No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID FUENTES,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

United States District Court

NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA

v.

ALEJANDRO ERNESTO DIAZ

JUDGMENT IN A CRIMINAL CASE

Case Number: **2:18-CR-00077-D-BR(4)**
USM Number: **57442-177**
Roger S Cox/Slater Elza
Defendant's Attorney

THE DEFENDANT:

☒	pleaded guilty to count(s)	**1 of the superseding information filed on October 30, 2018**
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
21 U.S.C. §§ 841(a)(1) & (b)(1)(C) - Possession With Intent to Distribute Methamphetamine	07/16/2018	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Original indictment ☒ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 19, 2019
Date of Imposition of Judgment

Signature of Judge

SIDNEY A. FITZWATER
SENIOR JUDGE
Name and Title of Judge

February 20, 2019
Date

DEFENDANT: ALEJANDRO ERNESTO DIAZ
CASE NUMBER: 2:18-CR-00077-D-BR(4)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

one hundred eight (108) months as to count 1 to run concurrently with any sentences hereafter imposed for the offenses of possession of a controlled substance and tampering/fabricating physical evidence, to be prosecuted in Potter County, Texas, but for which no case number or court has been assigned.

☒ The court makes the following recommendations to the Bureau of Prisons: that the defendant be allowed to participate in the Institutional Residential Drug Abuse Program, if eligible, and be assigned to serve his sentence at a facility where he can participate in the Program. The court further recommends that the defendant be assigned to serve his sentence at a facility as close to Amarillo as is consistent with his security classification.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ALEJANDRO ERNESTO DIAZ
CASE NUMBER: 2:18-CR-00077-D-BR(4)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: ALEJANDRO ERNESTO DIAZ
CASE NUMBER: 2:18-CR-00077-D-BR(4)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ALEJANDRO ERNESTO DIAZ
CASE NUMBER: 2:18-CR-00077-D-BR(4)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $10 per month.

2. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $10 per month.

DEFENDANT: ALEJANDRO ERNESTO DIAZ
CASE NUMBER: 2:18-CR-00077-D-BR(4)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$100.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ALEJANDRO ERNESTO DIAZ
CASE NUMBER: 2:18-CR-00077-D-BR(4)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $ 100.00 due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

See special condition of supervision regarding restitution, as if set forth in full.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10258

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID FUENTES,

Defendant-Appellant

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

O R D E R:

The Federal Public Defender appointed to represent David Fuentes on appeal has filed a motion to withdraw and a brief that relies on *Anders v. California*, 386 U.S. 738 (1967). Fuentes has not filed a response.

An independent review of counsel's *Anders* brief and the record reveals a nonfrivolous appellate issue: whether the district court committed reversible plain error in its application of the relevant conversion ratios and calculation of the converted drug weights of methamphetamine attributed to Fuentes for purposes of sentencing. *See* U.S.S.G. § 2D1.1, comment. (n.8(D)); *United States v. Minano*, 872 F.3d 636, 636 (5th Cir. 2017). In particular, the district court arguably erred in finding that the converted drug weight for seven pounds of "methamphetamine" that Fuentes acknowledged that he received was 63,504 kilograms and not 6,350.4 kilograms. *See* ROA.165 (presentence report ¶ 46)

(distinguishing among methamphetamine, actual methamphetamine, and d-methamphetamine hydrochloride); *see also* § 2D1.1, comment. (n.8(D)) (stating drug conversion ratios for methamphetamine, actual methamphetamine, and d-methamphetamine hydrochloride).

Accordingly, counsel's motion for leave to withdraw is DENIED. Counsel is ORDERED to file within 30 days a brief on the merits addressing the above issue, as well as any other issue that counsel deems appropriate. The clerk is DIRECTED to establish a briefing schedule.

Patrick E. Higginbotham

PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19-10258

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

DAVID FUENTES,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

INITIAL BRIEF OF APPELLANT
CRIMINAL APPEAL

JASON D. HAWKINS
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Northern District of Texas

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Texas State Bar No. 24042691
Attorney for Appellant/Defendant

CERTIFICATE OF INTERESTED PERSONS

I certify that the following individuals may have an interest in the outcome of this case. I make these representations in order that the members of this Court may evaluate possible disqualifications or recusal.

