# APPENDIX A

(Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit)

# *United States v. Martinez*

United States Court of Appeals for the Fifth Circuit

June 14, 2019, Filed

No. 17-50889

**Reporter**
2019 U.S. App. LEXIS 17988 *; __ Fed. Appx. __; 2019 WL 2494529

UNITED STATES OF AMERICA, Plaintiff - Appellee v. MARCELINO MARTINEZ, also known as Nino, also known as Marcelino Martinez, Jr., Defendant - Appellant

**Notice:** PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**Prior History:** **[*1]** Appeal from the United States District Court for the Western District of Texas. USDC No. 1:17-CR-53-1.

## Core Terms

district court, plea agreement, sentence, guilty plea, comments, plea negotiation, methamphetamine, Guidelines, parties, substantial rights, statutory maximum, co-defendants, probability, distribute, deadline, wire

## Case Summary

### Overview

HOLDINGS: [1]-Even if the district court's error in opining on the likelihood of success at trial was clear and obvious, defendant had not shown an adverse effect on his substantial rights, as he accepted a favorable *Fed. R. Crim. P. 11(c)(1)(C)* plea that limited his potential sentence to 151 months on a charge that carried a statutory maximum of life imprisonment, and he did not show a reasonable probability that but for the district court's statements, he would not have entered the plea; [2]-As to defendant's challenge to the district court's statement that he was looking at a life sentence, this statement did not constitute clear and obvious error because defendant had made the decision to plead guilty, and thus the district court was not opining on the likely or correct sentence.

### Outcome

Judgment affirmed.

## LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

**HN1[] Plain Error, Definition of Plain Error**

To prevail on plain error grounds, a defendant must show (1) error (2) that is clear or obvious and (3) that affects his substantial rights. Even then, the court may correct the error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

**HN2[] Guilty Pleas, Allocution & Colloquy**

*Fed. R. Crim. P. 11* allows the district court to accept or reject a plea agreement. *Fed. R. Crim. P. 11(c)(4)-(5)*. In its consideration of the plea agreement, the district court is required to address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises and to determine that there is a factual basis for the plea. *Fed. R. Crim. P. 11(b)(2)-(3)*. The United States Court of Appeals for the Fifth Circuit characterizes Fed. R. Crim. P. 11's prohibition of judicial involvement as a bright line rule and an absolute prohibition on all forms of judicial participation in or interference with the plea negotiation process. The prohibition on judicial participation in plea negotiations (1) diminishes the possibility of judicial coercion of a guilty plea, (2) preserves the judge's impartiality by preventing the judge from having a stake in a particular agreement, and (3) prevents a misleading impression of the judge's role in the proceedings, protecting the judge's position as a neutral arbiter.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

**HN3[] Guilty Pleas, Allocution & Colloquy**

The United States Court of Appeals for the Fifth Circuit has rejected a narrow view of *Fed. R. Crim. P. 11* that would limit violations to discrete categories of factual circumstances where the courts have previously found a violation, instead making clear that *Fed. R. Crim. P. 11* and its interpretive case law unmistakably prohibit all forms of participation. At the same time, previous caselaw does provide some guidance. For instance, judges clearly violate *Fed. R. Crim. P. 11(c)(1)* where their statements could be construed as predictive of the defendant's criminal-justice outcome; suggestive of the best or preferred course of action for the defendant; or indicative of the judge's views as to guilt. The motives of the district court are irrelevant, and the court has not hesitated to find a *Rule 11* error even when the court's participation is minor and unintentional.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Appeals

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Guilty Pleas

**HN4[] Guilty Pleas, Allocution & Colloquy**

If the district court's statements constituted clear and obvious *Fed. R. Crim. P. 11* error, the court then determines whether the error affected the defendant's substantial rights. A defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under *Rule 11*, must show a reasonable probability that, but for the error he would not have entered the plea. Violation of *Rule 11(c)(1)* does not require automatic vacatur of the guilty plea—vacatur of the plea is not in order if the record shows no prejudice to defendant's decision to plead guilty. The primary focus of the prejudice analysis must be the period between the district court's participation and the defendant's guilty pleas, but the review is also informed by the entire record.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

