APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

JEREMIAH YBARRA, Movant,	)	
v.	)	CAUSE NO. P-16-CR-523
UNITED STATES OF AMERICA, Respondent.	)	

GOVERNMENT'S ORDERED ADDENDUM TO ITS RESPONSE TO MOVANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

The United States Attorney for the Western District of Texas provides this addendum to its original response (Docket Entry #146) to the Movant's, hereinafter Defendant, JEREMIAH YBARRA'S, Motion to Vacate, Set Aside, or Correct Sentence, pursuant to Title 28, United States Code, Section 2255. (Docket Entry #129)

This Court's current order has directed the Government to address the Defendant's due process claim more thoroughly, as well as, obtain affidavits from defense counsel, which we failed to do so initially. (Docket Entry #163)

The United States requests, based on its initial response and this addendum, that the Court deny the Defendant's motion in its entirety.

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I. THE ISSUES

The two issues to be addressed are: Was the Defendant's Due Process Rights violated by the Court in preventing him from presenting an entrapment defense (Docket Entry #129-1, at 17, Ground Seven); and was the Defendant a victim of ineffective assistance of counsel (Docket Entry #129-1, at 12, Ground Four).

II. ANALYSIS

Due Process:

Per Ground Seven of the Defendant's instant motion he claims; "the District Judge did not allow ***any*** evidence to be shown the jury of how he (the Defendant) was entrapt (sic)." (Docket Entry #129, page 17, Ground Seven) (Emphasis added). The Defendant also asserts that the Court abused its discretion preventing the Defendant to present evidence showing he was not predisposed to commit the crime. Id at 18. The Defendant alleges that he would show that the UC continuously harassed him and he refused the offers, had the Court allowed him. Id at 17.

He follows this assertion by stating he has evidence showing that he never committed the crime. Id at 18. The Defendant does not provide this Court the evidence he would have presented to substantiate his claim.

The Defendant also, going a bit far afield, raises other allegations that do not fall under the Court's alleged violation of his due process rights.

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The Defendant contends that the Government's action was outrageous. Id at 19. It is not clear by the Defendant's brief how the Government's conduct was outrageous

The Defendant declares that he should not have been prosecuted because others were neither charged nor convicted of this crime. He takes the position that his trial counsel was ineffective for not arguing this point.

The Defendant is adamant that he is not guilty of the offense because the Government failed to show he had "actual possession" of the drugs. Id at 20. The Defendant, bootstrapping this argument, then turns on his attorney and alleges she was ineffective for not arguing this fact. Id.

The Defendant's due process claim should be denied for three reasons:

First: the issue of a due process violation and the other sub issues, except the IAC claim, are not cognizable under Title 28, U.S.C. §2255.

Second: the issue of entrapment was extensively reviewed by the 5th Circuit, which upheld the Defendant's conviction. They confirmed, "he was not entrapped." (Docket Entry #125, at 4). The ruling of the 5th Circuit bars the Defendant from raising it in this instant motion.

Finally, and for sake of argument, if the issue of a due process violation is appropriately before this Court, the Defendant has failed to show how the Court infringed upon his due process rights in light of the trial record. Furthermore, the Defendant does not provide what evidence he wanted to present that the Court barred him from presenting.

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The 5th Circuit's judgement and mandate on the Defendant's appeal succinctly outlines the evidence that the Defendant presented at trial to buttress his claim of entrapment. Id. Briefly, that Court recognized that the Defendant claimed he was an "unwary innocent." The appellate court pointed to the evidence on record where the Defendant introduced evidence asserting his innocence that he did not benefit financially for his actions, he resisted the efforts of the CI and UC to participate, but due to his addiction, he was susceptible to their haranguing. Id at 2. The Defendant also claimed that since he did not possess the drugs, he could not be liable for the offense, as well.

The Defendant's accusation that the Court did not allow the Defendant to introduce *any* evidence of entrapment (Docket Entry #129-1, page 17) and the Court abused its discretion in so doing, Id at 18, is refuted by the trial record.