District Judge:	Honorable Sidney Fitzwater
Appellant:	David Fuentes
Federal Public Defender:	Jason D. Hawkins
Assistant Federal Public Defenders:	Cristy J McElroy (Trial) Bonita Gunden (Trial) Kevin Joel Page (Appeal)
United States Attorney for The Northern District of Texas:	Erin Nealy Cox
Assistant U.S. Attorney for The Northern District of Texas:	Anna Marie Bell (Trial) Joshua Jerome Frausto (Trial) Sean Jeffrey Taylor (Trial) Leigha A. Simonton (Appeal)

/s/ Kevin Joel Page
Kevin Joel Page

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful to further develop the meaning of the term "arithmetic error," which appears in most plea agreements from the Northern District of Texas. Counsel is aware of only one binding case construing this widely used term, and it does not provide a standard of general applicability. *See United States v. Minano*, 872 F.3d 636 (5th Cir. 2017).

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SUBJECT MATTER AND APPELLATE JURISDICTION

1. Subject Matter Jurisdiction in the District Court. The district court exercised jurisdiction over this case under 18 U.S.C. § 3231.

2. Jurisdiction in the Court of Appeals. This is a direct appeal from criminal sentence of the U.S. District Court for the Northern District of Texas, Amarillo Division. This Court has jurisdiction under 18 U.S.C. §3742(a) and 28 U.S.C. §1291.

The district court entered written judgment February 20, 2019, and Appellant filed his notice of appeal March 1, 2019 which complies with Fed. R. App. P. 4. *See* (ROA.64, 66).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the district court made a plain mathematical error in calculating the defendant's drug quantity?

STATEMENT OF THE CASE

I. Facts and Proceedings Below

Oral argument would be helpful to further develop the meaning of the term "arithmetic error," which appears in most plea agreements from the Northern District of Texas. Counsel is aware of only one binding case construing this widely used term, and it does not provide a standard of general applicability. *See United States v. Minano*, 872 F.3d 636 (5th Cir. 2017).

Appellant David Fuentes pleaded guilty to one count of distributing and possessing with intent to distribute an unspecified quantity of methamphetamine. *See* (ROA.142-152). He reached this plea by way of a plea agreement that included a waiver of appeal. *See* (ROA.147). But that waiver included exceptions for a sentence exceeding the statutory maximum, "an arithmetic error at sentence," a voluntariness challenge, or a claim of ineffective assistance of counsel. (ROA.147).

A Presentence Report (PSR) calculated a Guideline range of 235 to 240 months imprisonment, *see* (ROA.173), which range the district court accepted without objection, *see* (ROA.138). That range stemmed from a base offense level of 38 under USSG §2D1.1, which came in turn from a "marijuana equivalency"[1] of 90,420.36

[1]When a federal drug defendant has trafficked more than one kind of drug, the Guidelines convert each kind of drug into a marijuana equivalent, then add these hypothetical kilograms of marijuana together. *See* USSG §2D1.1, comment. (nn. 7-8). The Guidelines call mixtures of methamphetamine possessing less than 80% purity "Methamphetamine" and treat them as a

kilograms.[2] *See* (ROA.165-166). Notably, the Guidelines provide a quantity threshold of 90,000 kilograms of marijuana for an offense level 38. *See* USSG §2D1.1(c).

Before calculating Appellant's drug quantity, the PSR outlined three arrests, each accompanied by a drug seizure and a statement. *See* (ROA.159-165). The second of these happened June 11, 2018, and it resulted in the seizure of $4,715 in cash, and three batches of methamphetamine. *See* (ROA.159-165). Specifically, police seized one batch of 87.65 grams methamphetamine from the quarters of Appellant's roommate; they seized another batch of 7.18 grams methamphetamine from the quarters of Appellant's roommate; they seized a batch of 69.68 grams methamphetamine that Appellant himself claimed in his own residence, and they seized a final .455 gram quantity of methamphetamine that Appellant also claimed in his own residence. (ROA.161). All of them exceeded the 80% threshold for "ICE." *See* (ROA.161).

Fatefully, however, Appellant gave a statement to the authorities in connection with this second arrest:

---

different kind of drug than mixtures exceeding this threshold, which they call "ICE." *See* USSG §2D1.1(c) & (n. (C)). The methamphetamine content within a methamphetamine mixture is described by the Guidelines as "methamphetamine (actual)." *See* USSG §2D1.1(c), comment. (n. (B)). It is also treated as "ICE" by the Guidelines. *See* USSG §2D1.1(c), comment. (n. (B)).

