

No. \_\_\_\_\_

18-8183

IN THE  
SUPREME COURT OF THE UNITED STATES

GREGORY FRANK SPEROW - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT  
ON PETITION FOR A WRIT OF CERTIORARI TO  
UNITED STATES COURT OF APPEALS

FILED

NOV 14 2018

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gregory Frank Sperow  
Reg. No. 52273-146  
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Terminal Island  
1299 S. Seaside Avenue  
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FILED

NOV 27 2018

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

## QUESTIONS PRESENTED

1. Whether the government can breach a Rule 11(c)(1)(C) plea agreement concerning the return of seized properties and then rely on the agreement's waiver provision, waiving defendant's right to appeal, to prevent defendant from seeking relief?
2. Does the Constitution's Fifth Amendment Due Process Clause entitle a defendant whose property interests are at stake to notice and opportunity to be heard?
3. Does the due process guarantee of fundamental fairness require that a defendant's plea agreement be honored by the government?

**LIST OF PARTIES**

The only parties to the proceeding are those appearing in the caption to this petition.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Gregory Frank Sperow, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### **OPINIONS BELOW**

The unpublished order of the court of appeals granting Appellee's motion to dismiss Petitioner's appeal in United States v. Sperow, (USCA No. 17-30006) is reprinted in Appendix A to this Petition.

The unpublished judgment of the court of appeals denying a panel rehearing and rehearing en banc is reprinted in Appendix B.

The unpublished final order of forfeiture as to Santa Rosa Creek Road property, Templeton, California, and preliminary order of forfeiture as to Gregory Frank Sperow of the district court are reprinted in Appendices C and D respectively.

### **JURISDICTION**

The district entered a final order of forfeiture as to Santa Rosa Creek Road property, Templeton, California on December 29, 2016 (Dkt. No. 1257). The Court of Appeals for the Ninth Circuit granted the United States' motion to dismiss Petitioner's appeal on February 26, 2018. The Ninth Circuit denied Petitioner's motion for a panel rehearing and rehearing en banc on July 2, 2018. An extension of time to file a petition for a writ of certiorari was granted on September 10, 2018, in Application No. 18A236 and extended time to November 14, 2018. This petition is timely submitted. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves the following constitutional and statutory provisions:

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be ... deprived of ... property, without due process of law.

The Due Process Clause of the Fifth Amendment requires that:

Notice and opportunity for a hearing be provided before property can be taken.

Procedural due process provides in part:

Notice and opportunity to be heard in a meaningful time and in a meaningful manner.

Federal Rules of Criminal Procedure 11:

- (b) Considering and Accepting a Guilty or Nolo Contendre Plea
  - (1) Advising and Questioning the Defendant.  
Before the court accepts a plea of guilty or nolo contendre, the defendant may be placed under oath, and the court must address the defendant personally in open court, during this address, the court must inform the defendant of, and determine that the defendant understands the following: ...
  - (J) any applicable forfeiture;
  - (N) the terms of any plea-agreement provision waiving the right to appeal or collaterally the sentence;
- (c) Plea Agreement Procedure
  - (1) In General. An attorney for the government and defendant's attorney, or defendant when proceeding pro se, may discuss and reach a plea agreement. the court must not participate in these discussions. If the defendant pleads guilty or nolo contendre to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
    - (C) agree that a specific sentence or sentencing range is appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factors does or does not apply (such as a recommendation or request binds the court once the court accepts the plea agreement).
  - (2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered unless the court for good causes allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type in Rule 11(c)(1)(A) or (C), the court must accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

Federal Rules of Criminal Procedure 51(b) and 52(b)

Rule 51(b) - Preserving a Claim of Error. A party may preserve a claim of error by informing the court - when the court ruling or order is made or sought - of the action the party wishes the court to take, or the party's objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

Rule 52(b) - Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

#### **STATEMENT OF THE CASE**

This case involves the following: the enforceability of Petitioner's Amended Rule 11 Plea Agreement's "Waiver Caluse" (waiver of appeal) in light of the government's eventual breach of the Agreement seven and one-half years later; the district court's oral pronouncement made at the Rule 11 plea colloquy requiring the government, as a contract matter, to return certain unnamed properties to Petitioner; the government's acquiescence; and the forfeiture of the Santa Rosa Creek Road and Mount Pleasant Street properties.

#### **I. Relevant Procedural History**

1. On January 9, 2008, the government filed a ten count second superseding indictment charging Petitioner and two codefendants with an ongoing drug and money laundering conspiracy that included three forfeiture counts (six, seven and eight)(Dkt. No.<sup>1</sup> 425). Count Six of the indictment describes all property, real and personal, tangible and intangible, that is to be forfeited. Count Six was dismissed pursuant to the Agreement.

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<sup>1</sup>Dkt. No. hereinafter refers to docket report numbers in case no. CR-06-00126-BLW

2. On August 28, 2008, Petitioner signed an Amended Rule 11 Plea Agreement ("Agreement") (Dkt. No. 666) (appears at Appendix E). In the Agreement "Forfeiture" is referenced in Section IV, subsection E and "Waiver of Appeal" in Section VII, subsection A through C.

3. On September 3, 2008, the district court conducted a change of plea hearing. During the hearing Petitioner pled guilty to Counts Two, Three, Seven, and Eight (Dkt. No. 665).

4. Petitioner was sentenced on June 25, 2009, (Dkt. No. 870) and judgment was entered on July 1, 2009 (Dkt. No. 883).

5. The Preliminary Order of Forfeiture as to Gregory Frank Sperow ("POF") was entered on June 26, 2009 (Dkt. No. 872) (appears at Appendix D). The last paragraph of the POF held an exception for four properties that were to be handled as described in the Agreement. The Santa Rosa Creek Road and Mount Pleasant Street properties are two of the four.

6. On December 14, 2016, United States Treasury Agents entered the Mount Pleasant property and notified Petitioner's tenants that he no longer owned the property. Additionally, the agents told the tenants that the Treasury Department had contracted Pristine Property Management to manage the property until it is sold and all rents will be collected by the management company.<sup>2</sup>

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<sup>2</sup> On October 10, 2018, in the middle of Petitioner preparing this petition for certiorari, he received the UNITED STATES' MOTION FOR FINAL ORDER OF FORFEITURE AS TO 1433, 1433½, AND 1435 MOUNT PLEASANT STREET, LOS ANGELES, CALIFORNIA (ECF 1317). Petitioner interrupted his preparation of this petition and immediately filed an opposition to ECF 1317 for breach of the plea agreement and supported with a declaration. On February 2, 2018, Petitioner filed a motion for return of the seized rents from the Mount Pleasant property pursuant to F.R. Crim. P. Rule 41(g) in the District Court for the Central District of California (Case No. 2:18-CV-001186-VAP-JEMx)

7. On December 28, 2016, the government filed a Motion for Final Order of Forfeiture as to Santa Rosa Creek Road Property, Templeton, California (Dkt. No. 1256). Petitioner did not receive the government's 1256 motion or believe it attempted to ever serve Petitioner with it.

