth Magidson, United States Attorney. No other reference to the conduct in this offense is made in this Memorandum of Plea Agreement. The defense attorney announced and the trial court accepted that the plea was entered subject to a plea agreement. Mr. Becerra is a 36 year old man with a 9th grade education and some ability to read or understand English. The Court at re-arraignment questioned Mr. Becerra about the plea agreement receiving assurances that Mr. Becerra had signed it, that he had read it and understood it, discussed it with his lawyer that his lawyer answered any questions Mr. Becerra had about the plea agreement.

C. Sentencing

On November 14, 2016, Mr. Becerra was sentenced to 90 months in custody of BOP, followed by 4 years SRT.

D. Appeal

Mr. Becerra timely filed his appeal to the United States Court of Appeals for the Fifth Circuit and affirmed the District Courts judgment.

REASONS FOR GRANTING THE PETITION

The maximum punishment for possession of less than 50 kilograms of marijuana is a term of imprisonment of not more than 5 years. 21 U.S.C. Section 841(b)(D). Mr. Becerra's plea agreement stipulated that he was accountable for 19.99 kilograms of marijuana. Nonetheless, he was sentenced to 90 months, which is in excess of the maximum statutory punishment in the plea agreement. Accordingly, the sentence fails to follow the plea agreement between Mr. Becerra and the Assistant United States Attorney.

What we know from the record is that all parties agreed to the fact that Mr. Becerra possessed 19.99 kilograms of marijuana. Without this recitation of facts there is not an adequate factual basis to sustain the plea.

Mr. Becerra has the burden of demonstrating a breach by a preponderance of the evidence. *See United States v. Roberts*, 624 F.3d 241, 246 (5th Cir. 2010). Mr. Becerra did not raise the breach issue in the district court. Review is thus for plain error. *United States v. Brown*, 328 F.3d 787, 789 (5th Cir. 2003). Under plain-error review, a defendant must show (1) error, (2) that is clear or obvious, and (3) that

affected the defendant's substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If those requirements are met, we may exercise discretion to remedy the error only if it (4) "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*

Because, in this case the stipulation would have provided for a maximum punishment less than the punishment given it was error, clear and obvious and affected Mr. Becerra's substantial rights in a manner that seriously affects the fairness and integrity of his guilty plea.

Even when the plea agreement includes a waiver of the right to an appeal, as it did here, a defendant may appeal to claim a breach of a plea agreement. *See Roberts*, 624 F.3d at 244. A breach occurs if the Government's conduct was inconsistent with a reasonable understanding of its obligations. *See United States v. Hinojosa*, 749 F.3d 407, 413 (5th Cir. 2014).

United States v. Reyes 300 F3d 555 (5th Cir. 2002) repeats the standards upon which a Rule 11 challenge is based. A plain error analysis is applied. Under this analysis Mr. Becerra has the burden to show (1) there is an error, (2) that it is clear and obvious, and (3) that affects his substantial rights. *Id* at 558.

To evaluate the effect of any error on substantial rights, this Court will focus on whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty. In making this determination, this Court may consult the whole record on appeal. *Id* at 559.

This presents a similar situation between the facts for Mr. Becerra and those in the *Reyes* case. In the *Reyes* case defendant Mr. *Reyes* contended that the district court "made no mention of the sentencing guidelines, the requirement that the court consider them or the authority of the Court to depart from them in limited circumstances." *Id* at 561.

Just as Mr. *Reyes* had reason to hold onto hope for not going to jail because he was 75 years old and the guidelines were not explained to him, Mr. Becerra had reason to hope for a much less severe sentence because the facts stipulated that he possessed 19.99 kilograms of marijuana, rather than 14.97 kilograms. Even with an explanation of the guidelines and relevant conduct, he had reason to believe that he could rely on the stipulation of facts.

Just as Mr. *Reyes* conviction and sentence were vacated and remanded, so should those of Mr. Becerra be vacated and remanded.

*Harmless error does not apply in this case. I*n *Santobello v. New York*, the Supreme Court clarified that the essential inquiry does not focus on the harmlessness of the breach of a plea agreement. In *Santobello*, while the original prosecutor had agreed not to make any sentencing recommendation as part of the plea agreement. *Id* at 258. The new prosecutor recommended the maximum sentence at the sentencing hearing. *Id* at 259. The sentencing judge chose to sentence the defendant to the maximum sentence, and in doing so, declared that he was not affected in any way by the new prosecutor's breach of the plea agreement. Id. The Supreme Court acknowledged that it had "no reason to doubt" this

assurance. *Id* at 262. But the Supreme Court refused to reach the question of whether the sentencing judge was influenced by the plea agreement and its subsequent breach. *Id* at 262-263. Instead, the Supreme Court vacated the conviction and remanded the case in order to serve "the interests of justice and [in] appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty." *Id* at 262. In other words, the occurrence of the breach itself was enough to lead to vacatur of the judgment, notwithstanding a harmlessness analysis. In *United States v. Valencia*, 985 F.2d 758 (5th Cir. 1993) the Fifth Circuit read *Santobello* to foreclose a harmlessness inquiry.

As described, (1) There is an error because the stipulation of facts reflects an agreement that Mr. Becerra possessed 19.99 kilograms of marijuana and he was sentenced for possession of 14.97 kilograms of cocaine. (2) This is clear and obvious: compare the stipulation of facts with the sentence Mr. Becerra received based on guidelines for 14.97 kilograms. (3) His substantial rights are affected because any jail time involves substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). The substantial rights are made clear in applications of the guidelines.

Mr. Becerra received a sentence of 90 months based on a guideline range for 14.99 kilograms of cocaine which carried a base level of 32. Had he been sentenced for 19.99 kilograms of marijuana he would have been at a base level of 16. Rather than facing a guideline range of 87-108 months, his range would have been 12-18 months. Even in the middle of the range at 15 months, he would have been saved 75 months. U.S.S.G. Sec. 201.1(2) and (12); U.S.S.G. Sentencing table. The Supreme

Court in *Glover* noted that "…any amount of actual jail time has Sixth Amendment significance…." *Glover v. United States*, 531 U.S. 203 (2001).

For Mr. Becerra, there is no harmless error as a matter of law and there is no cure because he was sentenced under the harsher standard. Mr. Becerra did not object at trial, but his notice of appeal indicated his disagreement with the sentenced based on cocaine rather than marijuana. Minor breaches may not count *United State v. Clark*, 55 F. 3d 9, 13-14(1st Cir. 1995) and breaches must be material. *United States v. MacInnis* at 5 (5th Cir. June 7, 1995) (per curiam). The Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971) refused to reach the question of whether the court was influenced by the breach, *Id* at 262-63, but rather, based its decision on the "duty" of the prosecution. *Id* at 262. Breach itself was enough. The breach of the agreement with Mr. Becerra is material and not minor.

Whether or not inadvertent, whether or not harmless, the Government entered into a stipulation about the facts of this case. These facts are material and the stipulation should be honored.

CONCLUSION

Because Mr. Becerra and the Assistant United States Attorney entered into an agreement stipulating facts that were not followed at sentencing and because failure to follow the agreement resulted in a sentence greater than the statutory maximum of the offense, we urge this petition for a writ of certiorari should be granted.

Respectfully submitted,

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