[2]The PSR included the following notation: "The defendant admitted to law enforcement that he had been selling drugs since 2015; therefore, the drug amount above is substantially less than what he actually distributed." (ROA.165). The Brief discusses the significance of this below.

> When asked who Fuentes received the methamphetamine from that he was currently in possession of, Fuentes disclosed he had received the methamphetamine from Louis Mendoza. Fuentes stated he had received seven pounds of methamphetamine through FedEx.

(ROA.162).

The PSR added these seven pounds of methamphetamine to the drug quantity calculation. *See* (ROA.165). Although the PSR described this quantity simply as "methamphetamine" – not "ICE"; not "methamphetamine (actual)" – it converted them to a marijuana equivalency of 63,504 kilograms. *See* (ROA.165). Use of the correct conversion ratio for "methamphetamine" (as opposed to the heightened ratio reserved for "ICE" or "methamphetamine (actual)") would have resulted in a marijuana equivalency of 6,350.4 kilograms. This is because 3,175.2 grams[3] of "methamphetamine" x (2 kilograms of marijuana/1 gram of "methamphetamine") = 63,504 kilograms of marijuana. Adding this significantly reduced amount to the total would have produced a drug quantity calculation of just 33,266.76 kilograms of marijuana. That would have triggered a base offense level of 36, two levels below the level actually applied. *See* USSG §2D1.1(c).

At sentencing, the district court adopted the PSR's uncontested Guideline calculations before choosing to depart two levels downward. *See* (ROA.138). This

[3]There are 453.592 grams in a pound, and 453.592 grams x 7 pounds = 3,175.2 grams.

resulted in a range of 188-235 months imprisonment. *See* (ROA.138). It selected a sentence at the low end of this range: 188 months imprisonment. *See* (ROA.139).

The undersigned counsel filed a brief under *Anders v. California*, 386 U.S. 738 (1963), citing the waiver. Because that brief overlooked any discussion of the seven pounds converted using the wrong ratio, this Court denied counsel's motion to withdraw. It ordered briefing on the following issue:

> whether the district court committed reversible plain error in its application of the relevant conversion ratios and calculation of the converted drug weights of methamphetamine attributed to Fuentes for purposes of sentencing.

The undersigned is grateful for this assistance, and this appeal follows.

II. Summary of Argument

When the PSR's drug quantity calculation table referred to methamphetamine mixtures of more than 80%, it consistently used the term "d-methamphetamine hydrochloride." (ROA.165). And when it referred to the actual methamphetamine content of a methamphetamine mixture, it just as consistently used the term "actual methamphetamine." (ROA.165). Yet when it referred to the seven pound delivery allegedly received by the defendant (which accounted for nearly two thirds of the drug weight ultimately attributed to him), it described that quantity simply as "methamphetamine." (ROA.165). It used that unadorned term – "methamphetamine"

– at two other places in the chart, both of which referred to methamphetamine mixtures of unspecified or unknown purity. (ROA.165).

As such, this terminology communicated clearly: the PSR found that the seven pound delivery involved a methamphetamine mixture of unknown purity. Yet the PSR applied a conversion ratio of 20 kilograms of marijuana for each gram of this mixture. The Guidelines reserve that ratio for methamphetamine mixtures whose purity exceeded 80%, or for the actual methamphetamine content of a methamphetamine mixture. *See* USSG §2D1.1, comment. (n. (8)(D)). Put simply, the PSR and the district court multiplied a drug quantity by the wrong conversion ratio – it did the math wrong.

Alternatively, if the PSR and district court found that the seven-pound quantity consisted of "ICE," it double-counted the other drugs actually seized on June 11, 2018. If the PSR did make this finding, it could only be by extrapolating from the purity of other drugs actually seized on June 11, 2018, on the theory that they came from the greater seven pound batch. *See* (ROA.161). But if that is so, then the PSR and the district court counted those seized quantities twice: once by counting the amounts seized from Appellant's residence, and once by counting the full seven pound batch from whence they came. That is error. *See United States v. Shreffler*, 170 Fed.

Appx. 796, 798-799 (3d Cir. 2006)(unpublished); *United States v. Agis-Meza*, 99 F.3d 1052, 1055 (11th Cir. 1996); *United States v. