

No. _____

In the Supreme Court of the United States

MATTHEW JOSEPH LUCIO, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Mr. Lucio's plea agreement which extracted his guilty plea lacks consideration, and if so, whether his guilty plea violates the Fifth Amendment's Due Process Clause.

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LIST OF PARTIES

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

OPINION BELOW

The opinion of the court of appeals is an unreported case and can be found at 2019 WL 3770809. A copy of said opinion is also attached to this petition as Appendix A. A copy of the order denying Mr. Lucio's petition for rehearing *en banc* is also attached to this petition as Appendix B, and a copy of Mr. Lucio's Brief of Appellant that was filed in the United States Court of Appeals for the Fifth Circuit is also attached to this petition as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 9, 2019. The United States Court of Appeals for the Fifth Circuit denied Mr. Lucio's Petition for Rehearing *En Banc* by order filed on September 9, 2019. Thus, this petition is filed within 90 days from the date of the denial of rehearing. *See* SUP. CT. R. 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Lucio plead guilty pursuant to a plea agreement to all four counts in the indictment and waived his right to file a direct and collateral appeal. ROA. 119, 121, 281, 283. In exchange for Mr. Lucio's guilty plea and waiver of appellate rights, the Government made the following promises: (1) recommend Mr. Lucio be given a sentence of imprisonment within the applicable guideline range (ROA. 120, 281); (2) move pursuant to the Guidelines that Mr. Lucio receive maximum credit for acceptance of responsibility (ROA. 120, 281); and (3) recommend pursuant to the Guidelines a sentence reduction should Mr. Lucio provide the Government substantial assistance in furnishing information that the Government can use to prosecute another person. ROA. 120, 282. The district court imposed a life sentence on Mr. Lucio. Mr. Lucio argues on appeal that the Government's Promises are illusory, and because such is the case, his guilty plea lacks consideration, and is therefore involuntary and invalid.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was originally brought as a federal criminal prosecution under 8 U.S.C. § 1324. The district court therefore has jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

A. THE SUPREME COURT SHOULD GRANT THIS PETITION FOR A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISIONS OF SIX OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT MATTER.

Mr. Lucio plead guilty pursuant to a plea agreement to all four counts in the indictment and waived his right to file a direct and collateral appeal. ROA. 119, 121, 281, 283. In exchange for Mr. Lucio's guilty plea and waiver of appellate rights, the Government made the following promises (hereinafter referred to as "the Government's Promises": (1) recommend Mr. Lucio be given a sentence of imprisonment within the applicable guideline range (ROA. 120, 281); (2) move pursuant to the Guidelines that Mr. Lucio receive maximum credit for acceptance of responsibility (ROA. 120, 281); and (3) recommend pursuant to the Guidelines a sentence reduction should Mr. Lucio provide the Government substantial assistance in furnishing information that the Government can use to prosecute another person. ROA. 120, 282. Mr. Lucio argued/argues on appeal that the Government's Promises are illusory, and because such is the case, his guilty plea lacks consideration, and is therefore involuntary and invalid.

The following legal principles related to the first Government promise make clear its illusory nature. Whether a defendant pleads guilty or is found guilty by a jury, a district court is required to begin "all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552

U.S. 38, 49 (2007). A failure to correctly calculate the Guidelines range constitutes a procedural error. *Id.* at 51. A district court considering issuing a sentence that departs from the Guidelines “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. *Id.* at 50.

A sentence within the Guidelines range “is intended to, and usually does, exert controlling influence on the sentence that the court will impose.” *Peugh v. United States*, 559 U.S. 530, 545 (2013). The Guidelines are the lodestone of sentencing. *Id.* at 544. Since a sentence within the Guidelines range is what can reasonably be expected to occur “[i]n the usual sentencing,” *Id.* at 542) (quoting *Freeman v. United States*, 564 U.S. 522, 529 (2011) (plurality opinion), the first government promise recommending for the district court to do what it is legally required and reasonably expected to do confers absolutely nothing of value to Mr. Lucio. A beneficial promise to Mr. Lucio would have been something such as a Government recommendation to not impose a life sentence. In addition, for reasons stated below, the Government knew or should have known, at the time it made the Government’s Promises, including the first promise, that Mr. Lucio’s applicable guideline range would be a life term of imprisonment. Accordingly, the first Government promise is clearly illusory.

The second government promise is that it would move pursuant to § 3E1.1(a) and § 3E1.1(b) of the Guidelines for Mr. Lucio to receive maximum

credit for acceptance of responsibility, which ends up being a reduction of three sentencing levels. PSR ¶¶ 136, 137. Although it is true that § 3E1.1(b) does not permit the additional one-level reduction absent a motion from the Government, and the Government had no obligation to recommend this one level reduction absent the plea agreement, the second government promise was nevertheless still illusory. The reason this is so is because Mr. Lucio's applicable offense level ended up at Level 52, nine levels beyond the maximum Level of 43 which calls for a life sentence of imprisonment. PSR ¶ 135.

An argument could be made that the second promise is not illusory because Mr. Lucio's argument is being made with the benefit of hindsight, and since the second promise gave him a chance at obtaining a lower sentence, it is not illusory. This argument, however, is just plain wrong. And the reason it is wrong is because when the Government's plea bargain offer was presented as stated in the plea agreement, including the first and second promises, the following undisputed facts make clear that the Government knew or should have known that Mr. Lucio's offense level would still call for a life term of imprisonment even with a three sentencing level reduction being applied, which render the first and second promises illusory: the severity of the offenses¹ and allegations;² there are

1. The maximum term of imprisonment for Counts 3 and 4 is life. ROA. 125; PSR ¶ 180.

2. See the factual basis the Government read into the record at the re-arraignment hearing at ROA. 138-152

four minor victims alleged in the Indictment with respect to the four counts (ROA. 24-26); and there are ten more people the Government alleged were minor victims of Mr. Lucio it specifically mentioned at the re-arraignment hearing to make it clear they would be considered with respect to the relevant conduct of the offenses and counted in determining his sentencing level. ROA. 148-149; PSR ¶ 48, 131-35. Therefore, neither the first or second Government promise gave Mr. Lucio anything of value since they had no effect in avoiding the highest penalty he was subject to receiving—a life sentence.

The third Government promise, the substantial assistance promise, which the district court stated is standard in all plea agreements (ROA. 120), is also illusory to Mr. Lucio. It is so because there is no one else that is or could be a subject of another prosecution with respect to any of the allegations of the case. There is no evidence or allegation that Mr. Lucio acted in concert with any other person or organization with respect to the allegations made the basis of the case or anything else.

This is not a case that involves a low or medium level member of a drug cartel who has knowledge of illegal activities of the cartel's higher ranking members that the Government is targeting or would like to target. The substantial assistance promise is completely worthless to Mr. Lucio because he did not and does not possess any knowledge of anyone else's criminality to be able to furnish any assistance to the Government. The fact that the substantial

assistance promise is a standard term that is included in all plea agreements (ROA. 120) further reinforces Mr. Lucio's argument on appeal that it was not included therein to confer any specific benefit on Mr. Lucio whatsoever, and it clearly did not. It is also noteworthy that the record does not indicate anywhere that the Government made the recommendations to the district court like it promised it would in the plea agreement. The fact that the district court ended up imposing a Guidelines sentence and gave Mr. Lucio maximum credit for acceptance of responsibility without the Government even having to bother to mention the Government Promises in open court, further underscores Mr. Lucio's argument on appeal that the Government's Promises are illusory.³

For these reasons, the Government's Promises are all illusory. As a result, the plea agreement plainly and clearly lacks consideration. Since Mr. Lucio plead guilty pursuant to a plea agreement that is unenforceable for lack of consideration, Mr. Lucio is not and should not be prevented, as a matter of contract law, from withdrawing his guilty plea. *See Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 409 (Tex. 1997). (A contract that lacks consideration is unenforceable). Accordingly, Mr. Lucio elects to withdraw his guilty plea since he received absolutely nothing of value in exchange for it.