***HN5***[] **Guilty Pleas, Allocution & Colloquy**

The timing of the district court's participation is important: courts have noted the distinction between a sentencing court's comments before the parties have disclosed the terms to the court and the court's statements after this time. Once a plea agreement is disclosed in open court the district court is required to examine the plea agreement to determine whether it is voluntary and has a sound factual basis. The district court is expected to take an active role in evaluating a plea agreement, once it is disclosed. However, while *Fed. R. Crim. P 11* requires that a district court explore a plea agreement once disclosed in open court it does not license discussion of a hypothetical agreement that it may prefer.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

***HN6***[] **Guilty Pleas, Allocution & Colloquy**

Statements made in considering a plea agreement presented by parties are treated differently than statements made when the parties are still negotiating. The proper inquiry is whether the district court was actively evaluating a plea agreement, as the court is required to do, or whether the court is suggesting an appropriate accommodation for a subsequent plea agreement, something the court found prohibited in certain case law.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

***HN7***[] **Guilty Pleas, Allocution & Colloquy**

At the point where a defendant has made the decision to plead guilty, the district court is expected to take an active role in evaluation of the agreement. The triggering event is the defendant's decision to enter a guilty plea—whether with an agreement or not.

**Counsel:** For UNITED STATES OF AMERICA, Plaintiff - Appellee: Joseph H. Gay, Jr., Assistant U.S. Attorney, Mark Randolph Stelmach, Esq., Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Texas, San Antonio, TX.

For MARCELINO MARTINEZ, also known as Nino, also known as Marcelino Martinez, Jr., Defendant - Appellant: William Reynolds Biggs, Fort Worth, TX.

**Judges:** Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

## Opinion

PER CURIAM:[*]

Appellant Marcelino Martinez appeals his guilty plea conviction for conspiracy to posses with intent to distribute methamphetamine. Martinez contends that the district court violated *Federal Rule of Criminal Procedure 11(c)(1)* when it improperly involved itself in plea negotiations. Because Martinez has failed to show a reasonable probability that, but for the participation, he would not have entered the plea, he has not demonstrated plain error that affected his substantial rights. We affirm.

I.

Between October 2014 and February 21, 2017, Martinez conspired with several individuals to possess with intent to distribute methamphetamine. Martinez would direct his accomplices to pick up multi-ounce quantities **[*2]** of methamphetamine from his supplier in Katy and Houston, Texas to be redistributed in Central Texas. Martinez instructed his co-conspirators where and when to conduct the deliveries and directed couriers and distributors to specific stash houses. Martinez was also involved in the financial transactions, directing his co-conspirators to receive and deliver proceeds from the drug transactions.

On February 21, 2017, Martinez and six co-defendants were charged with one count of conspiracy to possess with intent to distribute methamphetamine, in violation of *21 U.S.C. §§ 841(a)(1)*, *841(b)(1)(A)*, and *846*, and five counts of possession with intent to distribute methamphetamine in violation of *§ 841(a)(1)*. The district court entered a scheduling order setting a hearing on pre-trial motions, followed by jury selection and trial on May 1, 2017. That order set a plea agreement deadline of April 28, 2017 pursuant to *United States v. Ellis*.[1] On April 19, 2017, Martinez signed a *Rule 11(c)(1)(C)* plea agreement, pleading guilty to the conspiracy count and agreeing to a sentence of 151 months, pending the court's approval.

On April 26, the government filed an assented-to motion for a continuance, advising the court that Martinez had changed his mind and had **[*3]** indicated to the government that he wanted to proceed to trial.[2] The court held a docket call on April 28, 2017 (pursuant to the scheduling order). During that call, the court informed Martinez that the plea agreement deadline expired at 5:00 p.m. that day and discussed setting a trial date. Although the court contemplated the possibility of postponing the trial by a few weeks to wait for one of Martinez's co-defendants to enter her guilty plea, the court decided to set the trial for May 22. If Martinez decided to enter a plea before 5:00 p.m., that trial date would be set aside.

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[*] Pursuant to ***5TH CIR. R. 47.5***, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in ***5TH CIR. R. 47.5.4***.

[1] *547 F.2d 863 (5th Cir. 1977)*. The *Ellis* order provided, in relevant part, "any plea bargain or plea agreement entered into by the parties in this cause shall be made known in writing to this Court on or before April 28, 2017."

[2] The government informed the court that one of Martinez's co-defendants, Brandy Meeks, had her first appearance in front of a magistrate judge the same day Martinez indicated he wanted to proceed to trial. Because Meeks had not yet decided whether to enter a plea or proceed to trial, the government sought a continuance to allow her counsel to prepare for trial should both Martinez and Meeks be tried jointly.