8. On December 29, 2016, the district court granted the government's 1256 motion for final order of forfeiture the day after it had been filed (Dkt. No. 1257)(appears at Appendix C)

9. On January 5, 2017, Petitioner received the district court's Final Order of Forfeiture as to the Santa Rosa Creek Road Property (Dkt. No. 1257).

10. On January 9, 2017, Petitioner submitted a timely Notice of Appeal that was received by the district court on January 13, 2017 (Dkt. No. 1260). Petitioner's notice was forwarded to the Ninth Circuit and docketed as Case Number 17-30006. (DktEntry<sup>3</sup> 1).

11. On July 31, 2017, Petitioner filed Appellant's Opening Brief (DktEntry 15).

12. On October 17, 2017, the government filed United States' Motion to Dismiss Appeal for Untimeliness and Waiver (DktEntry 19).

13. On December 27, 2018, Petitioner responded to government's motion to dismiss (DktEntry 19)(DktEntry 24).

14. On January 22, 2018, the government replied to Petitioner's response (DktEntry 24)(DktEntry 27).

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based on breach of the Agreement. The preceding is for information purposes only and to support Petitioner's assertion that the government is in continuing breach of the Agreement.

<sup>3</sup>DktEntry hereinafter refers to docket entries in Appeal No 17-30006.

15. On February 26, 2018, the United States Court of Appeals for the Ninth Circuit granted the government's motion to dismiss in light of a valid waiver (DktEntry 19) and dismissed Petitioner's appeal without addressing the merits raised in his opening brief. (DktEntry 28)(appears at Appendix A).

16. On May 8, 2018, Petitioner submitted his Petition for Panel Rehearing (FRAP Rule 40) and Rehearing En Banc (Ninth Circuit Rule 35-1) (DktEntry 31) because the panel decision conflicted with the Supreme Court decisions in Santobello v. New York, 404 U.S. 257, 262 (1971); Puckett v. United States, 556 U.S. 129, 133 (2009); and Mabry v. Johnson, 467 U.S. 504, 507-510 (1984); with the Fourth Circuit decision in United States v. Wood, 378 F.3d 342, 349 (4th Cir. 2009); and with the Ninth Circuit's own decision in United States v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984).

17. On July 2, 2018, the Ninth Circuit denied Petitioner's petition for panel rehearing (DktEntry 31) in a very brief order (DktEntry 33) (appears at Appendix B). Petitioner did not receive the court's order dated July 2, 2018, until August 17, 2018.

## **II. Course of Proceedings at Change-of-Plea Hearing Concerning Forfeiture of Certain Properties**

1. The court pursuant to Federal Rules of Criminal Procedure ("F.R. Crim. P.") Rule 11(b)(1), conducted a colloquy with Petitioner as an active participant. The court found that Petitioner was competent to enter a plea. (Plea Tr.<sup>4</sup> at 3-4)(Dkt. No. 1184) (Change of Plea Hearing Transcript appears at Appendix F).

2. The government recited the factual basis of the Agreement and Petitioner stated he agreed with the summary. Id. at 13-15.

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<sup>4</sup>Plea Tr. hereinafter refers to change of Plea Hearing Transcript (Dkt. No. 1184)

3. With regards to the forfeiture allegations, Petitioner stated that he took "the expansive view that possibly some money derived from the sale of marijuana could be involved, but the majority of it came from legitimate sources." Petitioner's counsel explained that Petitioner had elected to go ahead and plead guilty given the "expansive nature of the doctrines of money laundering, particularly as they pertain to co-mingling and what happens when funds that are derived from specified unlawful activities are utilized in any capacity on properties." Id. at 16.

4. The court then engaged counsel, Petitioner, and the government in further discussion regarding forfeiture. Id. at 17-22.

5. The government explained that it recognized that Petitioner had legitimate employment over the years.

6. The court continued to engage both parties in the discussion concerning forfeiture of properties, asking the government if it was "satisfied with defendant's allocution as covering all of the factual elements of the crime?" Id. at 17.

7. The government responded with concern "about what Mr. Sperow says is it's possible. It possibly connected." Id. at 17. The government wanted Petitioner to admit that there was money derived from drug trafficking that was co-mingled or that the properties to be forfeited represent some drug proceeds instead of being possible. Id. at 17-18.

8. The court in clarifying the government's position on the forfeiture issue stated, "So what you're [AUSA Stiles] saying is there may be some assets that will be returned to him that may have been properly forfeitable and that, in essence, you're just agreeing to

essentially as a **contract matter** give up property that is properly forfeitable back to defendant in exchange for his agreement not to argue or contend that other assets are not forfeitable even though he might be willing and able to so argue?" Id. at 19.

9. The government responded to the court's allocution, "That's correct, Your Honor. Basically we made an agreement as to which property would be forfeited, which would be returned to him ..." Id. at 19.

10. The hearing continued with the government acknowledging that it will return the Mount Pleasant property based on the Petitioner's cooperation in the terms of the plea agreement. Id. at 20.

11. The court was still not satisfied that there was a factual basis for the forfeiture and continued its discussion with the government and Petitioner. Id. at 21.

12. Responding to the court's concern the government [AUSA Stiles] stated:

"In that regard, because both the indictment and plea agreement refer to substitute assets, I believe the parties are capable of making a decision to forfeit this. Get this back. I don't think it affects the elements of the crime or the validity of the plea."

Id. at 21.

13. Due to the dispute over forfeiture of properties, the court resolved this matter in the following way addressing Petitioner first:

"Let me back up and state it this way in light of what Mr. Stiles just said. Mr. Sperow, do you agree that on balance, considering **both the properties to be returned to you** and the properties to be forfeited to the government, that on balance the properties being forfeited to the government reflect either directly or substituted assets, properties in which there have been commingled drug related funds? Perhaps I am still not

being clear. For example, if the government -- since the funds are commingled, there is no clear or easy way to decide precisely which property or what portion of which property should be forfeited. There is a dispute. And you agree to resolve that dispute by agreeing that certain properties will be returned to you. Certain properties will be forfeited to the government. I think you are free to do that as long as on balance you are comfortable and satisfied that the properties being forfeited to the government were either properties in which some drug-generated funds were commingled in that asset or that the asset is being substituted for other property."

