

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

SILVIO LOPEZ CUELLAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a defendant's plea agreement waiver of the statutory right of a sentencing appeal preclude appellate review of the sentence even where the district court fails to establish a sentencing guidelines range at sentencing?

INTERESTED PARTIES

The only parties interested in the proceeding other than those named in the caption of the appellate decision.

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TABLE OF AUTHORITIES

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<i>Douglas v. California</i> , 372 U.S. 353 (1963)	5
<i>Garza v. Idaho</i> , 139 S.Ct. 738 (2019)	5
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	5
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983)	5
<i>Molina-Martinez v. United States</i> , 136 S.Ct. 1338 (2016)	5
<i>Rosales-Mireles v. United States</i> , 138 S.Ct. 1897 (2018)	5
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<i>United States v. Khattak</i> , 273 F.3d 557 (3d Cir. 2001)	4
<i>United States v. Mezzanatto</i> , 513 U.S. 196 (1995)	3
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	4

STATUTORY AND OTHER AUTHORITY:

U.S. Const. amend. V	1, 3, 6
18 U.S.C. § 1028A	2
18 U.S.C. § 1029	1
18 U.S.C. § 3742(a)	2
28 U.S.C. § 1254(1)	1

28 U.S.C. § 2255	6
Sup. Ct. R. 13.1	1
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U.S.S.G. § 2B1.1(b)(11)(B)(i)	2

PETITION FOR WRIT OF CERTIORARI

David Chiddo respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 17-13523 in that court on January 11, 2019, *United States v. Cuellar* (not published in the Federal Reporter).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (1a).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on December 1, 2017. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

U.S. Const. amend. V (Due Process Clause)

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

STATEMENT OF THE CASE

Petitioner was indicted on January 27, 2017, on charges of conspiring to use, and using, unauthorized access devices during a one-year period to obtain anything of value aggregating more than \$1,000, in violation of 18 U.S.C. § 1029(a)(2), (b)(2) (Counts 1 and 2); and using the means of identification of another person without lawful

authority, on seven different occasions, during and in relation to a felony offense, in violation of 18 U.S.C. § 1028A(a)(1) (Counts 3-9). Petitioner entered into a plea agreement with the government, which provided for his waiver of statutory sentencing appeal rights under 18 U.S.C. § 3742(a) if the district judge imposed a sentence within or below “the advisory guideline range *that the Court establishes at sentencing*.” App. 25 a. At sentencing, the court failed to establish a guideline sentencing range, but imposed a sentence of 37 months, which was at the top of the guideline range stated in the probation office’s presentence report and advocated by the government. App. 4a. The district court rejected petitioner’s request for a two-year sentence.

On appeal to the Eleventh Circuit, petitioner claimed that the district court committed plain error by imposing a two-level guideline enhancement for trafficking in or producing an unauthorized access device, when the evidence showed no more than mere use of a fake credit card. Pet. C.A. Br. 8–9, 12–19. Petitioner contended the sentencing appeal waiver was inapplicable because “the district court never established an advisory guideline range on the record at sentencing. Nor did the court adopt on the record at sentencing the PSI’s recommended advisory guideline range or otherwise set forth what the advisory guideline range was.” *Id.* at 9.

The government filed an answer brief, arguing that petitioner’s appeal waiver barred his sentencing appeal and that, in any event, essentially every use of a false credit card “involve[s] the production” of a false credit card, i.e., that no matter how a defendant acquires a false credit card, it must have been produced by someone, making petitioner personally liable under U.S.S.G. § 2B1.1(b)(11)(B)(i) and guideline relevant

conduct principles. Govt. C.A. Br. 10–11.

The Eleventh Circuit dismissed the appeal, without reaching the plain sentencing error and without offering an explanation of how the appeal waiver could apply if the district court never established a guideline range at sentencing. App. 1a.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Certiorari to Limit Unwarranted Application of the Appeal Waiver Provisions, Particularly Where They Facilitate a Manifest Injustice.