Defense attorney Smith elicited from the undercover agent, TFO Javier Bustamante, to admit that an informant provided intelligence about the Defendant, which led to an introduction between the two. (Docket Entry #117, at 47-49). Bustamante admitted that the woman in the car was the one who would receive the money and was the supplier for the drug transaction. Id at 53. Smith also obtained from the case agent, SA Ruckman, that informants are motivated for various reasons to ensnare others in criminal conduct, such as the Defendant, for the benefit of the informant. Id at 64. Ruckman also testified that they tried to make more purchases from the Defendant, but he refused. Id at 70.

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Smith then established that her client, the Defendant, was a drug addict, through the Defendant's supervisory probation officer, Julio Estrada. Estrada testified that the Defendant has had drug issues[1] and had gone to treatment. This treatment led to some success in staying clean from November 2015 to October 2016.[2] Id at 74. Estrada stated that the Defendant is a drug addict. Id at 79.

Smith effectively laid out the framework for an entrapment defense prior to the Defendant taking the stand. The problem Smith had were twofold; the Defendant's criminal past and the Defendant being his worst witness for the entrapment defense.

The Defendant testified indicating he has been an addict since he was 15. Id at 85. He stated he spent three months at Lifetime (a drug rehabilitation center) followed by residence at a sober living location. Id at 84. The Defendant stated the object of his rehabilitation was to hold each other accountable, like making sure they go to AA meetings. Id.

The Defendant speaks of how he was encountered by the person who he believes was the informant. He paints a picture that this informant, a person he had not seen in years, approached him at church. Id at 85-89. This informant was a childhood friend of the Defendant. The Defendant considered him a brother. Id at 85-89, 97. This "brother" immediately asked the Defendant a favor to set up a drug deal. The Defendant responded

[1] The Defendant was previously convicted in this Court for drug distribution in cause number P-10-CR-100. There the Defendant pled, cooperated, and testified against a co-defendant, was sentenced, to include a term of supervised release in which Estrada supervised the Defendant.

[2] The Defendant was sober, or at least did not come up positive on a urinalysis during the time-period. Note that the incident in question occurred on July 29, 2016, a time the Defendant was sober.

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you "try your best not to say no." Id at 91. Therefore, the Defendant agreed to broker a drug deal for his "brother."

The Defendant expressed that he did not take possession of the drugs and got no money out of the deal. Id at 92. However, the Defendant did admit three times that he put the buyer and seller together. Id at 92, 100, and 106. However, the Defendant expressed but for this childhood friend he would have stayed clean and sober[3]. Id at 98. The Defendant advised the jury that he believed that since he did not touch the drugs that he was not committing a crime.[4] Id at 99.

The record is replete showing that this Court allowed the Defense to introduce evidence of entrapment. There is no information to the contrary. The Court even provided an entrapment jury instruction. Id at 141.

Therefore, the Defendant's claim of a due process violation is unfounded.

Yet, the Defendant raises other sub issues under the umbrella of a due process violation.

Outrageous conduct by the Government

The Defendant's claim is a bit convoluted. Having an informant ask the Defendant to set up a drug deal, is outrageous how? It is difficult to respond to this

[3] At the time of this incident, and the time the Defendant was dealing with the UC, the Defendant was clean and sober, according to Defense Witness Julio Estrada.

[4]. The Defendant cooperated extensively with the Government and testified against a co-defendant in cause number P-10-CR-100 where the co-defendant did not touch the drugs in that case. The co-defendant, as testified to by this Defendant, assisted the drug deal by picking the Defendant up to deliver the drugs and by scouting out the road for the Defendant, who was actually carrying the drugs. This Defendant is well aware that you do not need "actual possession" of the drugs to be convicted. He helped convict someone who did not have actual possession.

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allegation without clarification of how the Government's conduct, in this particular case, reached the level of outrageousness.

Others involved were not charged or convicted and not presented to the jury.