Id. at 21-22.

14. Petitioner acknowledged that he understood and agreed with the court's solution for resolving the dispute over forfeiture of properties. Id. at 22.

15. The court questioned the government if it was satisfied with the allocution. The government answered, "Yes, Your Honor." Id. at 22.

16. Petitioner left the change of plea hearing with the understanding that the Agreement had been modified requiring the government to return certain properties, albeit unnamed, but at least two. Petitioner assumed that it would be the Santa Rosa Creek Road and Mount Pleasant properties because both properties were purchased in the 1970s and neither property ever had any commingled funds (drug-generated or otherwise) involved in the purchase and maintenance of them.

### **III. Relevant Facts Concerning Breach of Plea Agreement Making Waiver of Appeal Unenforceable**

1. The change of plea hearing record reflects that the government and Petitioner agreed with the court's allocution concerning forfeiture matters, specifically the return of certain

properties ("considering both the properties to be returned to you . . ." Id. at 21) to Petitioner.

2. The record is devoid of which two properties were to be returned to Petitioner. The plain meaning of the district court's oral statements control over the written agreement in establishing Petitioner's understanding, and any ambiguities or inconsistencies favor him, placing on the government responsibility for its lack of clarity as to what properties it planned on returning.

3. The government never attempted to clarify what two properties were to be returned. It simply acquiesced with the court's resolution to remedy the dispute over what was to be forfeited and what was to be returned.

4. "... the court must inform the defendant of, and determine that defendant understands, the following: ... any applicable forfeiture." See Fed. R. Crim. P. Rule 11(b)(1)(J). Petitioner's reliance on the district court's characterization or mischaracterization of the material terms disclosed during the plea colloquy are fundamental to establishing whether he knowingly and voluntarily entered the plea.

5. The Agreement's waiver clause provides that,

"If the defendant believes the Government has not fulfilled its obligation under the agreement, defendant will object at the time of sentencing, otherwise the objection will be waived."

(Dkt. No. 666, Section VII, subsection (A)(3) at 16) (appears at Appendix E). Petitioner had no reason to object at sentencing concerning forfeiture, or anytime prior to the government motioning for a final order of forfeiture (Dkt. No. 1256), including the POF (Dkt. No. 872) (appears at Appendix D). Petitioner never received the government's motion for final order

of forfeiture for the Santa Rosa Creek Road property (Dkt. No. 1256).

6. Petitioner's understanding at the plea colloquy provided him with a reasonable expectation that he could rely upon the court's oral pronouncements disclosed during the hearing, as a contract matter, that the government would comply with the agreed to terms and return two properties to Petitioner.

7. For over seven years Petitioner acted on his understanding that clear title had been returned to the Santa Rosa Creek Road and Mount Pleasant Street properties, and they were exempt from forfeiture. Petitioner, acting on his understanding pursuant to the district court's resolution at the plea colloquy, kept the property taxes, mortgages, insurance, maintenance, an all other ancillary expenses current. Petitioner trusted the court and the government to honor and comply with the forfeiture terms pronounced during the plea colloquy.

8. Section VI, subsection A-C (Dkt. No. 666 at 13-14) (appears at Appendix E) of the Agreement set the parameters for Petitioner's cooperation. Subsection A. Truthful Information and Assistance. provides the following:

"Defendant promises to provide truthful and complete information to the Government and its investigative agencies, including full debriefings and truthful testimony at all proceedings, criminal, civil or administrative, including but not limited to grand jury proceedings, trials, pretrial and post-trial proceedings, concerning defendant's role and the roles of all others involved in the offense or offenses ... The defendant agrees to cooperate in good faith, meaning that the defendant will not only respond truthfully and completely to all questions asked, but will also volunteer all information that is reasonably related to subjects discussed in the debriefings or testimony. . . ."

Subsection C. Substantial Assistance Determination. provides that:

"Upon the Government's determination that defendant's cooperation amounts to 'substantial assistance' in the investigation of others, the Government will request that the Court depart downward from the applicable sentencing range, pursuant to Section 5K1.1 of the Sentencing Guidelines and/or any mandatory minimum sentence pursuant to Title 18 United States Code, Section 3553(a). . . ."

Petitioner cooperated in good faith and responded truthfully and completely to all questions asked. At Petitioner's sentencing hearing the court told the government that it had not seen its 5K1.1 motion for substantial assistance, The government (AUSA Stiles) responded as follows:

"Judge, I probably erred in not filing a motion. Because it was a binding plea agreement and there was a specified range that was outside the normal presentence range, I thought a mere expression to the Court that Mr. Sperow had fulfilled that section [Section VI. Cooperation] of it and that we were asking the Court to sentence within that range would be sufficient. I can address that further in my arguments --. . . ."

(Sent. Tr.<sup>5</sup> at 4)(Dkt. No. 1182)(appears at Appendix G).

The court was not satisfied with the government's statement and wanted to know if the Petitioner had provided cooperation pursuant to the Agreement. The court asked the government, "Right. Tell me, has the defendant provided that cooperation?" The government responded:

"For the purposes of the plea agreement, Your Honor, we set the bar fairly low in terms of a 3 point reduction for 5K [5K1.1], and our position is that he met that and we are going to ask the Court to sentence him within that range. . . ."

(Sent. Tr. at 5)(Dkt. No. 1182). Petitioner has never been contacted by the government concerning any post-trial proceedings requiring his continued cooperation pursuant to Section VI

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Sent. Tr. hereinafter refers to Sentencing Hearing Transcripts (Dkt. No. 1182)

"Cooperation" of the Agreement. The sentencing record clearly indicates that Petitioner satisfied Section VI of the Agreement:

"... I [AUSA Stiles] don't think the cooperation is the normal kind of cooperation that we get in a case. Mr. Sperow is -- thinks differently than perhaps any other defendant I've ever dealt with, but I think he provided sufficient information that we could, in good faith, tell the Court that he provided information that was valuable to us."

(Appendix G at 30).

9. Pursuant to Section IV, subsection E. Forfeiture:

"If the defendant's criminal convictions are not reversed and if he has provided complete and truthful cooperation as provided in the Plea Agreement, the Government agrees that it will take into consideration the legitimate income defendant has earned as a builder/contractor, in a determination of a final order of forfeiture in this criminal case as to the Mount Pleasant property, and will not seek forfeiture of the Mount Pleasant property to the extent of the legitimate origin."

(Appendix E at 10).

