APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40793
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MATTHEW JOSEPH LUCIO,

Defendant-Appellant

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 2:18-CR-167-1

Before BENAVIDES, DENNIS, and OLDHAM, Circuit Judges.

PER CURIAM:*

Matthew Joseph Lucio pleaded guilty, pursuant to a plea agreement, to two counts of production of child pornography and two counts of enticing a minor to engage in sexual activity. The district court sentenced him within the advisory guidelines range to 30 years of imprisonment on the child pornography charges and life imprisonment on the enticement charges, all such terms to run concurrently. Lucio now challenges his guilty plea

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

convictions on two related grounds, to wit: (1) his guilty plea was not made knowingly, voluntarily, and intelligently and thus he was deprived of due process because his plea agreement lacked consideration; and (2) the district court violated Federal Rule of Criminal Procedure 11(b)(2) by accepting his involuntary guilty plea.

The Government urges this court to dismiss the appeal on the basis that Lucio waived the right to appeal his convictions and sentences as part of his plea agreement. However, because we conclude that Lucio's challenges to his convictions fail on the merits, we pretermit the question whether the waiver bars the instant appeal. *See United States v. Story*, 439 F.3d 226, 230–31 (5th Cir. 2006).

The record of Lucio's rearraignment reflects that he acknowledged, under oath, that he understood the consequences of his plea—including the maximum sentence that could be imposed—and that he was pleading voluntarily, that no one had threatened him or forced him to plead guilty, and that no one had made any promises about his case other than what was provided in the written plea agreement. Lucio's "solemn declarations in open court . . . carry a strong presumption of verity." *United States v. Palmer*, 456 F.3d 484, 491 (5th Cir. 2006) (internal quotation marks, brackets, and citations omitted). In addition, this court has never expressly held that consideration is required to support a valid plea bargain. *See United States v. Smallwood*, 920 F.2d 1231, 1239 (5th Cir. 1991). Moreover, Lucio's arguments discount the Government's promises in the plea agreement to recommend a within-guidelines sentence; to move for the additional one-level reduction for acceptance of responsibility under the Guidelines; and to file a motion urging the court to consider a reduction of Lucio's sentence if the Government concluded that he had provided substantial assistance in the investigation or

prosecution of others. As those promises bound the Government to do something it was not otherwise required to do and offered Lucio the chance of a reduced sentence, Lucio has not shown that the Government's promises were illusory or that his bargain lacked consideration. His arguments do not establish any error or due process violation concerning his plea of guilty. *See United States v. Washington*, 480 F.3d 309, 315–16 (5th Cir. 2007).

Nor has Lucio shown that the district court violated Rule 11(b)(2) by accepting an involuntary guilty plea. As Lucio concedes, because this issue is raised for the first time on appeal, our review is for plain error. *See United States v. Vonn*, 535 U.S. 55, 58–59 (2002). Here, in compliance with Rule 11, the magistrate judge addressed Lucio personally in open court and specifically asked him about the voluntariness of his plea. *See* FED. R. CRIM. P. 11(b)(2). Lucio cites no authority in support of his contention that district courts have a duty to ensure that any plea agreement in fact has a bargained-for quid pro quo, and nothing in the language of Rule 11(b)(2) requires same. *See id.* He thus has not shown an error that is "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009); *see also United States v. Trejo*, 610 F.3d 308, 319 (5th Cir. 2010).

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40793

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MATTHEW JOSEPH LUCIO,

Defendant - Appellant

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 8/9/19, 5 Cir., _____, _____ F.3d _____)

Before BENAVIDES, DENNIS, and OLDHAM, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

APPENDIX B

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

APPENDIX C

Case No. 18-40793

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

MATTHEW JOSEPH LUCIO,

Defendant – Appellant

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

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 18-40793

MATTHEW JOSEPH LUCIO,
Defendant-Appellant.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America.

2. Matthew Joseph Lucio.

s/ derly joel uribe
Derly Joel Uribe
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REQUEST FOR ORAL ARGUMENT

Defendant-Appellant, Matthew Joseph Lucio, requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 34.2.

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STATEMENT OF JURISDICTION

1. **Subject Matter Jurisdiction in the District Court.** This case arose from the prosecution of alleged offenses against the laws of the United States. The district court exercised jurisdiction under 18 U.S.C. § 3231.

2. **Jurisdiction in the Court of Appeals.** This is a direct appeal from a final decision of the United States District Court for the Southern District of Texas, entering judgment of criminal conviction. This Court has jurisdiction of the appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Under Federal Rule of Appellate Procedure 4(b), a criminal defendant who wishes to appeal a district court judgment must file notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or a notice of appeal by the Government. Under Federal Rule of Appellate Procedure 4(b), a criminal defendant who wishes to appeal a district court judgment must file notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or a notice of appeal by the Government. The judgment appealed from was signed on August 13, 2018, and entered on the same date. Since Mr. Lucio's notice of appeal was filed on August 23, 2018, this appeal is timely.

STATEMENT OF THE ISSUES

1. Whether the district court violated the Due Process Clause of the Fifth Amendment because his guilty plea was involuntary as a result of his plea agreement lacking consideration.

2. Whether Mr. Lucio's guilty plea is voluntary in violation of Fed. R. Crim. P. 11(b)(2).

STATEMENT OF THE CASE[1]

A. Proceedings Below.

On February 28, 2018, a Federal Grand Jury returned a four count Indictment against Mr. Lucio. ROA. 23. Counts one and two allege production of child pornography in violation of 21 U.S.C. §§2251(a) and 2251(c). ROA. 24-25. Counts three and four allege enticement and coercion of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422 (b). ROA. 25-26. Mr. Lucio and the government entered into a written plea agreement. ROA. 281-285. On April 3, 2018, subsequent to entering into the written plea agreement, Mr. Lucio plead guilty to the four counts stated above. ROA. 105, 155-156. On August 9, 2018, the district court in addition to other rulings, sentenced Mr. Lucio to be imprisoned for life. ROA. 78-83 [judgment]; ROA. 261 [transcript of oral pronouncement of sentence]. On August 23, 2018, Mr. Lucio filed his timely notice of appeal. ROA. 86. This appeal followed.

B. Statement of the Facts.

After Mr. Lucio plead guilty, the Probation Office scored him at Level 49. PSR ¶ 138. However, pursuant to Chapter 5, Part A, (comment n. 2), the offense level will be treated as a level 43 for a recommended guideline sentencing range of life. PSR ¶ 138. Other facts relevant to this appeal are set forth in the Argument section below.

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[1] References to the Record on Appeal are made as "ROA. [page number]." The presentence report ("PSR") is referenced in the following manner: PSR, ¶ [paragraph number].

SUMMARY OF THE ARGUMENT

Mr. Lucio plead guilty and received a life sentence of imprisonment as a result of a plea agreement that contained illusory, worthless promises from the Government. Since Mr. Lucio's guilty plea was extracted with illusory, worthless promises, his guilty plea was not made on a voluntary, knowing, and intelligent basis. Accordingly, his guilty plea is invalid and unconstitutional in violation of the Fifth Amendment's Due Process Clause. For the same reasons, Mr. Lucio's involuntary guilty plea was accepted by the district court in plain violation of Fed. R. Crim. P. 11(b)(2). Since it was foreseeable Mr. Lucio would receive the highest penalty he was subject to receiving if he plead guilty, a life sentence, and his guilty plea was extracted with illusory government promises, Mr. Lucio's substantial, constitutional due process rights were clearly prejudiced. Moreover, a guilty plea that is involuntary because it was extracted by illusory, worthless promises by the Government is not and should not be acceptable to a civilized nation governed by the rule of law. Therefore, if Mr. Lucio's involuntary guilty plea is allowed to stand, the integrity, fairness, and public reputation of the district court that accepted it can justifiably be called into question, For these reasons, Mr. Lucio's guilty plea is invalid.

ARGUMENT

I. MR. LUCIO'S GUILTY PLEA WAS NOT MADE VOLUNTARILY AND KNOWINGLY.

A. The plea agreement's appellate waiver does not apply.

Mr. Lucio's plea agreement includes a waiver of "the right to appeal or 'collaterally attack' the conviction and sentence." ROA. 283. Appellate waivers can only be properly waived if they are part of a valid plea agreement. *See United States v. Pleitez*, 876 F.3d 150, 156 (5th Cir. 2017). In addition, the waiver, does not preclude him from arguing his plea was not voluntary, knowing, and intelligent. "A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). If Mr. Lucio's guilty plea was not voluntary, knowing, and intelligent, the entire plea agreement, including its waiver, is void. *E.g. Matthew v. Johnson*, 201 F.3d 353, 364 (5th Cir. 2000) ("A guilty plea not voluntarily and intelligently made ... is void." (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). In addition, since the plea agreement lacks consideration, the plea agreement cannot be enforced by the Government or this Court as a matter of contract law to prevent Mr. Lucio from filing a direct or collateral appeal. *See*

Federal Sign v. Texas Southern University, 951 S.W.2d 401, 409 (Tex. 1997). (A contract that lacks consideration is unenforceable).

B. The Court's review is *de novo*.

Voluntariness of a guilty plea is a question of law reviewed *de novo*. *United States v. Reyna*, 120 F.3d 104, 111 (5th Cir. 1997). The validity of a guilty plea is reviewed *de novo*. *United States v. Scott*, 857 F.3d 241, 245 (5th Cir. 2017); *United States v. Washington*, 480 F.3d 309, 315 (5th Cir. 2007) (citing *United States v. Reasor*, 418 F.3d 466, 478 (5th Cir. 2005)). Constitutional challenges are also reviewed *de novo*. *United States v. Pleitez*, 876 F.3d at 157 (5th Cir. 2017).

C. The plea agreement lacks consideration.

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 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.[2]

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*, 559 U.S. at 545. 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

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[2] It is also Mr. Lucio's position that his trial counsel also knew or should have known that the Government's Promises are illusory, and that his trial counsel's recommendation to him to accept the plea agreement constitutes ineffective assistance of counsel. However, Mr. Lucio reserves his right to assert this claim in a collateral appeal in accordance with the rule that such claims generally cannot be resolved on direct appeal. *See United States v. Scott*, 857 F.3d at 246.

usual sentencing," *Peugh v. United States*, 559 U.S. 530, 542 (2013) (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.

The Government will argue 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 offenses[3] and allegations;[4] there are 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 that they would be included as additional victims in determining his sentencing level. ROA. 148-149; PSR ¶ 48, 131-35. Therefore, neither the first or second Government promise gave Mr. Lucio

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

[4] *See* the factual basis the Government read into the record at the re-arraignment hearing. ROA. 138-152

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 even mentioned to the district court the specific promises it made 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, strongly reinforces Mr. Lucio's argument on appeal that the Government's Promises are illusory.[5]

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.

D. Mr. Lucio's guilty plea, induced by illusory promises, was not made knowingly, voluntarily, or intelligently in accordance with the Due Process Clause.

For a guilty plea to be constitutional it must be knowing, intelligent, voluntary, and done with sufficient awareness of the relevant circumstances and likely

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[5] Even the PSR explicitly states that "[t]he plea agreement had no impact" on it, (PSR ¶ 183) even though it ended up recommending a Guideline sentence of life imprisonment with Mr. Lucio receiving maximum credit for acceptance of responsibility (PSR ¶ 135-138)–which the district court followed and imposed. ROA. 281.

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 previously stated.

There are also several circuit courts of appeal that have followed the rulings of the Supreme Court cited above in holding that guilty pleas induced by illusory government promises (i.e. lacking consideration) are involuntary and unknowing and are therefore unconstitutional. *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.").

It further bears mentioning that in reviewing a guilty plea, the defendant's guilt is irrelevant. *E.g. United States v. Amaya*, 111 F.3d 386, 389 (5th Cir. 1997) (citing *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976) (even with "overwhelming evidence of guilt" ... "a plea cannot support a judgment of guilty unless it was voluntary"). This Court instead "considers all relevant circumstances and examines whether the conditions for a valid plea have been met." *Matthew v. Johnson*, 201 F.3d at 364-65. Pursuant to this authority, Mr. Lucio's plea agreement is invalid since the

Government's illusory promises induced his involuntary and unconstitutional guilty plea. Accordingly, the Court should withdraw his guilty plea.

II. Mr. Lucio's involuntary guilty plea was accepted in violation of Rule Fed. R. Crim. P. 11(b)(2).

A. The plea agreement's appellate waiver does not apply.

Mr. Lucio's plea agreement includes a waiver of "the right to appeal or 'collaterally attack' the conviction and sentence." ROA. 283. Appellate waivers can only be properly waived if they are part of a valid plea agreement. *See United States v. Pleitez*, 876 F.3d 150, 156 (5th Cir. 2017). In addition, the waiver, does not preclude him from arguing his plea was not voluntary, knowing, and intelligent. "A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). If Mr. Lucio's guilty plea was not voluntary, knowing, and intelligent, the entire plea agreement, including its waiver, is void. *E.g. Matthew v. Johnson*, 201 F.3d 353, 364 (5th Cir. 2000) ("A guilty plea not voluntarily and intelligently made ... is void." (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

B. The plain error standard of review applies to unobjected Fed. R. Crim. P. 11 violations.

Because Mr. Lucio did not object that his guilty plea was accepted in violation of Fed. R. Crim. P. 11(b)(2), this claim is reviewed for plain error under Fed. R. Crim. P. 52(b). *See Puckett v. United States*, 129 S.Ct. 1423, 1428 (2009). That standard requires (1) an error (2) that is plain and (3) affects the defendant's substantial rights. *Id.* at 1429. If these three requirements are met, then the Court of Appeals may, in its discretion, correct the error if failure to do so would seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

C. Mr. Lucio's guilty plea is invalidated even under the more deferential plain error standard of review.

Under a plain error analysis, the first inquiry to determine is whether the district court committed a Fed. R. Crim. P. 11 error that is clear and obvious. *Puckett v. United States*, 129 S.Ct. at 1429 (2009). As previously established, the Government's Promises are all plainly and clearly illusory, and as such, the plea agreement lacks consideration. Moreover, it is settled law that a guilty plea should not stand if it is "induced by 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). Accordingly, the error is clear and obvious.

The next inquiry to determine is whether the plain error affected Mr. Lucio's

substantial rights such that there is "a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004). Had Mr. Lucio actually understood the Government's Promises, he would have understood that the Government Promises gave him no reason to forego a jury trial and that pleading guilty was tantamount to receiving a life sentence, the highest and most severe sentence he was subject to had he been found guilty by a jury. Thus, he stood to gain absolutely nothing from the plea agreement the Government offered him. And if the plea agreement gave him no benefit, exercising his constitutional right to a jury trial at least gave him a chance of acquittal, or at the very least, a bargaining chip to avoid a life sentence. Therefore, Mr. Lucio's substantial rights were clearly prejudiced.

The final prong of the plain error methodology is whether the Court may, in its discretion, correct the error if failure to do so would seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Puckett v. United States*, 129 S.Ct. at 1429. The Supreme Court has made the following declarations regarding breaches of plea agreements by the government: (1) "when the Government reneges on a plea deal, the integrity of the system may be called into question[;]" and (2) "we recognize that the Government's breach of a plea agreement is a serious matter." *Puckett v. United States*, 129 S.Ct. at 1433. Justice Souter further expressed the

following points that are relevant to determining the final plain-error prong:

> It is hard to imagine anything less fair than branding someone a criminal not because he was tried and convicted, but because he entered a plea of guilty induced by an agreement the Government refuses to honor. Agreements must therefore be kept by the Government as well as by the individual, and if the plain-error doctrine can ever rescue a defendant from the consequence of forfeiting rights by inattention, it should be used when the Government has induced an admission of criminality by making an agreement that it deliberately breaks after the defendant has satisfied his end of the bargain.

Id. at 1435 (Souter, J., dissenting).

Although the case at bar does not involve a Government breach of a plea agreement, an unconscionable plea agreement which confers no benefit to a defendant is significantly worse. So the reasons given in the above cited cases equally apply with respect to satisfying the final prong of the plain error analysis. It further bears noting that this Court has recognized the importance and significance of prosecutors and defendants dealing with each other with trust and integrity since "97% of federal criminal convictions are the result of pleas of guilty. *See United States v. Purser*, 747 F.3d 284, 294 (5th Cir. 2014).

The legal proceedings in this case sanctioned a finding of guilt and the imposition of a life sentence as a result of a plea agreement that contained illusory Government promises. If this Court elects not to correct the plain Fed. R. Crim. P. 11 error that clearly prejudiced Mr. Lucio, the Government would be legally empowered

and authorized to extract guilty pleas with meaningless and worthless promises. And if the courts of the United States sanction something as unfair and unconscionable as a guilty plea extracted by illusory promises, the integrity, fairness, and public reputation of both the Government and the courts can justifiably be criticized and called into question. Accordingly, the plain-error standard of review has been and should be determined by this Court to be satisfied.

CONCLUSION

For the foregoing reasons, this Court should invalidate and withdraw Mr. Lucio's guilty plea on the basis that it was not voluntary, knowing, and intelligently given.

Respectfully submitted,

s/ derly joel uribe
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served on the U.S. Attorney's Office via ECM electronic mail on December 28, 2018, to those attorneys receiving service via ECM automatically. I further hereby certify that a copy of the above and foregoing document was served to the below named defendant at the below stated address via certified mail, 7017 1450 0000 9532 7690, return receipt requested:

Fort Bend County Sheriff's Office
Matthew Joseph Lucio, Register No. 36588-479
1410 Williams Way Blvd.
Richmond, TX 77469

s/ derly joel uribe
Derly Joel Uribe

CERTIFICATE REGARDING APPELLATE WAIVER

The undersigned certifies that on December 28, 2018, the Government advised that it intends to enforce and rely on the appellate waiver.

s/ derly joel uribe
DERLY JOEL URIBE

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,089 number of words or less, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect Office X5 in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

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