

FILED

NOT FOR PUBLICATION

NOV 2 2020

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ADAN TORRES-NIEVES **

Defendant-Appellant.

No. 19-30221

D.C. No. 3:17-cr-00386-SI-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Submitted October 29, 2020***
Portland, Oregon

Before: TASHIMA, GRABER, and IKUTA, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** Appellant states the correct spelling of his name is Torres-Nieves, not Torres-Nievez, the spelling used by the government and district court.

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Torres-Nieves appeals the district court’s denial of his motion to suppress and its determination that the government did not breach the plea agreement when it argued for an application of the firearm enhancement. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The district court did not err in denying Torres-Nieves’s motion to suppress the statements he made after he was transported to the police station. Torres-Nieves does not challenge the district court’s findings that, after the police first stopped him, he was read his *Miranda* rights, he understood his rights, and he did not ask for counsel. Because defendants who have been informed of their *Miranda* rights may waive those rights without making “an explicit statement of waiver” if they respond to questioning, *North Carolina v. Butler*, 441 U.S. 369, 375–76 (1979); *accord United States v. Younger*, 398 F.3d 1179, 1185–86 (9th Cir. 2005), Torres-Nieves waived his *Miranda* rights by making statements during the subsequent interview at the police station. Because it is undisputed that Torres-Nieves understood his rights, Torres-Nieves’s waiver was knowing, intelligent, and voluntary. *See United States v. Cazares*, 121 F.3d 1241, 1244 (9th Cir. 1997).

The district court did not err in concluding that the plea agreement did not bar the government from arguing for a two-level upward adjustment to the sentencing guidelines, under U.S. Sent’g Guidelines Manual § 2D1.1(b)(1), for

Torres-Nieves's possession of a firearm. Because paragraphs 11 and 14 of the plea agreement (stating that “[t]he parties have no agreement” as to whether the enhancement applies and that the government agrees not to seek any upward adjustment “except as specified” in the plea agreement) were ambiguous, the district court did not err in considering extrinsic evidence and concluding that the communication between the parties during plea negotiation, showed that the parties reasonably understood that once the plea agreement was accepted, the government could argue for (and Torres-Nieves could argue against) the application of the firearm enhancement. *See United States v. Clark*, 218 F.3d 1092, 1095–96 (9th Cir. 2000); *see also United States v. De la Fuente*, 8 F.3d 1333, 1338–40 (9th Cir. 1993).

AFFIRMED

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April 29, 2019

John Gutbezahl
 5 Centerpointe Drive, Suite 400
 Lake Oswego, OR 97035

Re: *United States v. Adan Torres-Nieves*, 3:17-CR-00386-SI
 Plea Agreement Letter

Dear Counsel:

1. **Parties/Scope:** This plea agreement is between this United States Attorney's Office (USAO) and defendant, and thus does not bind any other federal, state, or local prosecuting, administrative, or regulatory authority. This agreement does not apply to any charges other than those specifically mentioned herein.
2. **Charges:** Defendant agrees to plead guilty to Count 1 of the Indictment, which charges the offense of Possession with the Intent to Distribute Heroin in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A).
3. **Penalties:** The maximum sentence is life imprisonment, a mandatory minimum sentence of 10 years' imprisonment and 5 years of supervised release, a fine of \$10,000,000 (or twice the gross pecuniary gains or losses resulting from the offense if such amount exceeds \$250,000), and a \$100 fee assessment. Defendant agrees to pay the fee assessment by the time of entry of guilty plea or explain to the Court why this cannot be done. Defendant further stipulates to the forfeiture of the assets as set forth below. Defendant understands that if a mandatory minimum sentence is required, this may restrict the application of downward departures, adjustments, and variances in some cases.
4. **Dismissal/No Prosecution:** The USAO will move at the time of sentencing to dismiss any remaining counts against defendant. The USAO further agrees not to bring additional charges against defendant in the District of Oregon arising out of this investigation, known to the USAO at the time of this agreement.

Revised May 2018

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5. **Elements and Factual Basis:** In order for defendant to be found guilty of Count One of the Indictment, the government must prove the following elements beyond a reasonable doubt:

First, defendant knowingly possessed with the intent to distribute heroin, a Schedule I controlled substance;

Second, defendant knew that it was heroin or some other federally controlled substance; and

Third, the quantity exceeded 1 kilogram of a mixture or substance containing a detectable amount of heroin.

Defendant admits the elements of the offenses alleged in Count One of the Indictment.

The government's investigation established that defendant knowingly possessed with the intent to distribute more than 1 kilogram of a mixture or substance containing a detectable amount of heroin in the District of Oregon and elsewhere.

Defendant knew that it was heroin.

6. **Sentencing Factors:** The parties agree that the Court must first determine the applicable advisory guideline range, then determine a reasonable sentence considering that range and the factors listed in 18 U.S.C. § 3553(a). Where the parties agree that sentencing factors apply, such agreement constitutes sufficient proof to satisfy the applicable evidentiary standard.

7. **Relevant Conduct:** The parties agree that defendant's relevant conduct pursuant to U.S.S.G. § 2D1.1(c)(1) is a Base Offense Level of 34, involving approximately 1.764 kilograms of heroin, 646.42 grams of actual methamphetamine, and approximately 2.171 kilograms of cocaine, prior to adjustments.

8. **Acceptance of Responsibility:** Defendant must demonstrate to the Court that defendant fully admits and accepts responsibility under USSG § 3E1.1 for defendant's unlawful conduct in this case. If defendant does so, the USAO will recommend a three-level reduction in defendant's offense level (two levels if defendant's offense level is less than sixteen). The USAO reserves the right to change this recommendation if defendant, between plea and sentencing, commits any criminal offense, obstructs or attempts to obstruct justice as explained in USSG § 3C1.1, or acts inconsistently with acceptance of responsibility as explained in USSG § 3E1.1.

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9. **Sentencing Recommendation:** The USAO will recommend the low end of the applicable guideline range as long as defendant demonstrates an acceptance of responsibility as explained above.

10. **No Enhancement:** The USAO agrees not to file for a sentencing enhancement under 21 U.S.C. § 851 if defendant has any prior felony drug convictions.

11. **Firearm Enhancement:** The parties have no agreement as to whether the adjustment for possession of a firearm applies pursuant to U.S.S.G. § 2D1.1(b)(1).

12. **Obstruction of Justice Enhancement:** The parties have no agreement as to whether the obstruction of justice enhancement applies pursuant to U.S.S.G. § 3C1.1.

13. **“Safety Valve” Adjustment:** The parties have no agreement as to whether defendant meets the criteria of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 for “safety valve” relief from a mandatory minimum sentence.

14. **Additional Departures, Adjustments, or Variances:**

The USAO agrees not to seek any upward departures, adjustments, or variances to the advisory sentencing guideline range, or to seek a sentence in excess of that range, except as specified in this agreement.

Defendant agrees that, should defendant seek a downward departure, adjustment, or variance from the applicable guideline range determined by the Court and Probation Office, defendant will provide the government with notice of: (1) the factual basis for such request; (2) any evidence defendant intends to introduce or rely upon at the sentencing hearing; and (3) any witnesses, including expert witnesses, defendant intends to call or rely upon at the sentencing hearing. Such notice must be provided to the government no later than the Wednesday prior to the week during which the sentencing hearing is scheduled. Defendant agrees that if defendant fails to comply with this notice requirement, defendant will not oppose a government motion for a postponement of the sentencing hearing.