10. The government has never contacted Petitioner to discuss the source of funds used to purchase the Mount Pleasant property. Outside of the Petitioner's pre-sentencing debrief, the record is absent of any evidence that the government has made a good faith effort to contact Petitioner to determine the legitimate origin of the Mount Pleasant property that he purchased in January of 1972, several years before the commencement of the alleged conspiracy.<sup>6</sup>

11. The government has ignored and is continuing to ignore, as a contract matter, to comply with the district court's allocution at the plea colloquy and return both the properties (Santa Rosa Creek Road and Mount Pleasant Street), thereby

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<sup>6</sup> During the plea colloquy the government responded to the court's question "...Are you [AUSA Hall] saying there is really is no

breaching the Agreement and making the waiver of appeal not enforceable.

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firm agreement as to whether this property will or will not be forfeited?"

Mr. Hall: "The Mt. Pleasant -- well, the Mt. Pleasant property, Your Honor, it says in the plea agreement that we will return the Mt. Pleasant property based upon his cooperation in the terms of the plea agreement being carried out. . ." (Appendix F at 20).

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## REASONS FOR GRANTING CERTIORARI

The United States Court of Appeals for the Ninth Circuit in its very brief order (DktEntry 28)(Appendix A) based on United States v. Harris, 628 F. 3d 1203, 1205 (9th Cir. 2011), granting the government's motion to dismiss Petitioner's appeal has decided an important federal question in a way that has so far departed from the accepted and usual course of judicial proceedings or sanctioned such departure by the lower court as to call for an exercise of this Court's supervisory power.

The United States Court of Appeals in granting the government's motion to dismiss (DktEntry 19) in light of a valid waiver, completely ignored this Court's holdings in Puckett v. United States, 556 U.S. 129, 133 (2009) and Santobello v. New York, 404 U.S. 257, 262 (1971), and conflicts with decisions of other circuits. Additionally, the panel's decision also conflicts with its own circuit's long and consistently held rule on the same important questions presented herein.

Petitioner urges the court to use the facts of this case to guide prosecutors, courts, and defense counsel that there are rights in certain circumstances under Rule 11 pleas where appeal waivers will not be enforced.

## ARGUMENTS

### I

#### PETITIONER ARGUES THAT THE PLEA AGREEMENT WAIVER CLAUSE DOES NOT FORECLOSE HIS STATUTORY RIGHT TO APPEAL IN LIGHT OF THE GOVERNMENT BREACH OF THE AGREEMENT

##### A. Post-Sentencing Appellate Waivers

A defendant can always appeal issues concerning the validity of the plea agreement or the waiver of appeal itself because such

issues relate to the knowing and voluntary nature of the agreement. An appellate waiver does not preclude a claim that the sentence imposed violated the terms of the plea agreement or that the government breached its obligation under the agreement.

Cognizant of the appellate waiver in his plea agreement, Petitioner argues that he has been freed to appeal because the government breached the agreement not at sentencing but seven and one-half years later when it motioned the district court for a final order of forfeiture (Dkt. No. 1256).

Although the United States Supreme Court has not addressed the validity of appellate waivers in plea agreements, most courts of appeals have held that a waiver will not be enforced, even if it was knowing and voluntary, if the government breaches the plea agreement and thus releases the defendant from his promise not to appeal. The Ninth Circuit recognized that by a government breach of the plea agreement it releases a defendant from the bar of the appeal waiver. See United States v. Gonzalez, 16 F.3d 985, 990 (9th Cir. 1993). The Third Circuit held the same in United States v. Schwartz, 511 F.3d 403, 405 (3rd Cir. 2008) citing United States v. Moscahlaidis, 886 F.2d 1357, 1360 (3rd Cir. 1989).

The Ninth Circuit in dismissing Petitioner's appeal ruled contrary to its own case precedent and that of its sister circuits. It failed to recognize that Petitioner could not necessarily agree in advance to a waiver of appeal in light of the government's prospective breach of the Agreement because prospective waivers are unknown. Given the quantum of information unavailable to Petitioner at the time of the plea, a prospective waiver of appellate rights would be unknowing and unintelligent, thereby

making the waiver unenforceable and possibly the entire Agreement void. Forfeiture of the properties at issue did not occur contemporaneously with sentencing. It is this future event, the government proceeding with forfeiture of the Santa Rosa Creek Road and Mount Pleasant Street properties (the only two remaining properties that had not been forfeited after seven and one-half years), which breached the Agreement and had not yet occurred when he waived his right to appeal that makes the waiver no longer enforceable.

The Ninth Circuit recognized in determining whether a plea agreement has been broken, the courts look to "what was reasonably understood by [defendant] when he entered his plea of guilty." United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979). See United States v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984). The Travis Court noted that "If disputed, the terms of the agreement will be determined by the objective standards. Arnett at 1164." The court is to look to the objective proof on the record to ascertain defendant's reasonable expectation of the bargain.

In this case the court ignored that the government stipulated to the district court's resolution of the forfeiture issue, "as a contract matter," by agreeing to return certain properties to Petitioner. The government stipulated freely and voluntarily to return "both the properties" to Petitioner, albeit unnamed, in exchange for his agreement not to argue or contend that other assets are not forfeitable. See Appendix F at 19-22.

"Stipulations freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions. United States v. Gwaltney, 790 F.2d 1378, 1386

(9th Cir. 1986) cert denied 479 U.S. 1104 (1987). The general rule is especially applicable where the United States is a party to the agreement." United States v Shapiro, 879 F.2d 468, 470-471 (9th Cir. 1988). The same analogy would apply to Petitioner's change of plea hearing making the government's stipulation to return certain properties "binding and enforceable." After all this time the government continues to ignore its obligation to return "both the properties," thereby breaching the Agreement and making the waiver clause unenforceable.

**B. The Sentence Imposed was in Violation of the Plea Bargain**

A category of appeals which are traditionally permitted, despite a general waiver of appeal rights, includes issues of whether there has been compliance with the bargain. Since much of the reasoning supporting appeal waivers is grounded in notions of contract law, there is wide agreement that the defendant always retains the right to complain that the sentence was in excess of the bargain. This Court found that reasoning to be true in Santobello v. New York, 404 U.S. 257, 262 (1971). Chief Justice Burger writing for the majority in Santobello made clear that:

"This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise of the prosecutor, so it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.

Failure to comply with the terms of the bargain has alternatively been viewed by at least one federal court as undermining the voluntariness of the plea, with the court coming to the same conclusion on appealability as those courts which

rely on contract principles. Even though the Second Circuit in United States v. Salicido-Contreras, 990 F.2d 51, 52 (2d Cir. 1993), determined there had been no breach of the agreement it did make clear what undermines the voluntariness of a plea.