The conduct and status of others who may or may not have been involved was not presented to the jury for consideration, is true. In fact, Smith could not make such argument in light of the standard jury instruction; the jury is advised not to consider the guilt or innocence of others who may have been involved. Id at 136.[5] Smith arguing this would be unethical.

The Government did not prove the Defendant had actual possession of the drugs and Smith was ineffective for not arguing that point to the jury.

Such an argument is frivolous. You have to ask yourself whether the Defendant's claim is genuine in light of footnote four above. Nonetheless, Smith was keenly aware that the pattern jury instructions would make such an argument ridiculous. They speak of both actual and constructive possession. In fact, this Court gave such instruction. Id at 140. Whether this Defendant did or did not have "actual possession" does not exonerate him from liability for this offense under the constructive possession theory.

[5] To speak of the selective prosecution claim the Defendant raises in Ground Five of his motion (Docket Entry #129-1, at 14), attached to this response is an affidavit from the prosecutor on the case, Monty Kimball, who has since retired.

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Ineffective Assistance of Counsel Claims

It is necessary to point out the obvious. This Defendant went through three attorneys. Each time the facts and law did not go in his favor, he sought new court-appointed counsel, and now claims they were each ineffective.

Attorney Louis Correa refused to provide an affidavit unless the Court ordered one. The Government did not pursue a court order requiring an affidavit from Correa because the evidence and the law clearly indicate he was effective.

Louis Correa:

The Defendant states Correa was ineffective for not arguing and seeking the dismissal of the complaint at the time of the preliminary hearing. This Court signed off on the complaint. At the prelim hearing, Correa challenged the evidence and the Court ruled that the Government has shown the necessary probable cause to get the case before the grand jury. (Docket Entry #10). Furthermore, as addressed in our initial response, defects, if any, in the complaint were cured when the grand jury indicted the Defendant. (See Docket Entry #146, at 6-8, Government's initial response).

Mary Ellen "Mimi" Smith and Damian Castillo:

Attached are their affidavits addressing the Defendant's claims of ineffective assistance of counsel.

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III. CONCLUSION

Based on the Government's initial response and addendum, the Defendant's instant motion should be denied.

Respectfully submitted,
JOHN F. BASH
UNITED STATES ATTORNEY

By:

James J. Miller, Jr.
JAMES J. MILLER, JR.
Assistant U.S. Attorney
2500 North Highway 118, Suite A200
Alpine, Texas 79830

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May 2020, a true and correct copy of the foregoing instrument was electronically filed with the Clerk of Court using the CM/ECF System. In addition, a copy that will be mailed via certified on the same day to the Defendant who is a non CM/ECF participant, at the following address:

JEREMIAH YBARRA
Fed. Reg. No. 55024-280
FCI Big Spring
1900 Simler Avenue
Big Spring, Texas 79720

/S/
JAMES J. MILLER, JR.
Assistant U.S. Attorney

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)( )(	
v.	)(	4:19-CV-6 DC
	)(	4:16-CR-523
JEREMIAH YBARRA, Defendant.	)( )(	

AFFIDAVIT OF MONTY KIMBALL,
IN REPONSE TO 2255 MOTION

Before me, the undersigned notary, Monty Kimball, personally appeared and stated under oath as follows:

1. My name is Monty Kimball. I am above 18 years of age and I am competent to make this affidavit. The facts contained in this affidavit are within my personal knowledge and are true and correct.

2. I was the Assistant United States Attorney that prosecuted the defendant, Jerimiah Ybarra ("Ybarra"), in the above styled and numbered cause. I understand Ybarra is making claims that certain actions I took in the course of the prosecution were improper or unconstitutional.

3. I read Ybarra's 2255 motion and it appears he asserts two charges related to my handling of his prosecution: (1) I knew others were involved in distributing the controlled substances but failed to investigate why the others were not arrested; and (2) I interrupted a meeting between Ybarra and his counsel and threatened Ybarra with filing an enhancement if he went to trial.