3. Even the PSR explicitly states that "[t]he plea agreement had no impact" on it. PSR ¶ 183. This is noteworthy because it independently came up with and recommended a Guideline sentence of life imprisonment, and it did so with giving Mr. Lucio maximum credit for acceptance of responsibility (PSR ¶ 135-138)—which the district court followed and imposed. ROA. 281.

For a guilty plea to be constitutional it must be knowing, intelligent, voluntary, and done with sufficient awareness of the relevant circumstances and likely consequences. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005); *see also United States v. Washington*, 480 F.3d 309, 315 (5th Cir. 2007). The Supreme Court has further ruled: “A plea of guilty entered by one fully aware of the direct consequences ... must stand unless induced by ... misrepresentation (including unfulfilled or unfulfillable promises).” *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), quoting *Shelton v. United States*, 246 F.2d 571 n.2 (5th Cir. 1957)(en banc). An involuntary and unintelligent guilty plea is a violation of due process and is void. *Matthew v. Johnson*, 201 F.3d 353, 364 (5th Cir. 2000) citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Mr. Lucio asserts that his guilty plea should not stand because it was induced by the Government’s Promises, all of which are illusory and unfulfillable for the reasons stated *supra*.

The Fifth Circuit Court of Appeals has never decided whether consideration is or is not required to support a valid plea agreement. *See United States v. Smallwood*, 920 F.2d 1231, 1239 (5th Cir. 1991); *U.S. v. Exinia*, 236 Fed. Appx. 73, 74-75 (5th Cir. 2007). However, several circuit courts of appeal have held that consideration is required to support a valid plea agreement. *See United States v. Randolph*, 230 F.3d 243, 250-51 (6th Cir. 2000) (“[W]e cannot say that [Randolph] entered into the [plea agreement] knowingly or voluntarily, since he was in no way informed as to the illusory nature of the government’s

promise.”); *United States v. Parrilla-Tirado*, 22 F.3d 368, 371 (1st Cir. 1994)(lack of consideration is a legal basis to invalidate a guilty plea); *United States v. Brunetti*, 376 F.3d 93, 95 (2nd Cir. 2004); *United States v. Johnson*, 850 F.3d 515, 523-24 (2nd Cir. 2017) (“[Johnson’s] options, if he understood them, were to plead guilty and receive a life sentence, or to proceed to trial and receive a life sentence if convicted. The latter might not turn out to be much better than the former, but it is no worse, and it offers at very least a bargaining chip. Why, then, would Johnson take a ... guilty plea?”); *United States v. Isaac*, 141 F.3d 477, 483 (3d Cir. 1998); *United States v. Winnick*, 490 Fed. Appx. 718, 721 (6th Cir. 2012); *United States v. Kilcrease*, 665 F.3d 924, 928 (7th Cir. 2012); *United States v. Novosel*, 481 F.3d 1288, 1291 (10th Cir. 2007); *Spearman v. United States*, 860 F.Supp. 1234, 1250 (E.D. Mich 1994)(“Illusory representations made by the prosecution to induce a defendant to waive his right to trial and instead enter a guilty plea have been found to constitute coercion justifying the withdrawal a guilty plea.”).

CONCLUSION

The Fifth Circuit’s decision in the case at bar and its jurisprudence, which has yet to determine whether consideration is required to support a valid plea agreement, conflicts with the decisions of six other United States Court of Appeals which do require consideration to support a valid plea agreement. The

Court has an opportunity to resolve this conflict. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: November 4, 2019

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CERTIFICATE OF SERVICE

Derly J. Uribe, appointed under the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by depositing an envelope containing the above documents in the United States mail with first-class postage provided prepaid to:

The Honorable Noel Francisco
Solicitor General of the United States
950 Pennsylvania Ave, NW
Washington, D.C. 20530-0001

today, November 4, 2019 and by electronic mail today to the Office of the Solicitor General at supremectbriefs@usdoj.gov. The undersigned further certifies that all parties required to be served have been served.

s/Derly Joel Uribe
DERLY JOEL URIBE