The court then started to excuse Martinez. At this point, Martinez asked the court if he could request new counsel, which the court denied, and then Martinez asked what an "*Ellis* deal" was. The district court counseled that Martinez's lawyer could explain what an *Ellis* order was, but briefly told Martinez that it was a deadline for entering into a plea agreement.[3] Martinez voiced concern that he did not understand why his first lawyer had been removed from the case, and the court explained that the Federal Public Defender who had initially been appointed was forced to withdraw because of a conflict of interest. **[*4]** [4] The court explained the appointment process, then told Martinez:

> The bottom line is, Mr. Martinez, you've got a couple of hours today to decide if you wish to plead or not. And if you stay and want a trial, which is your constitutional right, there's no problem. I've just gotta set it. I just have lots and lots of trials. I've got criminal trials set all the way through this year into next year. Many of them are large. Most of them won't go to trial, but I don't know which ones will and which ones won't, so I have to arrange for the ability to try the case. And that's where you are.
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> It doesn't look very good when the other Martinez and Padilla, Meeks and Welsh and Hinds [Martinez's co-defendants] have already entered pleas because that makes all of them witnesses, if they wish to testify or the government wish [sic] for them to testify. But that's just a factor that you could talk intimately with Mr. -- with your lawyer. But go ahead and talk to him and talk to him about the *Ellis* order. And just like the gentleman beforehand, if he enters a plea today before 5:00 where I can cut the jury numbers down, then he's still within the *Ellis* order. But after today, he's not.

Later that day, **[*5]** Martinez signed a *Rule 11(c)(1)(C)* "amended" plea agreement providing for a sentence of 151 months pending the court's approval.[5] That same day, Martinez pleaded guilty before the magistrate judge, confirming that he had read the agreement, discussed it with counsel, and agreed to its terms.

Following the recommendation of the magistrate judge, the district court accepted the guilty plea but reserved acceptance of the agreement until sentencing. Probation prepared a PSR calculating a Guidelines range of 360 months to life based on an attributable drug quantity of 104 kg of methamphetamine. On July 14, 2017, the district judge held a sentencing hearing and rejected the plea agreement.[6] The district court expressed its concern with the agreement:

> This was a wire case. There was information and months and months of expense to the government on the activities. It just seems to me unfathomable that you can make a difference between five and 104 guessing. But what is more incredible is to try to tie my hands to a sentence, which I will not do.

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[3] You have a certain amount of time to negotiate a plea with the government, if you wish to. If you do not get an agreement, then you go to trial. But there are consequences for that that the law has placed here. Usually it is a three-level increase if you go to trial and are found guilty under the guideline system. It's not always. It depends on the evidence one way or the other."

[4] The court appointed attorney John Butler to take over representation.

[5] The only difference between the April 28 plea agreement and the April 19 plea agreement was a correction to the statutory maximum for a violation of *21 U.S.C. § 841(b)(1)(A)*.

[6] At that hearing, the court probed the government's decision to agree to a sentence of 151 months for an offense with a Guidelines range of 360 months to life: "I have an 11(c)(1)(C) sentence for 151 months, and I'll hear from the government on how that's possible." The government explained that it thought it would have been difficult to prove the drug quantity reflected in the PSR based on the witness testimony available. The government agreed to a plea based on a drug quantity of between one and five kilograms (rather than the 104 kg calculated in the PSR).

The district court then pressed the government on why it chose to execute a *Rule 11(c)(1)(C)* agreement.[7] The court then stated:

> It was a wire. It didn't make any difference if he's going **[*6]** to plea or not. It's a three or four-day case. He's going to be found guilty. It doesn't make any difference one way or the other. So you were tieing [sic] my judgment up simply to avoid a trial?
> . . .
> But here, I'm looking at a life sentence. . . . When I authorize and --authorized the wire and the extensions to the wire and all of the expense it is to the government and then, you come up with a disparity like this and you tie my hands or the judge's hands, I want to know why. It's just a mistake. It was just a mistake. It's a bad mistake. If it's intentional, it's worse.

The district court declined to accept the plea and set the case for trial.