4. Apparently, Ybarra bases his first allegation on the fact that he was the only defendant in his indictment. That fact does not support his allegation that others were not prosecuted. In fact, several targets of the investigation were arrested, indicted and convicted, either in Federal court

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or State court. Others were identified as transporting Ybarra to the site where he sold controlled substances to an uncover agent of the Drug Enforcement Administration. However, the government did not have sufficient evidence on the element of knowledge to arrest these drivers, especially since Ybarra never cooperated. The government also structured its arrests and prosecutions with an eye on protecting sources and seeking cooperation from co-conspirators. Therefore, Ybarra's first allegation that I did not "investigate" why DEA did not arrest others who were involved in the crime is simply inaccurate.

5. I did inform Ybarra, through his attorney and through the court that I intended to file an enhancement information if Ybarra went to trial. The enhancement information had the effect of raising the mandatory minimum term of imprisonment from 5 years to 10 years, among other things. I did not interrupt a meeting between Ybarra and his defense counsel to threaten him as he alleges. During a status hearing before then Magistrate Judge Counts, the court inquired regarding the status of any plea negotiations. I informed Judge Counts that I intended to file an enhancement before trial and Judge Counts admonished the defendant on the consequences of continuing to trial. The defendant chose trial and lost. No one attempted to deter him from exercising his right to a jury trial. The court, his counsel and I simply wanted him to know the risks.

6. Ybarra mentions that witnesses that could show his innocence were not called. I do not know which witnesses he is alluding to. Ybarra also references grand jury misconduct. I did not present the case to the grand jury.

Monty Kimball

Signed under oath before me on April 30, 2020.

Signature of Notary

LORI FRANCO
Notary Public, State of Texas
Comm. Expires 01-17-2021
Notary ID 3306657

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AFFIDAVIT

State of Texas
County of Brewster

Mary Ellen Smith, of lawful age, being first duly sworn upon her oath, affirms the following:

My name is Mary Ellen Smith.

1. I am an attorney, licensed in the State of Texas, State Bar number 00785002. I am admitted to practice law in the Western District of Texas and in the Fifth Circuit Court of Appeals.

2. I represented Jeremiah Ybarra, from the date of my appointment, through trial, and verdict. At Mr. Ybarra's request, my representation was terminated before sentencing, and new counsel was appointed, Mr. Damien Castillo.
3. I have attached, as an exhibit, the CJA-20 which has a detailed accounting of the work performed for Mr. Ybarra. The details were noted contemporaneously, with the tasks performed.

Issues Raised by Case 4:16-CR-OO523 -DC Document 129-1 .

Page 13 Asserts that I, as Defense Counsel was not allowed to raise evidence to support the defenses of Entrapment and Entrapment by Estoppel.
I was allowed to present evidence to support the Defense of Entrapment. One, Mr. Ybarra testified to the fact that he was asked by a friend to put these "buyers" together with drugs to sell to truck drivers. DEA agent Ruckman testified to the fact that Mr. Ybarra had declined the invitation to find cocaine and meth for the "buyers".

We raised the evidence of entrapment sufficiently to obtained an Jury Instruction on entrpament.

Mr. Ybarra's testimony weakened the defense of Entrapment. During many client conferences (Please reference attorney's CJA-20 time sheets) with Mr. Ybarra, he described being pressured by a childhood friend to allow a meth dealer to contact Mr. Ybarra to arrange for the meth seller to acquire meth to sell to truckers. On the witness stand in his own defense, Mr. Ybarra did not describe this sequence of events, but rather, that just thought it was a good idea.

Page 15 Failure to object to the Court's exclusion of evidence. Or to the Court's

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refusal to exclude evidence. I don't know what trial court rulings Mr. Ybarra refers to.

Page 16. The evidence of possession with intent to distribute the meth included: undercover police witnesses, additione drugs in his hand, to constitute possession. in hopes of avoidinal DEA witnesses who were on the scene, and Mr. Ybarra's own testimony.