15. **Waiver of Appeal/Post-Conviction Relief:** With one exception discussed below, defendant knowingly and voluntarily waives the right to appeal from any aspect of the conviction and sentence on any grounds, except for a claim that: (1) the sentence imposed exceeds the statutory maximum, or (2) the Court arrives at an advisory sentencing guideline range by applying an upward departure under the provisions of Guidelines Chapters 4 or 5K, or (3) the Court exercises its discretion under 18 U.S.C. § 3553(a) to impose a sentence which exceeds the

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advisory guideline sentencing range as determined by the Court. Defendant may appeal only the Court's denial of his motions to suppress, as set forth in the Court's opinion and order dated February 13, 2019.

Defendant's waiver includes, but is not limited to, any challenges to the constitutionality of the statute(s) to which defendant is pleading guilty and any argument that the facts to which defendant admits are not within the scope of the statute(s). Should defendant seek an appeal, despite this waiver, the USAO may take any position on any issue on appeal. Defendant also waives the right to file any collateral attack, including a motion under 28 U.S.C. § 2255, challenging any aspect of the conviction or sentence on any grounds, except on grounds of ineffective assistance of counsel, and except as provided in Fed. R. Crim. P. 33 and 18 U.S.C. § 3582(c)(2). In the event that defendant's conviction(s) under this agreement are vacated, the government may reinstate and/or file any other charges, and may take any position at a resentencing hearing, notwithstanding any other provision in this agreement.

16. **Court Not Bound:** The Court is not bound by the recommendations of the parties or of the presentence report (PSR) writer. Because this agreement is made under Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, defendant may not withdraw any guilty plea or rescind this plea agreement if the Court does not follow the agreements or recommendations of the parties.

17. **Full Disclosure/Reservation of Rights:** The USAO will fully inform the PSR writer and the Court of the facts and law related to defendant's case. Except as set forth in this agreement, the parties reserve all other rights to make sentencing recommendations and to respond to motions and arguments by the opposition.

18. **Breach of Plea Agreement:** If defendant breaches the terms of this agreement, or commits any new criminal offenses between signing this agreement and sentencing, the USAO is relieved of its obligations under this agreement, but defendant may not withdraw any guilty plea.

If defendant believes that the government has breached the plea agreement, defendant must raise any such claim before the district court, either prior to or at sentencing. If defendant fails to raise a breach claim in district court, defendant has waived any such claim and is precluded from raising a breach claim for the first time on appeal.

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19. **Forfeiture Terms:**

A. **Assets and Authority:** By signing this agreement, defendant knowingly and voluntarily forfeits all right, title, and interest in \$26,166, which defendant admits represents proceeds he personally obtained, directly or indirectly, and was used to facilitate the commission of the offense in Count 1 of the Indictment.

In addition, defendant knowingly and voluntarily forfeits all right, title, and interest in and to the following firearms, accessories, and ammunition, which the defendant admits is property used or intended to be used, in any manner or part, to commit or to facilitated the criminal activity set forth in Count 1 of the Indictment pursuant to 21 U.S.C. § 853(a)(2):

1. A Strum and Ruger .41 caliber revolver, serial number 40-07225; and
2. A Charter Arms Cougar .38 caliber revolver, serial number 12-00662.

B. **No Alteration or Satisfaction:** Defendant knowingly and voluntarily waives the right to a jury trial on the forfeiture of assets. Defendant knowingly and voluntarily waives all constitutional, legal, and equitable defenses to the forfeiture of this money judgment, including any claim or defense under the Eighth Amendment to the United States Constitution, and any rights under Rule 32.2 of the Federal Rules of Criminal Procedure. Defendant further agrees forfeiture of defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty this Court may impose upon defendant in addition to forfeiture. Defendant agrees that forfeiture of substitute assets as authorized pursuant to 21 U.S.C. § 853(p) shall not be deemed an alteration of defendant's sentence.

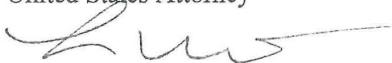
20. **Memorialization of Agreement:** No promises, agreements, or conditions other than those set forth in this agreement will be effective unless memorialized in writing and signed by all parties listed below or confirmed on the record before the Court. If defendant accepts this offer, please sign and attach the original of this letter to the Petition to Enter Plea.

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21. **Deadline:** This plea offer expires if not accepted by May 3, 2019 at 12:00 p.m.

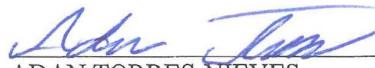
Sincerely,

BILLY J. WILLIAMS
United States Attorney


LEWIS S. BURKHART
Assistant United States Attorney

I have carefully reviewed every part of this agreement with my attorney. I understand and voluntarily agree to its terms. I expressly waive my rights to appeal as outlined in this agreement. I wish to plead guilty because, in fact, I am guilty.

5-6-19
Date


ADAN TORRES-NIEVES
Defendant

I represent the defendant as legal counsel. I have carefully reviewed every part of this agreement with defendant. To my knowledge, defendant's decisions to make this agreement and to plead guilty are informed and voluntary ones.

5/6/19
Date


JOHN GUTBEZAHL
Attorney for Defendant

I fully and accurately translated this agreement to the above-named defendant as the interpreter in this case. I fully and accurately interpreted discussions between the defendant and the attorney.

5-6-19
Date


Interpreter (if necessary)

Gutierrez
5 Contenport Dr
Ste 400
LO 029035
ED 524 1919

Attorney for Defendant
Abogado defensor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

***VISTO EN EL TRIBUNAL DE PRIMERA INSTANCIA DE LOS ESTADOS UNIDOS
PARA EL DISTRITO DE OREGÓN***

UNITED STATES OF AMERICA,
Plaintiff,
vs.
DAWN TAYLOR RIGGS,
Defendant.
CR No. 37-CR-3586-SJ
PETITION TO ENTER PLEA
OF GUILTY, CERTIFICATE
OF COUNSEL, AND ORDER
ENTERING PLEA.

The defendant represents to the court:

El acusado manifiesta al juez que:

1. My name is RON TOLSS NISSS. I am 45 years old.

I have gone to school up to and including the _____ grade.

1. *Mi nombre completo es _____ . Tengo _____*

años de edad. Asistí a la escuela incluyendo hasta el _____ año.

2. My attorney is John Gutierrez / Ezekiel Cortez.

2. *Mi abogado es _____ .*

3. My attorney and I have discussed my case fully. I have received a copy of the Indictment or Information. I have read the Indictment or Information, or it has been read to me, and I have discussed it with my attorney. My attorney has counseled and advised me concerning the nature of each charge, any lesser-included offense(s), and the possible defenses that I might have in this case. I have been advised and understand that the elements of the charge(s) alleged against me to which I am pleading "GUILTY" are as follows [see instructions]: _____

Possess or Intent to Distribute

I have had a full and adequate opportunity to disclose to my attorney all facts known to me that relate to my case. I understand that the Court may ask whether I am satisfied with the advice I have received from my attorney.

3. *He hablado ampliamente de mi caso con mi abogado. Recibí una copia de la acusación formal o la acusación de la fiscalía contra mí. He leído la acusación formal o la acusación de la fiscalía, o me la han leído, y he hablado de ella con mi abogado. Mi abogado*

me ha aconsejado y asesorado sobre la naturaleza de cada uno de los cargos, de cualquier delito menos grave incluido, y de las defensas posibles que pueda tener en este caso. He sido asesorado y entiendo que los elementos del cargo (o los cargos) que se me ha imputado al (o a los) que me declaro CULPABLE son los siguientes: [véase las instrucciones]: _____

He tenido amplia oportunidad para decirle a mi abogado todo lo que yo sé respecto a los hechos relacionados con mi caso. Entiendo que el juez podría preguntarme si estoy satisfecho con el asesoramiento que he recibido de mi abogado.

4. I know that if I plead "GUILTY," I will have to answer any questions that the judge asks me about the offense(s) to which I am pleading guilty. I also know that if I answer falsely, under oath, and in the presence of my attorney, my answers could be used against me in a prosecution for perjury or false statement.

4. *Sé que si me declaro CULPABLE, tendré que contestar todas las preguntas que el juez me haga sobre el delito al (o los delitos a los) que me declaro culpable. También sé que si contesto falsamente, bajo juramento, y en presencia de mi abogado, mis respuestas pueden ser usadas en mi contra en un procesamiento por perjurio o por haber jurado en falso.*

5. I am not under the influence of alcohol or drugs. I am not suffering from any injury, illness or disability affecting my thinking or my ability to reason except as follows: _____

None

I have not taken any drugs or medications within the past seven (7) days except as follows: _____

None

5. *No estoy bajo la influencia de alcohol ni de drogas. No padezco de ninguna lesión,*

enfermedad o incapacidad que afecte mi pensamiento o mi capacidad de razonar, excepto la siguiente: _____

No he tomado drogas ni medicamentos en los últimos siete (7) días excepto los siguientes: _____

6. I understand that conviction of a crime can result in consequences in addition to imprisonment. Such consequences include deportation, or removal from the United States, or denial of naturalization, if I am not a United States citizen; loss of eligibility to receive federal benefits; loss of certain civil rights (which may be temporary or permanent depending on applicable state or federal law), such as the right to vote, to hold public office, and to possess a firearm; and loss of the privilege to engage in certain occupations licensed by the state or federal government.

6. *Entiendo que un fallo condenatorio por un delito puede tener consecuencias adicionales al encarcelamiento. Tales consecuencias incluyen ser deportado, o expulsado de los Estados Unidos, o se me puede negar la naturalización, si no soy ciudadano estadounidense; puedo perder el derecho de recibir subsidios federales; perder temporal o permanentemente ciertos derechos civiles, según la ley estatal o federal que se aplique, por ejemplo, el derecho a votar, de ocupar un cargo público, y de poseer armas de fuego; y perder el derecho a trabajar en ciertas ocupaciones para las cuales se necesita una licencia del gobierno estatal o federal.*

7. I know that I may plead "NOT GUILTY" to any crime charged against me and that I may persist in that plea if it has already been made. I know that if I plead "NOT GUILTY" the Constitution guarantees me:

7. *Sé que puedo declararme "NO CULPABLE" de cualquier delito de que se me acuse, y que puedo persistir en esa declaración si ya se ha hecho. Sé que si me declaro "NO CULPABLE", la Constitución de este país me garantiza:*

- a. The right to a speedy and public trial by jury, during which I will be presumed to be innocent unless and until I am proven guilty by the government beyond a reasonable doubt and by the unanimous vote of twelve jurors;
- a. *El derecho a tener un juicio público, sin demora y por un jurado constituido por doce personas durante el cual se asume que soy inocente a menos que y hasta que el gobierno compruebe mi culpabilidad más allá de una duda razonable y por el voto unánime de los doce miembros de dicho jurado.*
- b. The right to have the assistance of an attorney at all stages of the proceedings;
- b. *El derecho de que un abogado me ayude durante todas las etapas del proceso;*
- c. The right to use the power and process of the court to compel the production of evidence, including the attendance of witnesses in my favor;
- c. *El derecho a utilizar los poderes y procedimientos del juez para exigir que se presenten pruebas, incluyendo la comparecencia de testigos a mi favor;*
- d. The right to see, hear, confront, and cross-examine all witnesses called to testify against me;
- d. *El derecho a ver, escuchar, confrontar y contrainterrogar a todos los testigos llamados a dar testimonio en contra mía.*
- e. The right to decide for myself whether to take the witness stand and testify, and if I decide not to take the witness stand, I understand that no inference of guilt may be drawn from this decision; and
- e. *El derecho a decidir por mi mismo si presto testimonio o no,*

y si decido no prestar testimonio, entiendo que no se puede concluir que soy culpable debido a que no he prestado testimonio; y

f. The right not to be compelled to incriminate myself.

f. *El derecho a que no se me obligue a incriminarme.*

8. I know that if I plead “GUILTY” there will be no trial before either a judge or a jury, and that I will not be able to appeal from the judge’s denial of any pretrial motions I may have filed concerning matters or issues not related to the court’s jurisdiction [see instructions].

8. *Sé que si me declaro CULPABLE, no habrá juicio, ni ante un juez ni ante un jurado de doce personas, y que no podré apelar la denegación del juez sobre cualquier pedimento que yo hubiera presentado antes del juicio, con respecto a asuntos o cuestiones que no están relacionados con la jurisdicción del tribunal [véase las instrucciones].*

9. In this case I am pleading “GUILTY” under Rule 11(c)(1)(B). My attorney has explained the effect of my plea under Rule 11(c)(1)(B) to be as follows [see instructions]:

I may not withdraw my plea
if the court does not follow my
agreement

9. *En este caso, me declaro CULPABLE según la Regla 11(c)(1)(). Mi abogado me explicó que la consecuencia de mi declaración según la Regla 11(c)(1)() es la siguiente [véase las instrucciones]:*

10. I know the maximum sentence which can be imposed upon me for the crime(s) to which I am pleading guilty is life imprisonment and a fine of \$1000000 I also know there is a mandatory minimum sentence of 10 years imprisonment. *(Se pide que)*

10. *Sé que la pena máxima que se me puede imponer por el delito al (o los delitos a los) que me declaro culpable es de _____ años de prisión y una multa de \$_____. También sé que hay una pena mínima obligatoria de _____ años de prisión.*

11. I know that the judge, in addition to any other penalty, will order a special assessment as provided by law in the amount of \$ 100 per count of conviction.

11. *Sé que el juez, además de cualquier otro castigo, fijará, según lo estipula la ley, una cantidad obligatoria de \$_____ por cada cargo de que se me encuentre culpable.*

12. I know that if I am ordered to pay a fine, and I willfully refuse to pay that fine, I can be returned to court, where the amount of the unpaid balance owed on the fine can be substantially increased by the judge and I can be imprisoned for up to one year.

12. *Sé que si se me ordena pagar una multa e intencionalmente rehuso pagar dicha multa, puedo ser enviado al tribunal nuevamente, donde el juez puede aumentar considerablemente el saldo pendiente de la multa, y puede mandarme a la cárcel por un periodo hasta de un año.*

13. My attorney has discussed with me the Federal Sentencing Guidelines. I know the Guidelines are advisory, not mandatory. I also know the sentencing judge, in determining the particular sentence to be imposed, must consider those factors set forth in Title 18, United States Code, Section 3553(a), including, but not limited to: the nature and circumstances of the offense, my own history and characteristics, the goals of sentencing (punishment, deterrence, protection,

and rehabilitation), and the sentencing range established by the advisory Guidelines. If my attorney or any other person has calculated a Guideline range for me, I know that this is only a prediction and advisory, and is only one of the factors that the judge will consider in making a final decision as to what sentence will be imposed. I also know that a judge may not impose a sentence greater than the maximum sentence referred to in paragraph (10) above.

13. *He hablado con mi abogado sobre las Pautas Penales Federales. Sé que según dichas pautas, el juez que imponga la condena generalmente elegirá una condena dentro de los límites de dicha pauta. Sin embargo, si el caso presentase hechos fuera de lo común u otras circunstancias, la ley le permite al juez apartarse de las pautas e imponer una pena ya sea mayor o menor de los límites de las pautas. Aunque la mayoría de las penas serán impuestas dentro de los límites de las pautas, sé que no existe ninguna garantía de que la pena que se me imponga estará dentro de estos límites. Si mi abogado, u otra persona, ha calculado los límites de las pautas que sugieren el castigo que me corresponde, sé que esto es únicamente una suposición y que el juez es quien toma la decisión definitiva con respecto a cuales son los límites de las pautas y cual será el castigo. También sé que un juez no me puede sentenciar a un plazo mayor al castigo máximo indicado en el párrafo (10) de la presente.*

14. I know from discussion with my attorney that, under the Federal Sentencing Guidelines, if I am sentenced to prison I am not entitled to parole. I will have to serve the full sentence imposed except for any credit for good behavior that I earn. I can earn credit for good behavior in prison at a rate of up to 54 days for each year of imprisonment served. Credit for good behavior does not apply to a sentence of one year or less.

14. *Por las conversaciones que he tenido con mi abogado, sé que, según las Pautas*

Penales Federales, si me condenan a ser encarcelado, no tengo derecho a recibir libertad condicional (parole). Tendré que cumplir toda la condena que se me imponga menos el tiempo que se me descuento por observar buena conducta en la prisión. Puedo obtener una rebaja de la condena por buena conducta hasta de 54 días por cada año cumplido en la prisión. Esta rebaja no se aplicará si la condena es de un año o menos.

15. I know that if I am sentenced to prison, the judge will impose a term of supervised release to follow the prison sentence. During my supervised release term I will be supervised by a probation officer according to terms and conditions set by the judge. In my case, a term of supervised release can be _____ to 5 years. If I violate the conditions of supervised release, I may be sent back to prison for up to 3 year(s) [see instructions].

15. *Sé que si se me condena a ser encarcelado, el juez impondrá un tiempo de libertad supervisada que sería después de que yo haya cumplido el castigo en la cárcel. Durante este tiempo, estaré supervisado por un agente de libertad probatoria de acuerdo a los términos y condiciones fijados por el juez. En mi caso, el término de libertad supervisada puede ser de _____ a _____ años. Si no cumple con las condiciones de libertad supervisada, podría ser enviado nuevamente a la cárcel por un periodo hasta de _____ año(s) [véase las instrucciones].*

16. I know that in addition to or in lieu of any other penalty, the judge can order restitution payments to any victim of any offense to which I plead guilty. I am also informed that, for certain crimes of violence and crimes involving fraud or deceit, it is mandatory that the judge impose restitution in the full amount of any financial loss or harm caused by an offense. If imposed, the victim can use the order of restitution to obtain a civil judgment lien. A restitution

order can be enforced by the United States for up to twenty (20) years from the date of my release from imprisonment, or, if I am not imprisoned, twenty (20) years from the date of the entry of judgment. If I willfully refuse to pay restitution as ordered, a judge may resentence me to any sentence which could originally have been imposed.

16. *Sé que además de o en vez de cualquier otro castigo, el juez puede ordenar que haga pagos de restitución a víctimas de cualquier delito de que me declaro culpable. También se me ha informado que, por ciertos delitos de violencia y delitos que incluyen fraude o engaño, el juez está obligado a imponerme la restitución de la cantidad total de alguna pérdida o daño económico causado por el delito. Si se impone la orden de restitución, la víctima puede utilizar dicha orden para obtener un gravamen impuesto por un fallo civil. El gobierno federal puede hacer que se cumpla una orden de restitución hasta de veinte (20) años a partir de la fecha en que salí de la cárcel, o, si no me encarcelan, veinte (20) años a partir de la fecha en que se registró el fallo. Si intencionalmente rehuso pagar la restitución como se me ha ordenado, el juez puede volver a sentenciar me a cualquier condena que me hubiera impuesto inicialmente.*

17. On any fine or restitution in an amount of \$2,500 or more, I know that I will be required to pay interest unless that fine or restitution is paid within fifteen (15) days from the date of the entry of judgment.

17. *Sé que estaré obligado a pagar intereses respecto a alguna multa o restitución de \$2,500 o más, a menos que se pague dicha multa, o la restitución, dentro de quince (15) días a partir de la fecha en que se registró el fallo.*

18. If I am on probation, parole, or supervised release in any other state or federal case, I know that by pleading guilty in this court my probation, parole or supervised release may

be revoked and I may be required to serve time in that case, which may be consecutive, that is, in addition to any sentence imposed on me in this court.

18. *Si estoy bajo libertad condicional, libertad a prueba o libertad supervisada en cualquier otro caso estatal o federal, sé que al declararme culpable en este tribunal la libertad condicional, libertad a prueba o supervisada podría ser revocada. Puede que se me ordene cumplir el tiempo de la condena de aquel caso, el cual podría ser consecutivo, es decir, además de la pena que se me imponga en este tribunal.*

19. If I have another case pending in any state or federal court, I know that my Petition and Plea Agreement in this case do not, in the absence of an express and written agreement, apply to my other case(s), and that I can be faced with consecutive sentences of imprisonment.

19. *Si tengo otro caso pendiente en algún tribunal estatal o federal, sé que mi solicitud y el acuerdo declaratorio en este caso no se aplican al otro caso (u otros casos) sin un acuerdo expreso y por escrito, y que podría enfrentar condenas de encarcelamiento consecutivas.*

20. My plea of "GUILTY" is based on a Plea Agreement that I have made with the prosecutor. That Plea Agreement is attached hereto and incorporated herein. I have read or had read to me the Plea Agreement, and I understand the Plea Agreement.

20. *Mi declaración de CULPABILIDAD se basa en el acuerdo declaratorio que he hecho con el fiscal federal. Se adjunta dicho documento y forma parte de esta solicitud. He leído, o me han leído, el acuerdo declaratorio y lo entiendo en su totalidad.*

21. The Plea Agreement contains the only agreement between the United States government and me. No officer or agent of any branch of government (federal, state or local) or anyone else has promised or suggested that I will receive a lesser term of imprisonment, or

probation, or any other form of leniency if I plead "GUILTY" except as stated in the Plea Agreement. I understand that I cannot rely on any promise or suggestion made to me by a government agent or officer which is not stated in writing in the Plea Agreement, or which is not presented to the judge in my presence in open court at the time of the entry of my plea of guilty.

21. *El gobierno y yo hemos llegado a este único acuerdo declaratorio. Ningún oficial o agente gubernamental (federal, estatal o local) u otra persona me ha prometido, o me ha sugerido que recibiré un plazo reducido en la cárcel, o libertad a prueba, u otro tipo de castigo menos severo si me declarase CULPABLE, con la única excepción de lo manifestado en el acuerdo declaratorio. Entiendo que no puedo contar con ninguna promesa o sugerencia de parte de ningún agente u oficial del gobierno que no se haya indicado por escrito en el acuerdo declaratorio, o que no se haya presentado al juez, en mi presencia, en pleno tribunal al momento de declararme culpable.*

22. My plea of "GUILTY" is not the result of force, threat, or intimidation.

22. *No me han forzado, amenazado o intimidado a que me declare CULPABLE.*

23. I hereby request that the judge accept my plea of "GUILTY" to the following count(s): I Possess my Intent to Distribute Heroin.

23. *Por la presente solicito al juez que acepte mi declaración de CULPABILIDAD al siguiente cargo (o cargos):* _____

24. I know that the judge must be satisfied that a crime occurred and that I committed that crime before my plea of "GUILTY" can be accepted. With respect to the charge(s) to which I am pleading guilty, I represent that I did the following acts and that the following facts are true [see instructions]:

In May 2017 In the District of Org. I knowledged
possess more than 1 Kg of a substance containing
heroin with the intent to sell the heroin

24. *Antes de que se pueda aceptar mi declaración de CULPABILIDAD, sé que el juez debe quedar satisfecho de que ocurrió un delito y que dicho delito lo cometí yo. Con respecto al cargo (o a los cargos) al que me declaro culpable, manifiesto que cometí los siguientes actos y que los siguientes hechos son verídicos [véase las instrucciones]:*

25. I offer my plea of "GUILTY" freely and voluntarily and of my own accord and with a full understanding of the allegations set forth in the Indictment or Information, and with a full understanding of the statements set forth in this Petition and in the Certificate of my attorney that is attached to this Petition.

25. *Me declaro CULPABLE libre y voluntariamente y con el entendimiento total de las alegaciones expuestas en la acusación formal o la acusación de la fiscalía, y con el total entendimiento de las declaraciones expuestas en esta solicitud y en el certificado de mi abogado, el cual se adjunta a la presente.*

SIGNED by me in the presence of my attorney, after reading (or having had read to me) all of the foregoing pages and paragraphs of this Petition on this 6 day of May,
2009

FIRMADO por mí en presencia de mi abogado, después de haber leído (o después de

(haber escuchado) todos los párrafos y páginas anteriores de esta solicitud el día _____ del mes de _____ de 200 ____.



Defendant/Acusado

CERTIFICATE OF COUNSEL***CERTIFICADO DEL ABOGADO DEFENSOR***

The undersigned, as attorney for defendant Adan Tonks Howe, hereby certifies:

El que suscribe, abogado defensor de _____, por la presente

CERTIFICA QUE:

1. I have fully explained to the defendant the allegations contained in the Indictment or Information in this case, any lesser-included offense(s), and the possible defenses which may apply in this case.
1. *Le he explicado detalladamente al acusado las alegaciones de la acusación formal o la acusación de la fiscalía en este caso, cualquier delito (o delitos) menos grave incluido, y las posibles defensas que puedan aplicarse en este caso.*
2. I have personally examined the attached Petition To Enter Plea of Guilty And Order Entering Plea, explained all its provisions to the defendant, and discussed fully with the defendant all matters described and referred to in the Petition.
2. *He examinado personalmente la solicitud para presentar una declaración de culpabilidad y orden judicial para asentar la misma; le he explicado al acusado todas las disposiciones de la misma, y he hablado detalladamente con él sobre todos los asuntos descritos y mencionados en dicha solicitud.*
3. I have explained to the defendant the maximum penalty and other consequences of entering a plea of guilty described in paragraphs (6)-(20) of the Petition, and I have also explained

to the defendant the applicable Federal Sentencing Guidelines.

3. *Le he explicado la pena máxima y las consecuencias de presentar una declaración de culpabilidad, descritas en los párrafos (6) a (20) de la solicitud, y también le expliqué las Pautas Penales Federales pertinentes a su caso.*

4. I recommend that the Court accept the defendant's plea of "GUILTY."

4. Recomiendo que el juez acepte la declaración de "CULPABILIDAD" del acusado.

SIGNED by me in the presence of the above-named defendant, and after full discussion with the defendant of the contents of the Petition To Enter Plea of Guilty, and any Plea Agreement, on this 6 day of May, 2015.

FIRMADO por mí en presencia del acusado, y después de haber hablado detalladamente con él respecto al contenido de la solicitud para presentar una declaración de culpabilidad, y cualquier acuerdo declaratorio, el día _____ del mes de _____ de 200_____.

Attorney for Defendant
Abogado defensor

ORDER ENTERING PLEA

FALLO JUDICIAL SOBRE LA DECLARACIÓN

I find that the defendant's plea of GUILTY has been made freely and voluntarily and not out of ignorance, fear, inadvertence, or coercion. I further find the defendant has admitted facts that prove each of the necessary elements of the crime(s) to which the defendant has pled guilty.

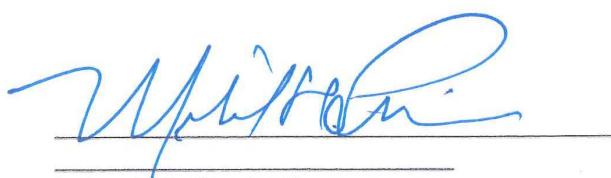
El juez que preside determina que la declaración de "CULPABILIDAD" del acusado ha sido libre y voluntaria, y no por ignorancia, miedo, inadvertencia o coerción. Así mismo determina que el acusado ha admitido los hechos que comprueban cada uno de los elementos necesarios del delito al (o los delitos) a que se ha declarado culpable.

IT IS THEREFORE ORDERED that the defendant's plea of GUILTY be accepted and entered as requested in this Petition and as recommended in the Certificate of defendant's attorney.

POR LO TANTO SE ORDENA que se acepte y asiente la declaración de CULPABILIDAD presentada por el acusado tal y como lo pide en esta solicitud y lo recomienda en su certificado su abogado.

DATED this 6th of May, 2019, in open court.

FECHADO el día _____ del mes de _____ de 200____, en pleno tribunal.



Judge, U.S. District Court
Juez, Tribunal Federal de Primera Instancia

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORLAND DIVISION

UNITED STATES OF AMERICA

3:17-cr-00386-SI

v.

**GOVERNMENT'S SENTENCING
MEMORANDUM**

ADAN TORRES-NIEVES,

Defendant.

Introduction

The United States of America submits the following memorandum recommending that defendant be sentenced to 168 months of imprisonment.

Factual Background

A. The Offense Conduct

The Court is particularly familiar with the facts of this case following an evidentiary hearing on February 11, 2019 and the issuance of an opinion on February 13, 2019, in which the Court made findings of fact. *See* Opinion and Order [ECF Doc. 34] at 5-9.

In short, investigators from the Blue Mountain Narcotics Enforcement Team (“BENT”) began investigating defendant as he appeared to be the source of supply for a lower-level drug dealer, Carlos Cisneros-Razo.

Through a series of controlled purchases of methamphetamine from Cisneros-Razo, investigators established probable cause to arrest defendant and Cisneros-Razo and to execute a search warrant on each of their respective residences. On October 1, 2018, this Court sentenced Carlos Cisneros-Raza to 60 months of imprisonment for possessing with intent to distribute methamphetamine in *United States v. Cisneros-Razo*, 17-cr-00389-SI.

Upon arrest, defendant was advised of his *Miranda* rights and gave a statement. He asked who was in charge of this investigation because he was wondering about the charges he would be looking at and how he could help. Defendant admitted that he had a pound of methamphetamine, five “pieces” of heroin, a large amount of cocaine and \$20,000 in cash. He said that everything should be together in the garage and that he would take the officers there to show them where it was. He admitted to providing methamphetamine to Cisneros-Razo in the past, and said that he sells a half ounce of methamphetamine for \$150.

Investigators transported defendant to the residence, where he pointed them to the broken-down green 1997 Nissan Pathfinder located in the center of the garage. He said that

there would be two kilograms of cocaine in the Pathfinder and tried to open the door but it was locked. Investigators retrieved the keys from the items seized from defendant and provided them to defendant who opened the Pathfinder. Inside of the vehicle, investigators found the following: (1) 2.170 kilograms of cocaine; (2) 1.764 kilograms of heroin; (3) 646 grams of actual methamphetamine; (4) digital scales; (5) \$21,046 in cash; (6) a stolen revolver; and (7) a camouflage ballistic vest.

Investigators also found a second revolver in defendant's bedroom.



Firearm found in the Pathfinder



Items seized from defendant and his residence.

B. The Charges

On October 17, 2017, a federal grand jury returned a five-count indictment charging defendant with possessing with intent to distribute heroin, methamphetamine and cocaine, respectively, being a felon in possession of a firearm and possessing a firearm in furtherance of drug trafficking crime.

C. The Plea Agreement & Guideline Computations

On May 6, 2019, defendant pled guilty to count one of the indictment pursuant to a plea agreement. The government submits that defendant is subject to the mandatory minimum sentence of 120 months of custody and a term of supervised release of five years.

The plea agreement leaves open the following: (1) whether the firearm enhancement applies; (2) whether an obstruction of justice enhancement applies; and (3) whether safety valve applies.

The plea agreement allows defendant to appeal only the Court's denial of his motions to suppress, as set forth in the Court's opinion and order dated February 13, 2019.

The government agrees with the following calculations in the Presentence Report (PSR):

Enhancement	Government's Position
Base Offense Level — more than 10,000 kilograms of converted drug weight USSG § 2D1.1(c)(1)	34 (not contested)
Firearm Enhancement — USSG § 2D1.1(b)(1)	+2 (<i>contested</i>)
Safety Valve Adjustment --- USSG § 2D1.1(b)(18)	-0 (<i>contested</i>)
Obstruction of Justice — USSG § 3B1.1(C)	+2 (<i>contested</i>)
Acceptance of Responsibility— USSG § 3E1.1	-3 (not contested)
Government's Total Offense Level	35
Criminal History Category	I (PSR ¶ 45)
Resulting Guideline Range	168-210

Argument

A. Contested Guideline Issues

Defendant has contested two aspects of the PSR.

First, defendant contests the PSR's inclusion of a firearm enhancement, stating that there is no evidence that defendant used, threatened to use or possessed a firearm in connection with a drug transaction. The government disagrees.

An increase of two levels shall be applied “[i]f a dangerous weapon (including a firearm) was possessed.” USSG § 2D1.1(b)(1). The application note states that the enhancement should be applied if the weapon was present, unless it is “clearly improbable” that the weapon was connected with the offense, giving the example of an unloaded hunting rifle found in the closet. *Id.* at application note 11. The defendant bears the burden of proving that it was clearly improbable that he possessed a firearm in connection with the offense. *See United States v. Ferryman*, 444 F.3d 1183, 1186 (9th Cir. 2006).

The issue also implicates defendant's eligibility for safety valve, because defendant cannot be eligible for safety valve if he possessed a firearm or dangerous weapon in connection with the offense. USSG § 5C1.2(a)(2). The standard is slightly different, however. With respect to the safety valve adjustment, defendant bears the burden to establish by a preponderance of the evidence that he did not possess a firearm in connection with the offense. *See Ferryman*, 444 F.3d at 1186. The Ninth Circuit has joined other circuits in affirming the denial of safety valve relief based on the circumstances in which the firearms were found, coupled with the implausibility of

defendant's explanations. *Id.* One factor is whether the firearm was located "in close proximity to the drugs." *See United States v. Gillock*, 886 F.2d 220, 223 (9th Cir. 1989).

Here, defendant has entered a guilty plea to possessing more than one kilogram of heroin with intent to distribute. The parties agree that the relevant conduct includes the methamphetamine and cocaine. The heroin, methamphetamine and cocaine were found in the broken down, locked Pathfinder in defendant's garage. Defendant had the keys to that Pathfinder in his pocket when arrested after leaving a meeting with a fellow drug trafficker to whom he had distributed drugs in the last month. Inside the Pathfinder were also the common "tools of the trade" for large-scale drug traffickers. The Pathfinder contained: (1) digital scales, which are commonly used to measure smaller quantities of drug to be distributed; (2) \$21,046 in cash, which are drug proceeds; (3) a ballistic vest, which is commonly used for protection by drug traffickers; and (4) a .38 caliber revolver. Detective Hubel testified that the revolver had been stolen. In his post-arrest statement, defendant said that his family was not aware of his drug trafficking, meaning that he alone used the Pathfinder to store these items.

There does not appear to be any dispute that defendant possessed the gun found the Pathfinder. The government is not seeking the enhancement based on the gun found in his bedroom. The issue seems to be whether defendant has carried his burden that it was "clearly improbable" that it was connected to the offense. In fact, all of the evidence suggests that it was directly connected to defendant's drug trafficking. Indeed, he was charged with possessing a firearm in furtherance of a drug trafficking offense. Drug traffickers possessing tens of thousands of dollars of controlled substances possess

firearms to protect themselves and their product because they often cannot call police to report a robbery of drugs. Drug traffickers often carry guns in order to extract debts from dealers downstream and to avoid being robbed when moving large quantities of drugs. Defendant both stored large quantities of valuable drugs in Pathfinder in his garage and was engaged in distributing relatively small quantities downstream to make money. The large amount of cash, digital scales and ballistic vest are all consistent with someone who stores and distributes drugs.

The government submits that the firearm enhancement is appropriate and the safety valve adjustment is not appropriate because of the proximity of the firearm to the drugs and other drug trafficking materials, the fact that only defendant had access to the Pathfinder, and the absence of any explanation for why a stolen firearm would be located with tens of thousands of dollars of drugs. Defendant essentially maintained a safe to keep the items necessary to engage in drug trafficking and hid the safe in plain sight by using the locked Pathfinder in his garage.

Second, defendant contends that he did not obstruct justice. At the suppression hearing, defendant did not simply contest the admissibility of the evidence as presented by the government, but decided to testify to a version of events that conflicted with the evidence. Defendant testified to the following: (1) that he told Trooper Arroyo that he wanted an attorney three times; (2) that Detective Hubel never read him his *Miranda* rights; (3) that he asked for an attorney at City Hall; and (4) that the investigators told him that if he didn't cooperate with them that they were going to take his son from the house. *See* Transcript of Evidentiary Hearing at 141-49 (testimony of defendant).

The Court made the following findings: (1) Detective Hubel read defendant his Miranda rights; (2) the Court did not find defendant's testimony credible; (3) defendant did not ask for an attorney; and (3) when interviewed during a 52-minute long interview, defendant did not mention an attorney and offered to help officers. *See* Opinion and Order [ECF Doc. 34] at 7-9 and n. 1.

The government submits that defendant lied on the witness stand when he testified that he was never advised of his *Miranda* rights, that he lied when he testified that he asked for a lawyer repeatedly, and that he lied when he testified that the officers threatened to take his son away if he did not cooperate. The evidence at the suppression hearing disputed each of these, and the Court heard testimony from all witnesses and credited the officers and expressly stated that it did not find defendant's testimony credible. This is not simply a matter of differing recollections – defendant sought to have the evidence suppressed by concocting a version of events that the Court found not credible.

Application note 4(B) to USSG 3C1.1 includes committing perjury, and note (F) includes providing materially false information to a judge. Defendant's false testimony was material, because had it been credited by the Court it could have led to suppression of the evidence and dismissal of the criminal charges.

B. Government's Recommended Sentence

The government recommends a sentence of 168 months.

Defendant has been known to investigators for many years as a drug trafficker in Northeast Oregon and he has had numerous encounters with police. The PSR reflects an arrest for possession of a controlled substance from 1996 and a conviction in 2002 both of which were in Umatilla County. Detective Hubel testified to a total of five arrests at the evidentiary hearing.

Defendant was not simply a courier or stash house operator. He both possessed significant quantities of heroin, methamphetamine and cocaine and was actively distributing methamphetamine at the street level. Defendant does not have a drug addiction and appears to maintain some legitimate employment. Thus, he is not a young man who fell in with the wrong crowd and made bad decisions. Defendant appears to essentially have operated a drug trafficking business in order to make a profit, and it appears that defendant has been involved in drug trafficking for many years. Through the solid investigative work of BENT, defendant was arrested in connection with a relatively small series of drug transactions and a search warrant at his residence recovered large quantities of drugs, guns, cash and drug trafficking material.

C. Restitution & Forfeiture

Pursuant to the plea agreement, defendant agreed to forfeit \$26,166 which he admitted represented proceeds that he personally obtained and was used to facilitate the commission of the offense. Defendant also agrees to forfeit his interest in the two firearms seized from his residence.

Conclusion

Based on the foregoing, the government recommends that this Court impose a sentence of 168 months, followed by a five-year term of supervised release and subject to conditions set out in the PSR.

Dated: September 11, 2019

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney

William M. Narus
WILLIAM M. NARUS, CASB #243633
Assistant United States Attorney

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Attorney for Defendant and Trial Attorney

UNITED STATES DISTRICT COURT

District of Oregon

Portland Division Oregon

UNITED STATES OF AMERICA

Plaintiff

**DEFENDANT'S OBJECTION TO
GOVERNMENT'S SENTENCING
RECOMMENDATION**

V.

Case 3:17-cr-00386-SI-01

ADAN TORRES NIEVES

Defendant

Objections to Government's Sentencing Recommendations

Mr. Torres-Nieves hereby objects to the Government's Sentencing Recommendation in the following manner:

(1) SPECIFIC TERMS OF THE SENTENCING RECOMMENDATION

The binding Plea Agreement between the parties specifically and explicitly precludes the Government from seeking what it has just asked this Court to do – to

apply the gun and obstruction upward enhancements. This is a breach of the Agreement. *See, Puckett v. United States*, 556 U.S. 129, 136 (2009). For the reasons outlined here, Defendant, Adan Torres-Nieves, objects to the Government's recommendations for a gun enhancement and obstruction of justice enhancement, because the Plea Agreement that the Government drafted and accepted provides as follows at paragraph 14, page 3:

14. Additional Departures, Adjustments, or Variances:

The USAO agrees *not to seek any upward departures, adjustments, or variances to the advisory sentencing guideline range, or to seek a sentence in excess of that range, except as specified in this agreement.*

Defendant agrees that, should defendant seek a downward departure, adjustment, or variance from the applicable guideline range determined by the Court and Probation Office, defendant will provide the government with notice of: (1) the factual basis for such request; (2) any evidence defendant intends to introduce or rely upon at the sentencing hearing; and (3) any witnesses, including expert witnesses, defendant intends to call or rely upon at the sentencing hearing. Such notice must be provided to the government no later than the Wednesday prior to the week during which the sentencing hearing is scheduled. Defendant agrees that if defendant fails to comply with this notice requirement, defendant will not oppose a government motion for a postponement of the sentencing hearing.

Plea Agreement, emphasis added.

At paragraphs 11-13, the Plea Agreement specifically provides as follows:

11. Firearm Enhancement: The parties have no agreement as to whether the adjustment for possession of a firearm applies pursuant to U.S.S.G. § 2D1.1(b)(1).

12. Obstruction of Justice Enhancement: The parties have no agreement as to whether the obstruction of justice enhancement applies pursuant to U.S.S.G. § 3Cl.1.

13. "Safety Valve" Adjustment: The parties have no agreement as to whether defendant meets the criteria of 18 U.S.C. §3553(f) and U.S.S.G. § 5Cl.2 for "safety valve" relief from a mandatory minimum sentence.

Thus, the binding Plea Agreement specifically precludes the Government from seeking "*any upward departures, adjustments, or variances to the advisory sentencing guideline range, or to seek a sentence in excess of that range, except as specified in this agreement.*" The Agreement specifies that "there is no agreement on the firearm enhancement, no agreement on the obstruction of justice nor on the safety valve." But paragraph 14 is specific that, despite there being no agreement on the three issues the Government is still expressly precluded from seeking any of the enhancements it now proposes.

That this is a clear breach and specific performance and due process are required here, is clearly established law. *See, Mabry v. Johnson*, 467 U.S. 504, 507–08 (1984) (a defendant's guilty plea "implicates the Constitution," not the "plea bargain standing alone"); *Santobello v. New York*, 404 U.S. 257, 262-62 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) ("[A] plea of guilty is more than an admission of conduct; it is a conviction.")

Furthermore, the “PSR reflects an arrest for possession of a controlled substance from 1996 and a conviction in 2002 both of which were in Umatilla County. Detective Hubel testified to a total of five arrests at the evidentiary hearing.” See Government’s Sentencing Memorandum at page 10. Is there any claim that the PSR writer or Det. Hubel lied under oath? No, mistakes are made. The government did not object to the PSR. There is no recording anywhere that proves that Mr. Adan Torres-Nieves was read his Miranda warnings including in the 52 minute interview cited by the Government.

2. CHARACTERIZATION OF MR. TORRES-NIEVES

It appears that the Government wants to use of convictions from 2002 to label Mr. Torres-Nieves as a long time drug dealer. The search warrant affidavit makes a this blanket assertion as well without adding any significant facts to prove this assertion. Prior to this incident Mr. Torres-Nieves had never been charged let alone convicted of manufacture or delivery of controlled substances. The Government is seeking to use Mr Torres-Nieves acquittal or the failure of the state to successfully prosecute Mr. Torres-Nieves as reason for imposing this excessive sentence.

September 13 2019

/s/ John E. Gutbezahl

JOHN E. GUTBEZAHL OSB#940845

Attorney for Defendant

BILLY J. WILLIAMS, OSB #901366

United States Attorney

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Attorneys for United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORLAND DIVISION

UNITED STATES OF AMERICA

3:17-cr-00386-SI

v.

**GOVERNMENT'S SUPPLEMENTAL
SENTENCING MEMORANDUM**

ADAN TORRES-NIEVES,

Defendant.

Introduction

The United States of America submits the following supplemental sentencing memorandum in response to defendant's objection to the government's initial sentencing recommendation.

Defendant argues that the plea agreement precludes the government from arguing for sentencing enhancements for possession of a firearm and obstruction of justice. This argument overlooks the language of the plea agreement and disregards the intent of the parties.

First, the plea agreement states expressly that the parties have no agreement as to whether the firearm enhancement and the obstruction of justice enhancement apply. The plea agreement was revised to include this language in order to allow defendant an opportunity to argue against the enhancements. Paragraph fourteen of the plea agreement states expressly that the USAO will not seek an upward departure, adjustment, or variance “except as specified in this agreement.” The government submits that the plea agreement clearly explained that those enhancements were at issue and that the parties had not reached an agreement with respect to them.

Second, based on the negotiations between the parties, as reflected in the correspondence, the government’s recommendation of 168 months is exactly what was negotiated and expected. The government will request permission to file the correspondence under seal.

In May 2018, the government extended a plea agreement to defendant. That plea agreement included a joint recommendation by the parties for a firearm enhancement. *See Exhibit 1.* The plea agreement was revised in June 2018 and continued to include the firearm enhancement. *See Exhibit 2.* There was no obstruction of justice enhancement at that time, of course, because defendant had not testified at the evidentiary hearing.

On February 15, 2019, following the evidentiary hearing, counsel for the government inquired whether defendant would like a new plea agreement, and defendant proposed the following: “How about we argue for 120 and you cap your recommendation around 160 with his ability to appeal.” *See Exhibit 3.*

On February 19, 2019, the government responded, stating, “Could you let me know your thoughts on a government recommendation of 168 months, you can argue down to 120, and you can appeal the issues at the suppression hearing.” *Id.*

On February 21, 2019, the government extended a revised plea agreement, which still included the firearms enhancement and explained, “The plea agreement leaves open safety valve and obstruction of justice enhancements for the Court’s determination. We can submit our arguments at sentencing. Assuming the Court agrees he obstructed justice and safety valve is not applicable, the government would argue for a sentence of 168 months.” *See Exhibit 4.*

On April 28, 2019, defense counsel stated, “All we need is a decent shot at the +2 for the gun. The client will plead with John and I have some shot at showing that the enhancement should not be applied. You two argue that it does. Not much to ask to get the plea.” *See Exhibit 5.* In response, the government revised the plea agreement to leave open the issue of the firearm enhancement, changing the language from “parties agree to recommend a two-level upward adjustment for possession of a firearm” to the “parties have no agreement as to whether the adjustment for possession of a firearm applies.” *See Exhibit 6.*

Dated: September 17, 2019

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney

William M. Narus
WILLIAM M. NARUS, CASB #243633
Assistant United States Attorney

1 moment.

2 I'll just do it from this. I do believe that the express
3 statements in the plea agreement letter at paragraphs 11
4 through 13 make it clear that those are exceptions to the
5 comment in section 14 that the U.S. Attorney's Office does not
6 seek any upward departures, adjustments, or variances to the
7 advisory sentencing guideline range or to seek a sentence in
8 excess of that range, except as specified in this agreement.

9 I see that language or that text in paragraph 14, but I do
10 think that the statements in paragraphs 11, 12, and 13 that
11 expressly discuss the firearm enhancement, the obstruction
12 enhancement, and the safety valve issue, where it says that the
13 parties have no agreement on those issues, is sufficient to
14 constitute the exception identified in paragraph 14, that that
15 is not governed by any agreement and that both parties are free
16 to assert their positions.

17 I think that is the most reasonable interpretation on an
18 objective standard of the plea agreement letter, and so I am
19 rejecting the defendant's argument that the government is in
20 breach of the plea agreement.

21 That said, I do think -- although, I'm going to say this
22 for the record: I don't think that the issue is ultimately my
23 decision. I think it's for the Court of Appeals. But I do
24 think that that issue is preserved to the defendant, and the
25 defendant has every right to appeal that question to the Ninth

1 such a significant quantity and someone who has been known to
2 them for such a long period of time.

3 For all those reasons, we ask the Court to impose 135
4 months. If I may, Mr. Gutbezahl correctly represented we had
5 discussed a self-surrender. Mr. Torres-Nievez has been in
6 compliance, to my knowledge, and the government does not
7 object to self-surrender.

8 THE COURT: I think you do agree that a sentence of
9 ten years is a substantial sentence.

10 MR. NARUS: Yes, Your Honor.

11 THE COURT: All right. I do recognize that
12 Mr. Torres-Nievez has a number of factors that speak in his
13 favor. He's been in full compliance with pretrial conditions.
14 I respect that. He has a very loving and supportive family,
15 many of whom are here helping him, and I respect and recognize
16 that. And I frankly think that that speaks very well about,
17 you know, you, Mr. Torres-Nievez. None of us are as good as
18 our best deeds and none of us are as bad as our worst deeds,
19 but the offense to which you have pled guilty, to which you
20 have taken responsibility, of possession with intent to
21 distribute heroin, with additional relevant conduct here of the
22 methamphetamine and -- was there also cocaine involved too?

23 MR. NARUS: Yes, Your Honor. Five pounds of cocaine.

24 THE COURT: Those are significant quantities. Plus
25 the ballistic vest and the gun. These are serious offense --

1 the carve-outs, though, one of the exceptions is that the
2 defendant may appeal my ruling in his -- denying his motion to
3 suppress.

4 Am I correct, Mr. Narus?

5 MR. NARUS: Yes, Your Honor.

6 THE COURT: And so you certainly may appeal that.
7 I'm also of the opinion, but I don't think that will bind the
8 Ninth Circuit -- but I'm also of the opinion that the defendant
9 should be allowed to appeal, if he wishes, his argument that
10 there's been a breach of the plea agreement. I don't think
11 there has been, for the reasons I've stated on the record. But
12 if there has been, then that would relieve him of his waiver,
13 in my opinion. And, therefore, I think he should be allowed to
14 appeal that if he wants to. But then again, that's for the
15 government to decide whether or not it wishes to oppose and
16 ultimately for the Ninth Circuit to decide if they wish to hear
17 it or not.

18 Mr. Torres-Nievez, if you do want to appeal any -- any of
19 these issues or any other issues, including my decision on the
20 weapon enhancement or the sentence, if you believe you are
21 allowed to appeal that, you must file a notice of appeal within
22 14 days from the entry of judgment. If you are unable to pay
23 the cost of an appeal, you may apply for leave to appeal in
24 what the law calls in forma pauperis. And if you request, the
25 Clerk of the Court will prepare and file a notice of appeal on