The Court has not yet held that a defendant’s waiver of the statutory right to appeal, exacted by the government as a condition of the defendant’s receiving the benefit of a plea agreement, is constitutionally or statutorily permissible or whether the statutory right of appeal is coextensive with any right afforded by the Due Process Clause. This Court has, in other contexts, held that a defendant may knowingly and voluntarily waive constitutional and statutory rights as part of a plea agreement. *See United States v. Mezzanatto*, 513 U.S. 196, 200–02 (1995); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). But in those cases, the rights waived related to the conviction itself or the admissibility of evidence to prove conviction. *Id.*

The Eleventh Circuit has adopted a practice of accepting appellate waivers even where a plain sentencing error occurs, as in petitioner’s case. *See* App. 1a. The Eleventh Circuit’s holding conflicts with that of the Tenth Circuit and is in tension with the appeal waiver limitations imposed by the Third Circuit. *See United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (“We hold that enforcement of an

appellate waiver does not result in a miscarriage of justice unless enforcement would result in one of the four situations enumerated in [*United States v. Elliott*, 264 F.3d 1171, 1174 (10th Cir. 2001)]. We further hold that to satisfy the fourth *Elliott* factor—where the waiver is otherwise unlawful—“the error [must] seriously affect[] the fairness, integrity or public reputation of judicial proceedings[,]” as that test was employed in *United States v. Olano*, 507 U.S. 725, 732 ... (1993).”; *United States v. Khattak*, 273 F.3d 557, 562–63 (3d Cir. 2001) (“[W]e believe waivers of appeals should be strictly construed.”; holding that manifest injustice exception applies, but reserving question of whether it is satisfied by *Olana* test).¹

Because an appeal waiver by a criminal defendant in this context should be construed strictly, even if there were no exception for plain errors resulting in unjust incarceration, the waiver should nevertheless not be deemed enforceable unless the preconditions or predicates for the waiver have been established on the record.

Under petitioner’s plea agreement, the statutory appeal waiver was applicable only if petitioner’s guideline range was established by the district court at sentencing and petitioner was sentenced within or below that range. App. 6a. But that circumstance did not occur in petitioner’s case. As the government’s appellate answer

¹ There are other circuit conflicts regarding the application of appeal waivers in federal criminal cases, but the Court has thus far declined to grant review. *See* Amicus Brief, in Support of Petitioner, filed by National Association of Criminal Defense Lawyers, *Mearing v. United States of America*, 2018 WL 4913729 (Oct. 5, 2018), at 3 & cases cited therein (contending that it is “quite likely[] that federal criminal defendants entering identical plea agreements for the same federal crime would be understood to have waived different appellate rights, based solely on the jurisdiction in which their case is pending”).

brief acknowledged, at no point in the sentencing proceedings did the district court announce a guideline range, relevant offense levels, or criminal history category, and the sentencing court also failed to adopt the presentence report. That failure by the district court freed petitioner from the appeal waiver. Petitioner should therefore have had the benefit of appellate review of the plain sentencing error in his case. *See Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907–08 (2018) (miscalculation of sentencing guidelines range that was determined to be plain error and to affect defendant’s substantial rights would, in the ordinary case, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus would call for the court of appeals to exercise its discretion to vacate defendant’s sentence); *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345 (2016) (“When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant’s ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.”)

Strict construction of an appeal waiver, and requiring adherence to its preconditions, is also warranted because of the important need to avoid constitutional doubt regarding whether, in order to rectify plain error, the right to appeal is constitutional in nature. *See Garza v. Idaho*, 139 S.Ct. 738, 744 n. 4 (2019) (“While this Court has never recognized a ‘constitutional right to an appeal,’ it has ‘held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent.’ *Jones v. Barnes*, 463 U.S. 745, 751 ... (1983); *see also Douglas v. California*, 372 U.S. 353 ... (1963); *Griffin v. Illinois*, 351 U.S. 12, 18 ... (1956) (plurality opinion).”).

If there is no constitutional right to appeal the unlawful deprivation of liberty, and if legislatures are therefore free to disband all courts of appeals and eliminate all appellate rights, the legal world resulting from such a hypothesis might not be consistent with due process, particularly given the statutory limitations on collateral post-conviction relief under 28 U.S.C. § 2255.

Petitioner did not waive any *constitutional* right to appeal sentencing errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. And his right to enforcement of the plea agreement, *see Santobello v. New York*, 404 U.S. 257, 262–63 (1971), is itself constitutionally required.