Mr. Ybarra endeavored to avoid physically handling the methamphetamine, believing that he had to have the drugs in his hand, to constitute possession. Mr. Ybarra's previous attorney had given Mr. Ybarra copies of the applicable law of posses
sion. I reiterated the applicable law.
Law enforcement witnesses and Mr. Ybarra testified that he put together the meth sale. He arranged to have meth brought to his buyers, who, as far as Mr. Ybarra knew at the time, were acquiring meth through him in order to sell it to truckers. ["Buyers" refers to Task Force Officers who set up the sting, whom Mr. Ybarra believed to be buyers.] These events were described in texts, recorded phone calls, personal conversations (recorded), and Mr. Ybarra's testimony.

Page 15. Mr. Ybarra and I invited AUSA Monty Kimball to meet with Mr. Ybarra, to re-convey the government's offer. This was by informed consent of Mr. Ybarra. Mr. Ybarra did not say anything to Mr. Kimball. Mr. Kimball was fairly aggressive in his exhortation that he was holding open the plea offer without enhancement. The re-conveyance of the offer was to let Mr. Ybarra know that, despite several acceptance deadlines having passed, the government was still offering an unenhanced charge. I consulted extensively with Mr. Ybarra about having Mr. Kimball meet with us.

Page 16. Evidence of Intent to Distribute. Mr. Ybarra himself testified to his actions which included distribution of the drugs. Our defense was an affirmative defense, acknowledging the drug sale, while asserting the defense of Entrapment.

Mr. Ybarra gathered the methamphetamine to be given to the [TFO] Buyers, and Ybarra was physically present for the exchange. He physically facilitated the exchange of money for methampthetamine.
Page 17. Judge Martinez allowed evidence in support of the Entrapment Defense. I was allowed to bring it up in opening statement, argue it in closing, and call both Mr. Ybarra to the stand, as well as Mr. Ybarra's probation officer.

A witness whom Mr. Ybarra believed would support his claim of pressure and duress, when interviewed, told me, quite vehemently, that there was no duress, no entrapment, and only voluntary actions of Mr. Ybarra. This was Mr. Ybarra's counselor. When I interviewed her about testifying to Mr. Ybarra's rehabilitation, in the context of the

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entrapment defense, she told me that Mr. Ybarra acted voluntarily and that "he is playing you [me]". I decided not to call her as a witness because she adamantly disbelieved the notion of Mr. Ybarra having been persuaded, unduly, by the Task Force or by a childhood friend of Ybarra's, who first approached Ybarra about helping some guys get meth to sell to truckers.

In Ms. Mata's place, I called Mr. Ybarra's probation officer, who gave very supportive, detailed, documentation of Mr. Ybarra's successful behavior on probation.

Pg. 18. The trial Judge allowed me to put on evidence of entrapment, sufficient to obtain a Jury instruction on entrapment. Without evidence to raise the defense of entrapment, I could not have obtained the Jury instruction. This was entrapment by surrogate, about which I conducted immense legal research.

Mr. Ybarra and I spent many hours talking about how the childhood friend had played on childhood loyalties, when asking Mr. Ybarra to talk with the Buyers looking for a meth supply, who turned out to be Task Force Officers. In client conferences, we delved into the special pull of childhood loyalties that propelled Mr. Ybarra to launch on this several month effort to help these men get methampthetamine. This special pull was to be the heart and soul of Mr. Ybarra's testimony. However, Mr. Ybarra's testimony about his reasons for agreeing to find drugs for the Buyers was devastating to his defense. He did not tell the jury about the childhood ties, the emotional pressure exerted by his friend. He answered vaguely about his reasons for trying to facilitate a meth (and cocaine) sale. His testimony undermined the viability of his defense of Entrapment.

Page. 19: The young woman who brought the methamphetamine to the sale point was Cece Crespin. There was no proof that she was an informant nor a cooperating witness. She was not arrested, but neither was Mr. Ybarra arrested at the scene of this methamphetamine sale. In fact, Mr. Ybarra continued to try to connect the Buyers with Methamphetamine. Had Crespin been working as a cooperating witness or confidential informant, the Government would have had a duty to reveal this. I filed the appropiate discovery motions to urge this duty. I investigated the whereabouts of Ms. Crespin and obtained a subpoena for her to testify. I hired a private process server, and neither of us could locate Ms. Crespin to serve the subpoena. She could not have been forced to testify to her involvement with the drug sale.