"While the nature of the remedy of a breach by the government 'varies with the nature of the broken promise and the facts of each particular case,' United States v. Brody, 808 F.2d 994, 948 (2d Cir. 1986), the remedies available to the defendant must be firmly rooted in the interests of justice and sound judicial administration. In certain circumstances, the government's failure to adhere to the terms of the plea agreement renders a defendant's plea involuntary and thereby undermines the constitutional validity of the conviction. Brady v. United States, 397 U.S. 742, 752 (1969)."

The United States Supreme Court has recognized criminal forfeiture as part of a defendant's sentence. See Libretti v. United States, 3516 U.S. 29, 39-41 (1995). Because forfeiture is part of a defendant's sentence, Federal Rules of Criminal Procedure ("F.R. Crim. P.") require pursuant to Rule 11(b)(1)(J) that

"... the court must inform the defendant of, and determine that the defendant understands, the following ... any applicable forfeiture."

The district court followed the Rule 11 requirement making sure Petitioner understood any applicable forfeiture. As noted previously it resolved factual disputes concerning the forfeiture of properties and made findings with respect to those disputed facts. The record shows that Judge Winmill resolved the forfeiture issues with the agreement of the parties that certain properties would be returned to Petitioner and other properties would be forfeited to the government (Appendix F at 22).

The Ninth Circuit did not address and overlooked what Petitioner's reasonable understanding and expectation of the bargain was in dismissing his appeal, thus contradicting the holding in Travis and Arnett, *supra*, and other circuits in

ascertaining whether the plea agreement has been breached.

The Second Circuit along with all of its sister circuits have made clear in their holdings the following principles:

"Plea agreements are interpreted in accordance with contract law principles. The court must look to the reasonable understanding of the parties as to the terms of the agreement in determining whether a plea agreement has been breached. Any ambiguities in the agreement must be resolved against the government." (internal citations omitted). United States v. Colon, 220 F.3d 48, 51 (2d Cir. 2000).

Certainly it can be argued that the record is ambiguous as to which properties the government agreed to return. But the record cannot be disputed that the government did agree under the district court's supervision to return certain properties to Petitioner. Because of the brevity of the panel's order in this matter it is impossible to understand what criteria it used to determine that the government had not violated the bargain it made at the plea colloquy.

Simple logic would dictate that the government in moving to forfeit the only remaining properties (Santa Rosa Creek Road and Mount Pleasant Street) over seven years later violated the agreement.

As a threshold matter, the Ninth Circuit in relying on Harris, *supra* at 1205, to dismiss Petitioner's appeal failed to consider that the district court's statements at the plea colloquy created a reasonable expectation on Petitioner's part that the government would return certain properties to him. Further, the panel erred in not considering how Petitioner could have made an informed waiver to a governmental breach that was to occur seven years after sentencing. Without first knowing that the government planned to subsequently seize and forfeit the only remaining

properties years later, Petitioner would be uninformed and unaware of the consequences of his waiver of the right to appeal.

"The baseline for any waiver is that the defendant enter into it knowingly and voluntarily. Town of Newton v. Rumery, 480 U.S. 386, 394 (1987). In the plea-bargain context, the text of the plea agreement and the content of the change-of-plea colloquy are critically important to a determination of knowledge and volition. See e.g. United States v. Parrilla-Tirado, 22 F.3d 368, 373 (1st Cir. 1994)(examining both the text of the plea agreement and the change-of-plea colloquy to determine whether a guilty plea was entered knowingly and voluntarily). Like other courts e.g. United States v. Jemison, 237 F.3d 911, 916-18 (7th Cir. 2000); United States v. Nguyen, 235 F.3d 1179, 1182-83 (9th Cir. 2000), we will consult those sources in determining the validity of a particular presentence waiver of appellate rights." See United States v. Teeter, 257 F.3d 14, 24 (1st Cir. 2001).

The First Circuit in Teeter, id., makes clear that the content of the change-of-plea colloquy is critically important to a defendant's understanding of the terms of the agreement.

A reasonable expectation based on a plain reading of the district court's allocution at the plea colloquy goes to what Petitioner's understanding was concerning the forfeiture issue. Because an appellate waiver is not enforceable if the government breaches its obligation under the agreement, an appellate court must first address whether the government's conduct during sentencing (or anytime after sentencing) constitutes a breach. In United States v. Brye, 146 F.3d 1207, 1210 (10th Cir. 1998) the Tenth Circuit held the following in determining whether a breach has occurred:

"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 at the time the guilty plea was entered. United States v. Peglera, 33 F.3d 412, 414 (4th Cir. 1994)('Because a government that lives up to its commitments is the essence of liberty under law, the harm generated by allowing the government to forego its plea bargain obligations is one which cannot be tolerated.')."

The Ninth Circuit's order glossed over the fact that the government has not returned any properties to Petitioner. It did so without first addressing the content of the change-of-plea colloquy to determine whether the written agreement conflicts with the court's oral statements made during the hearing. Judge Winmill's clear and unambiguous statements during the change-of-plea colloquy concerning the return of certain properties left Petitioner with a reasonable understanding that he could trust the Judge's oral pronouncement. Certainly the court's oral pronouncement went to modify the Agreement's forfeiture clause.

Although United States v. Buchanan, 59 F.3d 914, 918 (9th Cir. 1994) concerns permitting a defendant to appeal, despite an appellate waiver, if he was led to understand by statements made by the district court at his plea colloquy or sentencing that he had the right to appeal nonetheless, then the same principle would apply to Petitioner's forfeiture issue. Because in Buchanan, id. at 918, the Ninth Circuit held the following:

"Litigants need to be able to trust oral pronouncements of district court judges. Given the district court judge's clear statements at sentencing, the defendant's assertion of understanding, and the prosecution's failure to object, we held in these circumstances, the district court's oral pronouncement controls and the **plea agreement waiver is not enforceable.**"

It is impossible to understand how the panel in this case could ignore such a fundamental principle as that established in Buchanan. Criminal defendant's "need to be able to trust oral pronouncements of district court judges." Id. at 918. That trust is maintained by enforcing their pronouncements in situations like this. Also of equal importance is the fact that the government was not silent in this matter, it fully agreed with the Judge Winmill's

allocution as did Petitioner "that certain properties will be returned to you." (Appendix F at 22). The Ninth Circuit in dismissing Petitioner's appeal without first having evaluated the court's allocution and Petitioner's reasonable understanding of those terms made a decision that not only conflicts with circuit precedent (i.e. Buchanan, Id.), but also with the majority of the other circuits.