On July 26, 2017, the government filed a second superseding information, charging Martinez with conspiracy to possess with intent to distribute methamphetamine, in violation of *21 U.S.C. §§ 841(a)(1)*, *841(b)(1)(C)*, and *846*. The statutory maximum for *§ 841(b)(1)(C)* was 20 years, as opposed to Martinez's initial plea to the *§ 841(b)(1)(A)* violation, which carried a statutory maximum of life. Martinez pleaded guilty without the benefit of a plea agreement before the magistrate judge on July 27, 2017. On September 29, 2017, the district court sentenced Martinez to the statutory maximum of 240 months followed by **[*7]** five years supervised release. This appeal followed.

II.

Martinez did not object to the district court's alleged improper participation in plea negotiations, so we review for plain error.[8] ***HN1***[↑] To prevail, Martinez must show (1) error (2) that is clear or obvious and (3) that affects his substantial rights.[9] "Even then, the court may correct the error 'only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'"[10]

Martinez complains of two separate instances of alleged improper participation by the district court in the plea negotiations. He argues that during the April 28, 2017 docket call, the district court improperly opined on Martinez's likely success at trial by noting that "it doesn't look very good" in light of his co-defendants' decisions to plead guilty and their potential to serve as witnesses against Martinez. Martinez also points to the district court's description of the three-level Guidelines increase that generally accompanies a conviction after trial. He asserts that his decision to plead the same day as the docket call demonstrates the coercive nature of the district court's comments.

Martinez also contends that the district court's **[*8]** comments at the July 14, 2017 sentencing hearing were error. Specifically, Martinez asserts that the district court again improperly entered the negotiations when it suggested that Martinez was "going to be found guilty" and expressed concern with the 151-month

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[7] "Well, if you recall, this was a very late plea. We thought it was going to be on the Wednesday before the docket call. I know the Court expressed some frustration on the Friday that Mr. Butler and Ms. Fernald appeared. . . . I think Mr. Martinez gave Mr. Butler some . . . unanticipated resistance at the eleventh hour. We thought it was going to be a plea the whole time, or I did . . ."

[8] *United States v. Mondragon-Santiago, 564 F.3d 357, 368 (5th Cir. 2009)*.

[9] *United States v. Draper, 882 F.3d 210, 215 (5th Cir. 2018)* (citing *United States v. Jones, 873 F.3d 482, 497 (5th Cir. 2017)*).

[10] *Jones, 873 F.3d at 497* (quoting *United States v. Moreno, 857 F.3d 723, 727 (5th Cir. 2017)*).

recommendation given the Guidelines range and the substantial resources involved in the wiretap investigation. Martinez highlights that the district court stated Martinez was "looking at a life sentence." Martinez contends that the errors are plain given existing precedent, his substantial rights were affected because he can show a reasonable probability he would have proceeded to trial absent the comments, and the errors impacted the integrity of the judicial proceedings.

The government concedes that the district court's statement that it did not "look very good" for Martinez may have been a technical violation of *Rule 11(c)(1)*. However, the government suggests that it was an isolated comment made in the context of explaining the court's scheduling concerns and answering Martinez's questions about the meaning of an *Ellis* order. The government also asserts that Martinez failed to show that he would not have pleaded guilty absent the district **[*9]** court's comments. With respect to the statements at the sentencing hearing, the government contends that while the court's statements may have been error had they been made prior to a negotiated plea agreement, they were not error where Martinez had already signed an agreement.

*Federal Rule of Criminal Procedure 11(c)(1)* provides that "[a]n attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions."[11] ***HN2***[↑] *Rule 11* allows the district court to accept or reject a plea agreement.[12] In its consideration of the plea agreement, the district court is required to "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises" and to "determine that there is a factual basis for the plea."[13] This circuit has "characterized *Rule 11*'s prohibition of judicial involvement as a 'bright line rule' and 'an absolute prohibition on all forms of judicial participation in or interference with the plea negotiation process.'"[14] The prohibition on judicial participation in plea negotiations (1) "diminishes the possibility of judicial coercion of a guilty plea," (2) preserves **[*10]** the judge's impartiality by preventing the judge from having a stake in a particular agreement, and (3) prevents a "misleading impression" of the judge's role in the proceedings, protecting the judge's position as a neutral arbiter.[15]

***HN3***[↑] This court has rejected a "narrow view" of *Rule 11* that would limit violations to "discrete categories of factual circumstances where the courts have previously found [a violation]," instead making clear that "*Rule 11* and its interpretive case law unmistakably prohibit all forms of participation."[16] At the same time, previous "caselaw does provide some guidance."[17] "For instance, judges clearly violate *Rule 11(c)(1)* where their

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[11] *Fed. R. Crim. P. 11(c)(1)*.