CONCLUSION

Given the need for at least a strict construction of appeal waivers, and given the absence of an essential predicate for the waiver in petitioner’s case, the waiver was inapplicable. Because of the importance of the right of appeal in the federal criminal judicial system, the Court should grant the petition to review and clarify the permissible application of appeal waivers.

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.
Counsel for Petitioner

Miami, Florida

April 2019

APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, <i>United States v. Cuellar</i> , No. 17-13523 (11th Cir. Jan. 11, 2019)	1a
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Sentencing Transcript, United States District Court, S.D. Fla., <i>United States v. Cuellar</i> , No. 17-cr-20073-CMA (S.D. Fla. July 12, 2017)	9a
Plea Agreement United States District Court, S.D. Fla., <i>United States v. Cuellar</i> , No. 17-cr-20073-CMA (S.D. Fla. May 1, 2017)	20a

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13523
Non-Argument Calendar

D.C. Docket No. 1:17-cr-20073-CMA-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SILVIO LOPEZ CUELLAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(January 11, 2019)

Before WILSON, BRANCH and JULIE CARNES, Circuit Judges.

PER CURIAM:

The Government's motion to dismiss this appeal pursuant to the sentence appeal waiver in Silvio Cuellar's plea agreement is GRANTED. *See United States v. Bushert*, 997 F.2d 1343, 1350-51 (11th Cir. 1993) (sentence appeal waiver will

be enforced if it was made knowingly and voluntarily); *United States v. Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir. 2005) (waiver of the right to appeal includes waiver of the right to appeal difficult or debatable legal issues or even blatant error).

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA**JUDGMENT IN A CRIMINAL CASE****v.****Case Number - 1:17-20073-CR-ALTONAGA-3****SILVIO LOPEZ CUELLAR**

USM Number: 09833-104

Counsel for Defendant: Gregory V. Chonillo, Esq.
 Counsel for the United States: Jessica Obenauf, Esq.
 Court Reporter: Stephanie McCarn

The defendant pled guilty to Counts 1, 2, 7, 10, and 11 of the Indictment.
 The defendant is adjudicated guilty of the following offenses:


<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
U.S.C. § 1029(b)(2)	Conspiracy to Commit Access Device Fraud	October 27, 2016	1
18 U.S.C. § 1029(a)(2)	Use of One or More Unauthorized Access Devices to Obtain Anything of Value Aggregating \$1000 or More	October 27, 2016	2
18 U.S.C. § 1028A(a)(1)	Aggravated Identity Theft	September 29, 2016	7
18 U.S.C. § 1029(b)(2)	Conspiracy to Commit Access Device Fraud	October 27, 2016	10
18 U.S.C. § 1029(a)(3)	Possession of Fifteen or More Unauthorized Access Devices	October 27, 2016	11

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The remaining Counts are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
 July 11, 2017


CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

July 12, 2017

DEFENDANT: SILVIO LOPEZ CUELLAR
CASE NUMBER: 1:17-20073-CR-ALTONAGA-3

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **61 months**. This term consists of concurrent terms of 37 months as to each of Counts 1, 2, 10, and 11; and a consecutive term of 24 months as to Count 7.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: SILVIO LOPEZ CUELLAR
CASE NUMBER: 1:17-20073-CR-ALTONAGA-3

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**. This term consists of 3 years as to each of Counts 1, 2, 10, and 11; and 1 year as to Count 7, with all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: SILVIO LOPEZ CUELLAR
CASE NUMBER: 1:17-20073-CR-ALTONAGA-3

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Community Service - The defendant shall perform **200 hours** of community service as monitored by the U.S. Probation Officer.

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Travel - If not removed, defendant is not permitted to travel outside of the Southern District of Florida unless restitution is paid in full.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: SILVIO LOPEZ CUELLAR
CASE NUMBER: 1:17-20073-CR-ALTONAGA-3

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$500.00	0	\$161,782.76

Restitution with Imprisonment -

It is further ordered that the defendant shall pay restitution in the amount of **\$161,782.76**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of \$50.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 15% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Amount of Loss</u>	<u>Amount of Restitution Ordered</u>	<u>Priority Order or Percentage of Payment</u>
TO BE PROVIDED BY THE UNITED STATES PROBATION OFFICE	\$161,782.76	\$161,782.76	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: SILVIO LOPEZ CUELLAR
CASE NUMBER: 1:17-20073-CR-ALTONAGA-3