Justice Stevens in his dissenting opinion in Libretti, supra 516 U.S. at 55, made clear that there is a "particular need for the district court to determine independently that a factual basis supports forfeiture judgments that it enters pursuant to plea agreements." In the present case, the record clearly shows that the district court judge followed this principle in resolving the dispute over forfeiture of properties leaving Petitioner with the reasonable expectation that the government would return at least two properties.

The Order (Appendix A) dismissing Petitioner's appeal is based on the court's contention that "... the record reflects neither the parties nor the district court modified the plea agreement to exclude the Santa Rosa Creek Road property from forfeiture." Although the record is silent as to which properties were to be returned to Petitioner, it is clear that the district court's material characterization of the forfeiture issues, the Petitioner's understanding of the terms, and the government's acquiescence in the court's explanation served to modify the terms of the plea agreement requiring the return of certain properties.

The Fourth Circuit has addressed precisely this situation in terms that are self evident. Because the purpose of the plea colloquy

is to establish that the defendant knowingly and voluntarily entered his plea, he will naturally and quite reasonably, rely on the district court's characterization of the material terms disclosed during the hearing. As a consequence, where a district court's mischaracterization of a material term is sufficiently prevasive to alter a defendant's understanding of the terms of his plea, the government's affirmative acquiescence in the court's explanation can serve to modify the terms of the plea agreement.

United States v. Woods, 378 F.3d 342, 349 (4th Cir. 2004)(citations omitted).

It is fundamentally wrong to tell Petitioner at the time of his plea, especially in light of the court's resolution of forfeiture issues concerning comingled funds, that certain properties will be returned to him and then seven and one-half years later for the government in concert with the district court begin forfeiting the only remaining properties (Santa Rosa Creek Road and Mount Pleasant Street) that can be returned. Furthermore, neither property has ever been tainted with comingled funds.

Petitioner, like Defendant Wood, clearly relied to his detriment on the explanations he was given at the change-of-plea colloquy. Similar to Defendant Wood, the district court's statements induced Petitioner's expectation that certain properties would be returned to him, and the government's acquiescence to them made his reliance reasonable. Wood, id. at 350. The Fourth Circuit recognized in its holding the following:

"... that 'modification of the terms of a plea agreement is ... beyond the power of the district court.' United States v. Howle, 166 F.3d 1166, 1168-69 (11th Cir. 1999). However, both through its own question and its failure to correct the misimpression created by the district court, the Government effectively achieved such a modification on these facts. Consequently, the

Government's successful attempt to block Wood from challenging the drug weight finding 'resulted in a deprivation of [Wood's] due process rights.' United States v. Martin, 25 F.3d 211, 217 (4th Cir. 1994). That the Government's breach of the plea agreement was inadvertent 'does not lessen its impact.' Santobello, supra at 262. As a result, Wood is entitled to specific performance of the modified agreement." Wood, id. at 350.

Unlike the Wood case, the government's breach was not inadvertent, it was purposeful making the impact an even greater deprivation of Petitioner's due process rights.

Furthermore, there is a heightened responsibility on the part of the government that extends beyond the negotiation and drafting of the plea agreement to all matters relating to it. Wood, id. at 348-49.

The Ninth Circuit's order dismissing Petitioner's appeal creates a conflict with the Fourth Circuit's precedent established in Wood, id., especially in light of the government's affirmative acquiescence to the district court's resolution of the forfeiture issues that served to modify the plea agreement. Not only have the Eighth, Tenth, and the District of Columbia circuits recognized the precedent set forth in Wood concerning when appellate waivers will not be enforced, Judge Ponson in his dissenting opinion in United States v. Hernandez, 647 Fed. Appx. 715, 717-718 (9th Cir. 2015) also recognized the same principle. Because the Ninth Circuit has entered a decision in conflict with the decisions of other court of appeals on the same important matter calls for the exercise of the Supreme Court's supervisory power to correct this error.

#### C. Review for Plain Error on Appeal

This Court has held that, when a defendant asserts for the

first time on appeal that the government breaches a plea agreement, the reviewing court examines the forfeited claim under the plain error test for Federal Rule of Criminal Procedure, Rule 52(b)(F.R. Crim. P.). See Puckett v. United States, 556 U.S. 129, 133 (2009).

Petitioner recognizes in federal cases that F.R. Crim. P. Rule 51(b) tells parties how to preserve claims of error. But that rule is not absolute. The provision of F.R. Crim. P. 52(b) that plain error or defects affecting substantial rights may be noticed even though they were not brought to the attention of the district court is the express exception to the Rule 51(b) clause that provides: "If the party does not have an opportunity to object to ruling or order, the absence of an objection does not later prejudice that party."

In this matter Petitioner would have had no reason to contemporaneously object to the government breach of the Agreement at sentencing to preserve his claim, because the government breach did not occur until seven and one-half years later. Furthermore, Petitioner never had an opportunity to object to the court's final order of forfeiture (Appendix C) because it ruled on December 29, 2016, one day after the government motioned the court for a final order of forfeiture on December 28, 2016 (Dkt. No. 1256). Because Petitioner was not afforded the constitutional procedural due process of notice and opportunity for a hearing preceding the deprivation of property, the Ninth Circuit should have recognized that Rule 51(b) excused Petitioner's failure to object because he never had an opportunity to do so prior to the court's final order of forfeiture. Accordingly, the

Ninth Circuit should have reviewed what could be construed as a forfeited claim under the plain error test for Rule 52(b), because Petitioner did not object to the breach of the Agreement at sentencing. There is no evidence in the record that the panel in this matter examined Petitioner's forfeited claim under the plain error test for Rule 52(b). This being the case makes the Ninth Circuit's order dismissing Petitioner's appeal for waiver contrary to Supreme Court precedent established in Puckett, *id.* at 133-134, and requires reversal for the court to examine the breach under plain-error review compelled by F.R. Crim. P. 52(b).

If the Ninth Circuit had followed the Supreme Court's holding in Puckett, *id.* at 143, it would have realized that application of plain-error review in the present context would have been the appropriate solution to examine the forfeited claim.

The forfeited claim in this case only became ripe for appeal upon the district court's final order of forfeiture (Appendix C).

The plain error in this matter was (1) the Ninth Circuit upholding the waiver when a clear breach of the plea agreement took place after it was signed (the breach in this case is even more egregious than the run-of-the-mill breach -- a fact overlooked by the panel); (2) the error is clear and obvious from the record (under the court's guidance the government agreed to return certain properties to Petitioner and has not done so); (3) It affected Petitioner's substantial rights by depriving him of property without due process in violation of the Fifth Amendment thereby prejudicing him with the loss of property (Petitioner was never afforded notice or opportunity to object to the government's motion for a final order of forfeiture (Dkt. No.