[12] *Fed. R. Crim. P. 11(c)(4)-(5)*.

[13] *Fed. R. Crim. P. 11(b)(2)-(3)*.

[14] *United States v. Pena*, 720 F.3d, 561, 570 (5th Cir. 2013) (internal citations omitted).

[15] *United States v. Rodriguez, 197 F.3d 156, 158-59 (5th Cir. 1999)* (quoting *United States v. Daigle, 63 F.3d 346 (5th Cir. 1995)* (internal quotation marks omitted)).

[16] *Rodriguez, 197 F.3d at 159* (rejecting government's argument that improper participation was limited to previously defined categories, "namely cases where the court injected terms into the agreement, changed the terms of the agreement, or discussed probable sentences").

[17] *Draper, 882 F.3d at 215*. This court has also found a *Rule 11* violation based on improper participation from a district court's statement in an off-the-record conference that it "would most likely follow any sentence recommendation by the government," *Daigle, 63 F.3d at 348-49*; a district

statements could be construed as predictive of the defendant's criminal-justice outcome; suggestive of the best or preferred course of action for the defendant; or indicative of the judge's views as to guilt."[18] The motives of the district court are irrelevant, and this court has "not hesitated to find a *Rule 11* error even when the court's participation is minor and unintentional."[19]

*HN4*[↑] If the district court's statements constituted clear and obvious *Rule 11* error, the court then determines whether the error affected the defendant's substantial rights. **[*11]** [20] "[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under *Rule 11*, must show a reasonable probability that, but for the error he would not have entered the plea."[21] Violation of *Rule 11(c)(1)* does not require automatic vacatur of the guilty plea—"vacatur of the plea is not in order if the record shows no prejudice to [defendant's] decision to plead guilty."[22] "[T]he primary focus of [the] prejudice analysis must be the period between the district court's participation and [the defendant's] guilty pleas, [but the] review is also 'informed by the entire record.'"[23]

The April 28 docket call statements made by the district court were made in the context of responding to Martinez's confusion about the meaning of an *Ellis* order.[24] The district court attempted to end the exchange after setting a trial date, but was stopped by Martinez's request for new counsel and query about the *Ellis* order. The district court directed Martinez to speak to his new counsel, explained why the Federal Public Defender had been removed from the case, and emphasized that the timing of the *Ellis* order meant that Martinez had until 5:00 p.m. to consider entering **[*12]** a plea. Even if the district court's error in opining on the likelihood of success at trial was clear and obvious, Martinez has not shown an adverse effect on his substantial rights. While a close temporal proximity between the timing of the plea and the district court's participation can support a finding of prejudice,[25] temporal proximity is not dispositive here. Given Martinez's misunderstanding of the meaning of the *Ellis* order, the timing of his plea is attributable to the district court's

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court's statement that "[r]ight now [the defendant is] looking at five years minimum and in about 30 minutes [i.e. if he did not enter the plea] he's going to be looking at ten years minimum," *Rodriguez, 197 F.3d at 158-60*; and a district court's statement that "the best chance[] here, quite frankly, for him is the plea of guilty and the concurrent sentencing [of the charges]," *United States v. Ayika, 554 F. App'x 302, 303 (5th Cir. 2014)* (per curiam).

[18] *Draper, 882 F.3d at 215*.

[19] *Ayika, 554 F. App'x at 305*; *see also Pena, 720 F.3d at 571* ("Given the sanctity of *Rule 11*'s absolute prohibition on any form of judicial involvement in plea negotiations, we conclude that, *albeit unintentionally*, the district court here stepped over the line and violated *Rule 11* . . .") (emphasis added).

[20] *Pena, 720 F.3d at 573*.

[21] *Id.* (internal quotation marks and citation omittd).

[22] *United States v. Davila, 569 U.S. 597, 601, 133 S. Ct. 2139, 186 L. Ed. 2d 139 (2013)*.

[23] *Pena, 720 F.3d at 574* (quoting *United States v. Dominguez Benitez, 542 U.S. 74, 83, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004)*).