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of **\$500.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Restitution in the amount of 161,782.76 is joint and several with the co-defendants in the instant offense.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 17-cr-20073-CMA

UNITED STATES OF AMERICA, Miami, Florida
Plaintiff, July 11, 2017
vs. 10:16 a.m. to 10:31 a.m.
SILVIO LOPEZ CUELLAR, Courtroom 11-4
Defendant. (Pages 1 to 11)

SENTENCING
BEFORE THE HONORABLE CECILIA M. ALTONAGA,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: JESSICA KAHN OBENAUF, ESQ.
Assistant United States Attorney
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(786) 441-5234
gregchonillo@gmail.com

Also Present: Sherika Prosper, USPO
Official Court Interpreter

REPORTED BY: STEPHANIE A. McCARN, RPR
Official Court Reporter
400 North Miami Avenue
Twelfth Floor
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(305) 523-5518
Stephanie_McCarn@flsd.uscourts.gov

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I N D E X

WITNESSES

<u>WITNESSES FOR THE GOVERNMENT:</u>	<u>Page</u>
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<u>EXHIBITS IN EVIDENCE</u>	<u>PRE</u>	<u>MARKED</u>	<u>ADMITTED</u>
Government's Exhibit No.	--	--	--
Defendant's Exhibit No.	--	--	--

MISCELLANEOUS

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1 (The following proceedings were held at 10:16 a.m.)

2 THE COURT: Good morning.

3 United States and Silvio Lopez Cuellar.

4 MR. CHONILLO: Yes, Your Honor, Greg Chonillo on
5 behalf of my client, Silvio Lopez Cuellar, who is present in
6 court with the aid of an interpreter.

7 THE COURT: Good morning.

8 MR. CHONILLO: Good morning.

9 MS. OBENAUF: Good morning, Your Honor,
10 Jessica Obenauf on behalf of the United States.

11 THE COURT: And from Probation?

12 PROBATION OFFICER: Good morning, Your Honor,
13 Sherika Prosper with U.S. Probation.

14 THE COURT: Good morning.

15 Mr. Lopez Cuellar, we are here for your sentencing
16 hearing. Have you had the opportunity of reviewing with your
17 attorney the presentence investigation report?

18 THE DEFENDANT: That's right.

19 THE COURT: All right. I'll be hearing first from the
20 Government, then from your attorney, and then from you.

21 Ms. Obenauf.

22 MS. OBENAUF: Thank you, Your Honor.

23 First, this morning the parties have signed a joint
24 motion for a court order approving agreed-upon restitution.
25 The Government will file that -- the original signed version in

1 CM/ECF. The amount is \$161,782.76 to be ordered jointly and
2 severally with the Defendant's codefendants.

3 The -- the Government will provide a victim list to
4 Probation with the -- the payment information.

5 There are no objections to the PSI. The guideline
6 range for this Defendant is 30 to 37 months, and then two years
7 consecutive for Count 7, the aggravated identity theft.

8 The Government is requesting a sentence of 37 months
9 plus the two years of consecutive imprisonment for a couple of
10 reasons. Based on the factors in Title 18, United States Code,
11 Section 3553, namely, the need for -- the need to promote
12 respect for the law and provide just punishment for the
13 offense, it's particularly egregious in this case that the
14 Defendant was on probation at the time that these offenses
15 occurred. That has been calculated into his criminal history
16 points, but what has not been calculated is the fact that it
17 was for the same conduct.

18 The Defendant and his codefendants in this case, as
19 Your Honor knows, used fraudulent credit cards to purchase
20 large amount of stone tile.

21 THE COURT: Slow down.

22 MS. OBENAUF: Oh, sorry. Large amounts of stone tile
23 at various retailers. At the time, the Defendant was on
24 probation for the same exact conduct. The time line is that
25 the Defendant was placed on probation in Broward County for

1 multiple felonies on February 25th, 2016. Pursuant to the
2 indictment in this case, the charged conspiracy began in July
3 of 2016. So just months after he received a break in the face
4 of at least 20 years' prison, he continued the same course of
5 conduct.

6 Based on the undisputed facts in the PSI, we know that
7 this Defendant has been engaged, um, in a continuous course of
8 conduct such as this since 2013. Also, it's important in this
9 case to protect the public from further crimes of the
10 Defendant.