1256), thereby affecting the outcome of the district court proceedings: (4) since Petitioner has demonstrated that all three prongs has been satisfied pursuant to United States v. Olano, 556 U.S. 129, 135 (1993) as cited in Puckett, id. at 135, the Ninth Circuit should be required to remedy the error because it seriously affects the fairness, integrity, and public reputation of the judicial proceeding in this case.

#### **D. The Ninth Circuit Ignored Ordinary Contract Law Principles**

It is well established that plea agreements are subject to ordinary contract law principles. It logically follows that the circuit courts in analyzing whether the district courts have ignored this principle in determining whether a breach of the agreement has occurred should closely examine the record.

The Sixth Circuit found the following which the Ninth Circuit must not have considered in its analysis to dismiss based on waiver:

"To form a contract, the parties must have a meeting of the minds on all essential terms of the contract. Whether there has been a meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective state of mind. In analyzing oral statements for contractual implications, a court must determine the meaning that reasonable persons might have attached to the language. In order to determine whether there was mutual assent to a contract, the court applies an objective test, looking the expressed words of the parties and the visible acts. The court considers the relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their intent. (internal citations and quotations omitted)."

See Innotext v. Petra'lex USA Inc., 694 F.3d 581, 588-89 (6th Cir. 2012). The Tenth Circuit held similar to the Sixth Circuit in United States v. Rockwell Int'l Corp., 124 F.3d 1194, 1199 (10th Cir. 1997):

"Merely because a writing claims to be a final and

exclusive expression of the parties' agreement does not in itself prohibit the court from looking beyond the document to see if other agreements exist between the parties."

The only possible explanation for the panel's decision to dismiss Petitioner's appeal based on waiver is that it did not conduct a comprehensive review of the change-of-plea colloquy. Otherwise, it overlooked and/or misapprehended the expressed words of the court and the government's acquiescence thereto, which combined to modify the Agreement requiring certain properties be returned to Petitioner. Further, looking to the visible acts, the government waiting over seven years after sentencing to move for a final order of forfeiture for the only remaining properties (Santa Rosa Creek Road and Mount Pleasant Street), would leave a reasonable person (Petitioner) with the expectation that he still owned the properties, but also based on the fact that these properties had not been forfeited.

The fact that the Ninth Circuit has ignored these basic tenents of contract law as expressed by the Sixth and Tenth Circuits requires this Court to exercise its supervisory power and remand this matter back to the Ninth Circuit to determine the remedy for the clear and unambiguous breach of the Agreement.

## II

### PETITIONER ARGUES THAT HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS HAS BEEN VIOLATED

#### A. Government's Failure to Give Notice

Petitioner was not afforded notice or the opportunity to object to the government's motion for a final order of forfeiture as to the Santa Rosa Creek Road property (Dkt. No. 1256), because

he was never served with it. Further compounding this due process violation, Judge Winmill granted the government's 1256 motion dated December 28, 2016, the following day on December 29, 2016, (Dkt. No. 1257), thereby precluding Petitioner from adjudicating the matter in the district court. See Appendix C.

Petitioner's only option, due to the finality of the court's final order of forfeiture as to the Santa Rosa Creek Road property, was to file a notice of appeal because of the government's blatant disregard of Petitioner's right to due process.

The Ninth Circuit overlooked the Fifth Amendment's elementary principle of due process requiring that a deprivation of life, liberty or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case" in dismissing Petitioner's appeal. The Supreme Court has clearly stated the above principal in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950):

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

See Mathews v. Eldridge, 424 U.S. 319, 333 (1976):

"This court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v. McDonnell, 418 U.S. 539, 557-558 (1974) ... 'at a meaningful time and in a meaningful manner' Armstrong v. Manzo, 380 U.S. 545, 552 (1965)."

The deprivation of this Fifth Amendment protection to due process was certainly ignored and overlooked by the court in

dismissing Petitioner's appeal based on waiver without first examining the record, because "Notice and a meaningful opportunity to be heard are the hallmarks of procedural due process." See Ludwig v. Astrue, 681 F.3d 1047, 1053 (9th Cir. 2012).

Therefore, the Ninth Circuit's decision in this case conflicts with Supreme Court precedent, especially in light of it staying silent to Petitioner's due process claim, and thus should require remand to correct this constitutional violation.

#### **B. Fairness in the Constitutional Sense**

Fairness in the constitutional sense, as defined by due process, is designed to protect the individual citizen from the unjust acts of a powerful and unwieldly government. Based on this reasoning, the Fourth Circuit in Cooper v. United States, 594 F.2d 12, 18 (4th Cir. 1979) concluded that "expectations reasonably formed [by the defendant] in reliance upon the honor of the government in making and abiding by its proposals" (and in this case by its agreement to return certain properties to Petitioner) deserved constitutional protection.

In securing an agreement between an accused and a prosecutor, there must be safeguards to insure that the defendant receive fair treatment during plea bargaining. The source of the right to a fair plea bargaining is constitutional. Courts have drawn heavily on the ready analogies of substantive and remedial contract law to supply the body of doctrine necessary to order plea bargaining practices and to afford relief to defendants aggrieved in the negotiating process. To the extent therefore that there has evolved any general body of "plea bargain law," it is heavily freighted with these contract law analogies. However, the

core concept in plea bargaining is the existence of a constitutional right in the defendant to be treated with fairness. See Cooper, *id.* at 16.

As previously referenced in the record, the government orally agreed, explicitly as a contract matter, to return certain properties that may have been properly forfeitable back to the defendant in exchange for him not argue other properties that might not be forfeitable. Judge Winmill clarified matters by asking Petitioner if he understood that certain properties would be returned to him and certain properties would be forfeited to the government. See Appendix F at 19.

In forfeiting the Petitioner's last remaining properties, the expectations reasonably formed by him in reliance upon the honor of the government to return certain properties has been unfulfilled. It can be said that the Agreement has been breached. Because Petitioner was never given notice and opportunity to be heard before being deprived of these properties, Petitioner's right to due process and fairness in the constitutional sense has been violated.