Mr. Ybarra believed that there was ample evidence of the communications and urgings of his childhood friend on Mr. Ybarra's cell phone. I moved the Court to allow me to hire an expert to make sure that I was getting everything on Mr. Ybarra's cell phone that was in the custody of the DEA. I received authorization, and the expert drove from Dallas to Alpine to dump and copy the phone. There were no calls or texts on that

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phone from or to the childhood friend. Whatever phone held those texts and calls was not in the custody of the DEA nor of Mr. Ybarra. Mr. Ybarra had given or sold the phone before being arrested.

The childhood friend was not a participant in the crime. His involvement ended when he persuaded Mr. Ybarra to take the calls from the Buyers, or to call the Buyers. The childhood friend had nothing else to do with Ybarra, nor with the events that unfolded, as Ybarra sought to obtain methamphetamine and cocaine for the Buyers , over a period of months. There were no communications between the childhood friend and Ybarra on the latter's cell phone.

Page 20: Again, Mr. Ybarra misaprehends the legal definition of Possession.

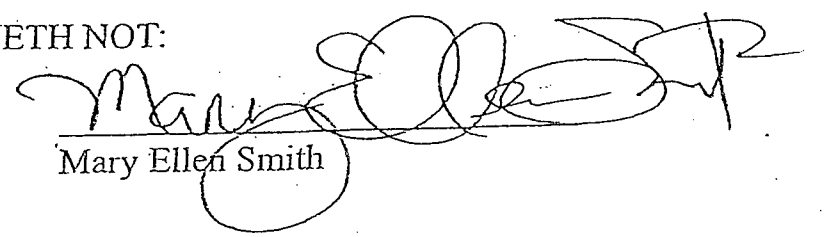
Page 20: There was one police report. I don't usually submit police reports to the jury. They harm the defense.

Page 21. Grand Jury Transcripts. There were no Grand Jury Transcripts. I told Mr. Ybarra this. According to AUSA Monty Kimball, and e testified, after qualifying as an expert witness, to the lab work and the findings, include quantity and chemical analysis (purity). Part of the affirmative defense of Entrapmfairly regular practice in this Division, the Grand Jury testimony was not recorded.

Chain of Custody: The chain of custody was properly demonstrated and attested to. The chemist who handled the methampthetamine testified, after qualifying as an expert witness, to the lab work and the findings, include quantity and chemical analysis (purity).

Grand Jury Transcript. There was no transcript nor recording of the Grand Jury testimony. This is fairly regular practice in this Division, that the Grand Jury testimony not be recorded.

FURTHER AFFIANT SAYETH NOT:



Mary Ellen Smith

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Subscribed and sworn to or affirmed before me on this 7th day of May, 2020.

LORI FRANCO
Notary Public, State of Texas
Comm. Expires 01-17-2021
Notary ID 3306657

Signature of Notary Public

Lori Franco

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
V.	§	4:19-CV-6-DC
	§	4:16-CR-523
JEREMIAH YBARRA	§	
	§	

ATTORNEY AFFIDAVIT IN RESPONSE TO DEFENDANT'S 2255 MOTION

Damian Castillo appeared in person before me today and stated under oath:

"My name is Damian Castillo. I am above the age of eighteen years, and I am fully competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

"The Defendant in this cause is Jeremiah Ybarra.

"On June 28, 2017 I was court-appointed to represent this Defendant in the above-captioned case. I was appointed after the Defendant had already been convicted by a jury of count one of his indictment. On September 8, 2017, the Defendant was sentenced by the district court to 120 months imprisonment. At the Defendant's request at the sentencing hearing, I remained as Defendant's counsel for appeal. (ROA.334). In my discussions with the Defendant, the Defendant understood that it would be my responsibility to review the records on appeal, review the caselaw and determine the best point or points for appeal. The Defendant understood and agreed with my role in his appeal.

"In my preparation of the appellant's brief I reviewed all transcripts, all pleadings, and other relevant proceedings in this case. Furthermore, I researched and reviewed caselaw involving multiple points of appeal. After a substantial review and research of the relevant caselaw on all

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potential issues, we decided to appeal the point of whether sufficient evidence existed to show that the Government agents induced the criminal activity alleged in the indictment and whether the Defendant had a lack of predisposition to engage in the criminal conduct.

"The Defendant first alleges in his motion that I failed to address the following issue on appeal: "the testimonies from agents at trial should not have been used to come upon probable cause to arrest. The testimonies that were made by the agents in court for the arrest cannot be used as testimonial evidence that it took place to cure the Affiant's affidavit for the lacking information." I disagree with the Defendant's contentions. During the trial-level proceedings and prior to his trial, the Defendant did not file any pretrial motions alleging that agent's statements should not be introduced at trial nor that they were legally insufficient in any way. This argument by the Defendant is meritless and would have been frivolous on his direct appeal.

"The Defendant also alleges in his motion that I failed to address the following issues on appeal: "(1) Failure to investigate a factual defense; (2) failing to cross examine a witness; (3) Failure to impeach government witnesses; (4) Failure to file motions on behalf of defense; (5) failing to object to the discovery issues; (6) failing to subpoena witnesses; (7) failing to object to the confrontation clause." I disagree with the Defendant's contention. The Defendant did not file any pretrial motions regarding these issues prior to his trial. Furthermore, these issues concern the ineffectiveness of his trial-level attorney and were not issues be addressed on direct appeal.

"The Defendant next alleges in his motion that I failed to address the following issue on appeal: Selective prosecution and equal protection issues. Specifically, that the "government singled Mr. Ybarra out for prosecution knowing that other's were involved in the alleged incident." Again, I disagree with this allegation. There was no factual nor legal basis to appeal selective prosecution and equal protection. There were no pretrial motions addressing these issues. There

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were also no facts at trial that would have warranted addressing these issues at trial or on appeal. This argument by the Defendant is meritless and would have been frivolous on his direct appeal.

"The Defendant next alleges that I failed to address the following issue on appeal: "there was no evidence to support the verdict of possession with intent to distribute." I disagree with this allegation. At the jury trial of this case, the primary defense presented by the Defendant was based on the Entrapment defense. At trial the Defendant requested and was granted specific jury instructions to address the entrapment defense. At trial there was overwhelming evidence presented against the Defendant to prove the elements of the offense. The defense primarily focused on the entrapment defense. A sufficiency argument was justified on appeal to address the entrapment issue. After reviewing the entire record, I did brief and properly appeal the point addressing whether the evidence was insufficient to show that the Defendant was not entrapped. Caselaw shows that a valid entrapment defense has two related elements: the government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. Based on the entire record available for appeal, the Entrapment issue was the only nonfrivolous issue available to address on direct appeal.

"The Defendant alleges that I failed address the following issue on appeal: due process violation by not allowing the Defendant to present evidence in his defense and not being allowed review the evidence before the grand jury. I disagree with this contention as well. After thoroughly reviewing the record, there were no nonfrivolous issues dealing with due process or lack of evidence issues. The defendant again did not address any of these issues thru pretrial motion hearings nor in the course of trial. These issues would have been frivolous on direct appeal.

"In ground eight Defendant alleges the issue of grand jury errors and US attorney misconduct was not addressed on appeal. There is no merit to this issue. There was no evidence

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presented at the trial-level concerning these issues. These issues would have been frivolous to address on direct appeal.

"In ground nine Defendant alleges the issue of a Confrontation clause violation. There is no merit to this issue as well. There were no pretrial motions nor hearings to address this issue. There was no evidence presented at the trial-level concerning this issue. These issues would have been frivolous to address on direct appeal.

Damian Castillo

SIGNED under oath before me on April 27, 2020.

JENNIFER ELAINE DOONAN
Notary ID #12316479
My Commission Expires
March 15, 2021

Notary Public, State of Texas