11 The restitution amount, as I've already informed the
12 Court, is over \$160,000. What's important about that is that
13 there are three stone tile retailers in this case, one of them
14 being Atlantic Stone, another was Haifa Limestone. Those are
15 small businesses. Atlantic Stone suffered an out-of-pocket
16 loss of more than \$50,000. Haifa suffered more than \$80,000
17 loss, not covered by insurance or the bank. That's an
18 out-of-pocket loss suffered by these small businesses.

19 It's -- it's obvious that based on the Defendant's
20 history and his conduct in this case, that it's important for
21 us to promote the respect for the law and the fact that the
22 Defendant, it's clear, doesn't have much respect for the law as
23 seen by his continuous conduct, sanctioned, released back in
24 the community and his continuation of his conduct.

25 And for those reasons, the Government is requesting

1 37 months plus two years. Thank you.

2 THE COURT: Thank you very much.

3 Mr. Chonillo.

4 MR. CHONILLO: Yes, Judge. Thank you.

5 In response to what the Government is saying,
6 basically, we have a situation here where the Court has to
7 weigh the equities. We agree, and my client is here to accept
8 responsibility for what he's done, and, yes, he was on
9 probation during the time that he was doing it. So, yes,
10 that -- that is true. However, there's an outstanding amount
11 of \$161,000 left to victims that are not made whole in this
12 case, Judge. And that is, according to what the Government has
13 just said, essential for these three stone tile retailers that
14 are small businesses. I would think that they would want to be
15 made whole.

16 Placing Mr. Cuellar Lopez [sic] in custody for
17 approximately, you know, over 60 months isn't going to assist
18 those victims in getting whole. What will assist them will be
19 allowing my client to be given a minor, after the -- the
20 minimum mandatory 24 months, a minor amount of jail time so he
21 can get out and go back to work, legitimate work.

22 THE COURT: Isn't he going to be deported to Cuba?

23 MR. CHONILLO: Yeah, Judge, but they are not sending
24 anybody physically to Cuba. There's a -- there's a hiatus on
25 that. So more likely than not what will happen is that he'll

1 be given a parole, which he'll be allowed to work and drive in
2 the community. So chances are he'll be more likely than not
3 released on supervised release.

4 He has a license or he has the ability to make money.
5 He's an air conditioner repairman, can open up his own business
6 and do that for a living in -- in an attempt to try and make
7 these victims whole, which is my client's intention. My
8 client's family is present today, and they're 100 percent
9 willing to support him in order for him to try and do that.

10 THE COURT: Did he make the victims whole when he was
11 on probation in Broward?

12 MR. CHONILLO: Yes, he was. He was making payments,
13 and he almost had everybody paid off. And it wasn't with
14 illegitimate money, Judge. He was working as a air conditioner
15 repairman during that time. So I think -- I think Your Honor
16 has to weigh the victims' interest in this case, which I
17 believe would be substantial with -- against the need to
18 promote justice and -- and to treat the Defendant fairly
19 pursuant to the factors listed in the 3553.

20 I suspect, Judge, that quite possibly, and I -- I
21 don't want to not pass the laugh test, but 24 months, maybe
22 another 6 months and allow him to be released to supervised
23 release or to community control, I mean, or to house arrest and
24 allow him to work would be more beneficial to these victims
25 than having him sit in prison almost 60 months where nothing is

1 being done for these people. He can't -- he can't generate any
2 income in there.

3 Thank you, Judge.

4 THE COURT: Thank you.

5 Mr. Lopez Cuellar, I'll hear from you now.

6 THE DEFENDANT: Yes. I want to ask forgiveness of my
7 family and all the victims that were involved in this offense.
8 Sorry.

9 (Pause in proceedings.)

10 THE COURT: I've carefully considered the presentence
11 investigation report, the history and characteristics of this
12 Defendant, the nature and circumstances of the offense conduct,
13 the need to provide deterrence, specific deterrence to
14 Mr. Lopez Cuellar so that he can cease his criminal behavior,
15 the need to provide general deterrence to others to safeguard
16 people's identities and to ensure that merchants are not
17 defrauded, the need to promote respect for the law, and that
18 the sentence should reflect just how serious the offense
19 conduct was.