Clearly the Ninth Circuit's decision in this matter conflicts with the Supreme Court's decisions in Santobello, *supra* at 262, and Mabry v. Johnson, 467 U.S. 504, 507-510 (1984). The Ninth Circuit cited the constitutional significance of a prosecutorial breach of a plea agreement (which it seemingly has ignored in the instant matter) in Cuero v. Cate, 850 F.3d 1019, 1022 (9th Cir. 2015). The Cuero court held the following:

"... the central issue in Mabry was whether due process concerns are implicated when a defendant accepts the prosecution's offer of a plea deal or only when the

defendant pleads guilty in detrimental reliance on the plea agreement, Mabry, at 507-08. The core holding of Mabry is thus that a plea of guilty induced by a plea agreement triggers due process protection. Together, these Supreme Court cases [Santobello and Mabry] clearly establish that a defendant whose guilty plea was induced by a prosecutorial promise is constitutionally entitled to fulfillment of that promise and that a subsequent prosecutorial breach of the plea agreement violates the defendant's due process rights."

See also Kernan v. Cuero, 199 L. Ed. 2d 236, 241 (2017).

Similar to Cuero, once Petitioner pled guilty and fully performed his promise to cooperate, and the government moved to dismiss the remaining counts in the indictment, he stood convicted pursuant to the "Judgment in a Criminal Case" signed by the Judge.

Petitioner's plea was influenced by Judge Winmill's oral statements concerning the return of certain properties and the forfeiture of others and the government's acquiescence to the court's resolution of the forfeiture issues during the change-of-plea colloquy. Petitioner is constitutionally entitled to fulfillment of the promise "that certain properties will be returned to you." The government's subsequent breach of that agreement years later violates Petitioner's due process rights.

See Cuero, id. at 1022:

"According to Mabry, at that point Cuero's [Petitioner's] plea agreement transformed from an 'executory agreement' that did not 'implicate the Constitution' to one that bore 'constitutional significance' because Cuero's guilty plea and conviction were induced by the prosecutor's agreement to reduced charges. 467 U.S. at 507-08. Cuero's plea rested on a promise of the prosecutor, requiring that promise to be fulfilled. Santobello, 404 U.S. at 262. The plea agreement became a constitutionally enforceable agreement, and Cuero [Petitioner] was entitled to have the prosecution carry out its end of the deal."

Petitioner, to his detriment, relied on the government's integrity to fulfill the Agreement that now appears to be a misrepresentation due its broken promise and breach of the

Agreement, not only a material point of fact but also of law, that was certainly overlooked and misapprehended by the panel in its decision to dismiss his appeal based on waiver.

"Because a government that lives up to its commitments is the essence of liberty under law, the harm generated by allowing the government to forego its plea bargain obligations is one which cannot be tolerated." United States v. Peglera, 33 F.3d 412, 414 (4th Cir. 1994).

### III

#### **PETITIONER ARGUES THAT THE PRELIMINARY ORDER OF FORFEITURE HELD AN EXCEPTION TO FOUR PROPERTIES**

##### **A. The Santa Rosa Creek Road and Mount Pleasant Street Properties are the Only Two Properties that can be Returned Pursuant to the Change-of-Plea Colloquy**

It is the Preliminary Order of Forfeiture ("POF") that needs to be read in conjunction with the pertinent part of the change-of-plea colloquy concerning return of properties. It is the language of the last paragraph of page 20 of the POF (see Appendix D at 20) that the Ninth Circuit must have overlooked in examining the record. The last paragraph reads as follows:

"The United States shall have clear title to the above-described properties following the court's disposition of all third-party interests, or, if none, following the expiration of the period provided in 21 U.S.C. § 853(n)(2), which is incorporated by 18 U.S.C. § 982(b), for the filing of third party petitions, **except** as to those properties to be handled as described in the Plea Agreement:

- (1) 4914 Rangeview Ave., Los Angeles, CA [which belonged Petitioner's now deceased brother Jeffrey Sperow];
- (2) 545 Tune Road, El Prado Taos County, New Mexico [which belongs to Petitioner's sister and brother-in law, Janelle and Tony Palma (Tony Plama is a retired NYPD detective)];
- (3) 1433, 1433½, and 1435 Mount Pleasant Street, Los Angeles County, Los Angeles, California [was purchased by Petitioner in January of 1972 for \$23,500 prior to any of the alleged predicate acts in the conspiracy and no comingled funds were ever involved in the purchase and maintenance of the property];

(4) Santa Rosa Creek Road, Adelaide, California [purchased by Petitioner in 1979 for \$152,000 and no comingled funds were ever involved in the purchase and maintenance of the property].

Properties (1) and (2) above could never have been returned to Petitioner because they did not belong to him and further, he has never held an interest in either of the properties or invested in them, thereby making forfeiture of them inapposite.

Petitioner had no reason to timely appeal the POF because the order held exception to four properties that were to be handled as described in the Plea Agreement. Petitioner's reasonable understanding and expectation was that properties (3) and (4) were to be returned based on Judge Winmill's oral statements at the change-of-plea colloquy and the government's acquiescence, especially in light of the fact that seven and one-half years passed before the government moved to forfeit the properties.

In a matter like this the court is to look to the objective proof to ascertain defendant's reasonable expectation of the bargain. See Travis, supra at 1132. The objective proof on the record, besides the court's allocution, to ascertain Petitioner's expectation of the bargain, the Ninth Circuit should have considered his judicial notice that was filed into the case. Had this been properly considered it would have evidenced that for seven and one-half years Petitioner paid the mortgage, property taxes, insurance, and maintained the properties with the reasonable expectation that he was the rightful owner.

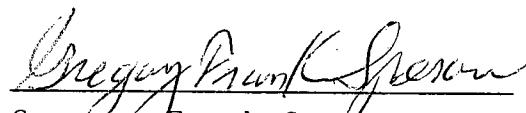
Therefore, the matter did not become ripe for appeal until the court granted the government's motion for final order of forfeiture (Dkt. No. 1256) on December 29, 2016, thereby breaching the Agreement. See Appendix C.

The record makes clear that the Agreement concerning forfeiture was modified during the change-of-plea colloquy, a fact that cannot be disputed. Because the properties to be returned to Petitioner were not named that ambiguity must be resolved against the government. After seven and one-half years only two properties had not been forfeited. Logic dictates that the two remaining properties are the properties that must be returned to Petitioner. Any other explanation would mean that a breach in the Agreement occurred earlier because certain properties (more than one) were to be returned and only two remained. Whether the breach occurred earlier or later is no consequence. It is the breach that makes the appellate waiver not enforceable. This by of itself makes the Ninth Circuit's order dismissing Petitioner's appeal in light of a valid waiver in conflict with all other circuits and the Supreme Court on this very issue. This matter requires remand for appellate review to avoid a miscarriage of justice.

#### CONCLUSION

Based on the facts and reasons presented herein, the petition for a writ of certiorari should be granted.

Respectfully submitted this 14th day of November, 2018.

  
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Gregory Frank Spelow  
Petitioner pro se