[24] *See e.g., United States v. Larrier, 648 F. App'x 441, 443 (5th Cir. 2016)* ("The district court's comments, when read in context, do not reflect obvious improper participation in a plea discussion. The challenged remarks made by the district court were made in the context of answering Larrier's inquiries, addressing her misunderstandings about the guilty-plea process, and ensuring that she understood her choice of pleading guilty or going to trial. The comments did not create an appearance of impartiality or coercion.").

[25] *Davila, 569 U.S. at 611* (comparing a plea "soon after" judicial participation with a three-month delay); *Pena, 720 F.3d at 574* (holding that the fact defendant pleaded guilty "[j]ust five days later" "support[ed] a finding of prejudice").

explanation of the deadline, rather than any improprietous suggestion about Martinez's likelihood of success at trial. Ultimately, Martinez accepted a favorable Rule 11(c)(1)(C) plea that limited his potential sentence to 151 months on a charge that carried a statutory maximum of life imprisonment. The benefit of that plea agreement, taken together with the imminent expiration of the *Ellis* order deadline, likely influenced Martinez's decision to enter the plea. Martinez has not shown a reasonable probability that but for the district court's statements on the docket call he would not have entered the plea.

With respect to Martinez's challenge to the district court's statements at his first sentencing **[*13]** hearing on July 14, 2017,[26] those statements were made *after* Martinez had entered the plea and signed the plea agreement. This court has emphasized that ***HN5***[⬆] the timing of the district court's participation is important: "We have noted the distinction between a sentencing court's comments *before* the parties have disclosed the terms to the court and the court's statements *after* this time."[27] Once a plea agreement is disclosed in open court the district court is *required* to examine the plea agreement to determine whether it is voluntary and has a sound factual basis.[28] "The commentary to Rule 11 and [this circuit's] previous decisions make it clear that the district court is expected to take an active role in evaluating a plea agreement, once it is disclosed."[29] However, while "Rule 11 requires that a district court explore a plea agreement once disclosed in open court . . . it does not license discussion of a hypothetical agreement that it may prefer."[30]

In *Crowell*, the court distinguished between comments made in the context of the district court's evaluation of a first plea agreement presented by the parties and comments made after the rejection of the first plea agreement, but before the second plea agreement **[*14]** was in its final form.[31] While the content of the comments was similar—the district court opined on the likely sentence if Crowell were convicted—the timing was determinative: "The fact that this comment was injected into the discussions while the parties were still preparing the second agreement is critical. It is precisely this type of participation that is prohibited by Rule 11."[32] In other words, ***HN6***[⬆] statements made in considering a plea agreement presented by parties are treated differently than statements made when the parties are still negotiating. Similarly, in *Pena*, the court noted that "the fact that the court made the statements while plea negotiations between Pena and the government were ongoing is crucial."[33] So the "proper inquiry is whether the district court was actively

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[26] Specifically, the district court stated: (1) "It was a wire. It didn't make any difference if he's going to plea or not. It's a three or four-day case. He's going to be found guilty. It doesn't make any difference one way or another." and (2) "But here, I'm looking at a life sentence." Martinez also challenges the court's admonitions that it had authorized substantial expenditures for the wiretap and that the government was tying the court's hands to a sentence well below the guideline range.

[27] *Pena, 720 F.3d at 572*.

[28] *Id. at 570* (citing *Fed. R. Crim. P. 11(b)(2) - (3)*).

[29] *United States v. Crowell, 60 F.3d 199, 204 (5th Cir. 1995)*.

[30] *United States v. Miles, 10 F.3d 1135, 1140 (5th Cir. 1993)* (finding that the "district court's comments went beyond exploring the presented agreements").

[31] *Crowell, 60 F.3d at 204*.

[32] *Id.*

[33] *Pena, 720 F.3d at 572*.

evaluating a plea agreement, as the court is required to do, or whether the court is suggesting an appropriate accommodation for a subsequent plea agreement, something this court found prohibited in *Miles*."[34]

The statements at issue here occurred in connection with the district court's evaluation of Martinez's first plea agreement. Although it is true that the court rejected that agreement, meaning that further **[*15]** plea negotiations took place after the comments were made, these statements did not constitute clear and obvious error because Martinez had made the decision to plead guilty and HN7[↑] at that point, "the district court is expected to take an active role" in evaluation of the agreement.[35] "The triggering event is the defendant's decision to enter a guilty plea—whether with an agreement or not."[36] Because the statements were made after Martinez's decision to plead guilty, the district court was not opining on the likely or correct sentence.[37]

III.

Because Martinez has not shown that the district court plainly erred, the district court's judgment is affirmed.

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**End of Document**

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[34] *United States v. Smith, 417 F.3d 483, 488 (5th Cir. 2005)* (internal citation and quotation marks omitted); *see also United States v. Hemphill, 748 F.3d 666, 673 (5th Cir. 2014)* (distinguishing between comments made during the plea colloquy and comments made before defendant accepted the government's offer).

[35] *Hemphill, 748 F.3d at 673*.

[36] *Draper, 882 F.3d at 215 n.8*.

[37] *Crowell, 60 F.3d at 204*.

# APPENDIX B

(Judgment and Sentence of the United States District Court for the Western District of Texas)

# UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION



UNITED STATES OF AMERICA

v.

Case Number: AU:17-CR-00053(1)-SS
USM Number: 86610-380

MARCELINO MARTINEZ
*True Name: Marcelino Martinez Jr.*
*Aliases: Neno, Nino, Nino Martinin, Marcelino Martin Jr.*

Defendant.

## JUDGMENT IN A CRIMINAL CASE
**(For Offenses Committed On or After November 1, 1987)**

The defendant, MARCELINO MARTINEZ, was represented by John S. Butler.

The defendant pled guilty to Count 1 of the Second Superseding Information on July 27, 2017. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 846 | Conspiracy to Possess with Intent to Distribute Methamphetamine | 02/21/2017 | 1ss |

As pronounced on September 29, 2017, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall 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 material changes in economic circumstances.

Signed this 3rd day of October, 2017.

SAM SPARKS
United States District Judge

DEFENDANT: MARCELINO MARTINEZ
CASE NUMBER: AU:17-CR-00053(1)-SS

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **TWO HUNDRED FORTY (240) MONTHS** as to count 1ss to run consecutive to any sentence imposed in the pending parole violation matter in the 277th Judicial District Court, Williamson County, Texas, Case No. 00-812-K277.

The defendant shall remain in custody pending service of sentence.

## 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 UNITED STATES MARSHAL

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## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS.**

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

**The defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The program may include testing and examination during and after program completion to determine if the defendant has reverted to the use of drugs. The probation officer shall supervise the participation in the program (provider, location, modality, duration, intensity, etc.). During treatment, the defendant shall abstain from the use of alcohol and any and all intoxicants. The defendant shall pay the costs of such treatment if financially able.**

**The defendant shall not use or possess any controlled substances without a valid prescription. If a valid prescription exists, the defendant must disclose the prescription information to the probation officer and follow the instructions on the prescription.**

**The defendant shall submit to substance abuse testing to determine if the defendant has used a prohibited substance. The defendant shall not attempt to obstruct or tamper with the testing methods. The defendant shall pay the costs of testing if financially able.**

**The defendant shall not use or possess alcohol.**

**The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search shall be conducted at a reasonable time and in a reasonable manner.**

**The defendant shall not communicate, or otherwise interact, with any known member of the Latin Kings street gang, without first obtaining the permission of the probation officer.**

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# CONDITIONS OF SUPERVISION

**Mandatory Conditions:**

[1] The defendant shall not commit another federal, state, or local crime during the term of supervision.

[2] The defendant shall not unlawfully possess a controlled substance.

[3] 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 on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.

[4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

[5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.

[6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

[7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

[8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.

[9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

**Standard Conditions:**

[1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

[2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

[3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

[4] The defendant shall answer truthfully the questions asked by the probation officer.

[5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change

[6] The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.

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[7] The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

[8] The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

[9] If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

[10] The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

[11] The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

[12] If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

[13] The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

[14] If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

[15] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

[16] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

[17] If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

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# CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 501 West Fifth Street, Suite 1100, Austin, TX 78701. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

If the defendant is not now able to pay this indebtedness, the defendant shall cooperate fully with the office of the United States Attorney, the Federal Bureau of Prisons and/or the United States Probation Office to make payment as soon as possible, including any period of incarceration. Any unpaid balance at the commencement of a term of probation or supervised release shall be paid on a schedule of monthly installments to be established by the U.S. Probation Office and approved by the Court.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **TOTALS** | $100.00 | $.00 | $.00 |

## SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. Payment of this sum shall begin immediately.

## FINE

The fine is waived because of the defendant's inability to pay.

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 above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

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

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