20 And I would agree with the Government, this is a very
21 serious offense made all the more egregious because Mr. Lopez
22 Cuellar was on probation for the exact same type of offense
23 conduct. So the State court gave Mr. Lopez Cuellar the
24 opportunity to repay victims there and to live within the law,
25 and Mr. Lopez Cuellar turned around and did this.

1 Giving very careful consideration to the factors in
2 18 U.S. Code, Section 3553, it is the judgment of the Court
3 that Silvio Lopez Cuellar is committed to the custody of the
4 Bureau of Prisons, to be imprisoned for 37 months as to
5 Counts 1, 10, 11 and 2, and a consecutive term of 24 months as
6 to Count 7.

7 The Defendant will pay joint and several restitution
8 with his codefendants in the amount of \$161,782.76. During
9 incarceration, if the Defendant earns wages in a federal prison
10 industries job, he must pay 50 percent of wages earned toward
11 this financial obligation. If he does not work in a federal
12 prison industries job, he must pay a minimum of \$50 per quarter
13 toward the financial obligations imposed.

14 Upon release from incarceration, the Defendant will
15 pay restitution at the rate of 15 percent of monthly gross
16 earnings until the Court alters that payment schedule in the
17 interest of justice.

18 The U.S. Bureau of Prisons, U.S. Probation Office and
19 U.S. Attorney's Office will monitor the payment of restitution
20 and report to the Court any material change in the Defendant's
21 ability to pay. These payments do not preclude the Government
22 from using any other anticipated or unexpected financial gains,
23 assets or income of the Defendant to satisfy restitution.

24 Restitution is to be made payable to the Clerk of the
25 United States Courts and, in turn, is to be forwarded to the

1 victims.

2 Upon release from imprisonment, Mr. Lopez Cuellar, you
3 will be on supervised release for concurrent terms of three
4 years as to Counts 1, 2, 10 and 11, and one year as to Count 7.

5 Within 72 hours of release from the custody of the
6 U.S. Bureau of Prisons, you will report in person to the
7 probation office in the district to which you are released.

8 While on supervised release, you will not commit any
9 crimes. You are prohibited from possessing a firearm or other
10 dangerous device. You will not possess a controlled substance.

11 You will cooperate in the collection of DNA. You will
12 comply with standard conditions of supervised release,
13 including the following special conditions: You will surrender
14 to Immigration for removal following your imprisonment. You
15 will comply with the financial disclosure requirement. Unpaid
16 restitution, fines or special assessments and permissible
17 search of are noted in Part G of the presentence report.

18 You will actively seek and maintain full-time
19 employment. You may not incur any new debts without the
20 approval of the Court. And you will perform 200 community
21 service hours. You must also pay the United States a special
22 assessment of \$100 as to each count of conviction for a total
23 of \$500.

24 Now that the sentence has been imposed, does the
25 Defendant or his attorney object to the Court's findings or the

1 manner in which the sentence was announced?

2 MR. CHONILLO: No, Judge.

3 THE COURT: Mr. Lopez Cuellar, you have the right to
4 appeal the sentence. Any notice of appeal must be filed within
5 14 days after entry of the judgment. If you're unable to pay
6 the cost of an appeal, you may apply for leave to appeal
7 *in forma pauperis*.

8 Is there anything additional?

9 MS. OBENAUF: Yes, Your Honor. Government moves to
10 dismiss Count 9 of the indictment.

11 THE COURT: That count is dismissed.

12 Mr. Chonillo, anything additional?

13 MR. CHONILLO: No, Your Honor.


14 THE COURT: All right. You all have a good day.

15 (The proceedings adjourned at 10:31 a.m.)

16 C E R T I F I C A T E

17
18 I hereby certify that the foregoing is an
19 accurate transcription of the proceedings in the
20 above-entitled matter.

21
22
23 02/23/18
DATE

24 
STEPHANIE A. McCARN, RPR
Official United States Court Reporter
400 North Miami Avenue, Twelfth Floor
Miami, Florida 33128
25 (305) 523-5518

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 17-20073-CR-ALTONAGA

UNITED STATES OF AMERICA

vs.

SILVIO LOPEZ CUELLAR,

Defendant.

PLEA AGREEMENT

The United States Attorney's Office for the Southern District of Florida ("this Office") and Silvio Lopez Cuellar (the "Defendant") enter into the following agreement:

1. The Defendant agrees to plead guilty to Counts 1, 2, 7, 10, and 11 of the Indictment, which charge the Defendant with conspiracy to commit access device fraud, in violation of Title 18, United States Code, Section 1029(b)(2) (Count 1); use of one or more unauthorized access devices, in violation of Title 18, United States Code, 1029(a)(2) (Count 2); aggravated identity theft, in violation of Title 18, United States Code, Section 1028A(a)(1) (Count 7); conspiracy to commit access device fraud, in violation of Title 18, United States Code, Section 1029(b)(2) (Count 10); and possession of fifteen or more unauthorized access devices, in violation of Title 18, United States Code, Section 1029(a)(3) (Count 11).

2. This Office agrees to seek dismissal of Count 9 of the Indictment after sentencing.

3. The Defendant is aware that the sentence will be imposed by the Court after considering the advisory Federal Sentencing Guidelines and Policy Statements (the "Sentencing Guidelines"). The Defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be

determined by the Court relying in part on the results of a pre-sentence investigation by the Court's probation office, which investigation will commence after the guilty plea has been entered. The Defendant is also aware that, under certain circumstances, the Court may depart from the advisory Sentencing Guidelines range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The Defendant is further aware and understands that the Court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose a sentence within that advisory range; the Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines advisory range. Knowing these facts, the Defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses identified in paragraph 1 and that the Defendant may not withdraw the plea solely as a result of the sentence imposed.

4. The Defendant understands and acknowledges that, as to Counts 1 and 10, the court may impose a statutory maximum term of imprisonment of up to 5 years as to each Count, followed by a term of supervised release of up to 3 years; as to Counts 2 and 11, the Court may impose a statutory maximum term of imprisonment of up to 10 years as to each Count, followed by a term of supervised release of up to 3 years; and as to Count 7, the Court must impose a term of imprisonment of 2 years, to run consecutive to any term of imprisonment imposed for Counts 1, 2, 10, and 11, followed by a term of supervised release of up to 1 year, which may run concurrently to the term of supervised release imposed for Counts 1, 2, 10, and 11. In addition to a term of imprisonment and supervised release, the Court may impose a fine of up to \$250,000 and must order restitution as to each Count.

5. The Defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 3 of this agreement, a special assessment in the amount of \$100 per count of conviction, for a total of \$500, will be imposed on the Defendant. The Defendant agrees that any special assessment imposed shall be paid at the time of sentencing. If the Defendant is financially unable to pay the special assessment, the Defendant agrees to present evidence to this Office and the Court at the time of sentencing as to the reasons for the Defendant's failure to pay.

6. This Office reserves the right to inform the Court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the Defendant and the Defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

7. This Office agrees that it will recommend at sentencing that the Court reduce by two levels the Sentencing Guidelines level applicable to the Defendant's offense, pursuant to Section 3E1.1(a) of the Sentencing Guidelines, based upon the Defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the Defendant's offense level is determined to be 16 or greater, this Office will file a motion requesting an additional one level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the Defendant has assisted authorities in the investigation or prosecution of the Defendant's own misconduct by timely notifying authorities of the Defendant's intention to enter a plea of guilty, thereby permitting the United States to avoid preparing for trial and permitting the United

States and the Court to allocate their resources efficiently. This Office, however, will not be required to make this motion and these recommendations if the Defendant: (a) fails or refuses to make a full, accurate and complete disclosure to the probation office of the circumstances surrounding the relevant offense conduct; (b) is found to have misrepresented facts to the United States prior to entering into this plea agreement; or (c) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

8. This Office and the Defendant agree that, although not binding on the probation office or the Court, they will jointly recommend that the Court make the following findings and conclusions as to the sentence to be imposed:

- a. Loss Amount: Under Section 2B1.1(b)(1), the relevant amount of actual, probable or intended loss resulting from the offense committed in this case is at least greater than \$150,000, but could be determined to be a higher amount at sentencing.
- b. Victims: Under Section 2B1.1(b)(2), the offense involved 10 or more victims.

9. The Defendant is aware that the sentence has not yet been determined by the Court. The Defendant also is aware that any estimate of the probable sentencing range or sentence that the Defendant may receive, whether that estimate comes from the Defendant's attorney, this Office, or the probation office, is a prediction, not a promise, and is not binding on this Office, the probation office or the Court. The Defendant further understands that any recommendation that this Office makes to the Court as to sentencing, whether pursuant to this agreement or otherwise,

is not binding on the Court and the Court may disregard the recommendation in its entirety. The Defendant understands and acknowledges, as previously acknowledged in paragraph 3 above, that the Defendant may not withdraw his plea based upon the Court's decision not to accept a sentencing recommendation made by the Defendant, this Office, or a recommendation made jointly by the Defendant and this Office.

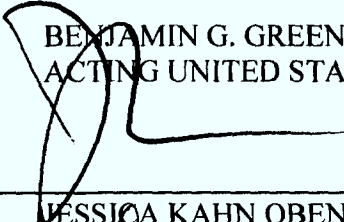
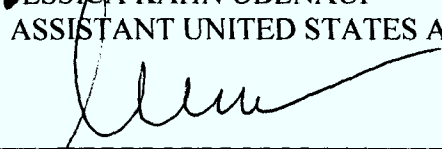
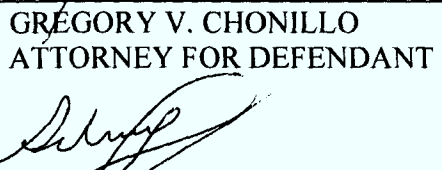

10. The Defendant agrees, based on his convictions for violations of Title 18, United States Code, Section 1029, as charged in Counts 1, 2, 10, and 11 of the Indictment, to forfeit all property, real or personal, that constitutes or is derived from proceeds traceable to the offense and all property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of that offense is forfeitable to the United States. The Defendant waives all interest in the above-named property in any administrative or judicial forfeiture proceeding, whether criminal or civil, state or federal, and also agrees to voluntarily abandon all right, title, and interest in the above-named property. The Defendant consents to the entry of orders of forfeiture for such property and waives the requirements of Rules 32.2 and 43(a) of the Federal Rules of Criminal Procedure regarding notice of the forfeiture in the Indictment, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. The Defendant admits and agrees that the conduct described in the Indictment and Factual Proffer provide a sufficient factual and statutory basis for the forfeiture of the property sought by the United States. The Defendant knowingly and voluntarily waives any claim or defense that he may have under the Eighth Amendment to the United States Constitution, including any claim of excessive fine or penalty with respect to the forfeited property.

11. The Defendant recognizes that pleading guilty may have consequences with respect to the Defendant's immigration status if the Defendant is not a natural-born citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offenses to which the Defendant is pleading guilty. In addition, under certain circumstances, denaturalization may also be a consequence of pleading guilty to a crime. However, removal, denaturalization, and other immigration consequences are the subject of a separate proceeding, and the Defendant understands that no one, including, the Defendant attorney or the Court, can predict to a certainty the effect of the Defendant's conviction on the Defendant's immigration status. The Defendant nevertheless affirms that the Defendant wants to plead guilty regardless of any immigration consequences that the Defendant's plea may entail, even if the consequence is the Defendant's denaturalization and automatic removal from the United States.

12. The Defendant is aware that Title 18, United States Code, Section 3742 and Title 28, United States Code, Section 1291 afford the Defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the Defendant hereby waives all rights conferred by Sections 3742 and 1291 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing. The Defendant further understands that nothing in this agreement shall affect the United States' right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b) and Title 28, United States Code, Section 1291. However, if the United States appeals the Defendant's sentence pursuant to Sections 3742(b) and 1291, the

Defendant shall be released from the above waiver of appellate rights. By signing this agreement, the Defendant acknowledges that the Defendant has discussed the appeal waiver set forth in this agreement with the Defendant's attorney.

13. This is the entire agreement and understanding between this Office and the Defendant. There are no other agreements, promises, representations, or understandings.

Date:	<u>5/1/17</u>	By:	 BENJAMIN G. GREENBERG ACTING UNITED STATES ATTORNEY
Date:	<u>4-30-17</u>	By:	 JESSICA KAHN OBENAUF ASSISTANT UNITED STATES ATTORNEY
Date:	<u>4-30-17</u>	By:	 GREGORY V. CHONILLO ATTORNEY FOR DEFENDANT
Date:	<u>4-30-17</u>	By:	 SILVIO LOPEZ CUELLAR DEFENDANT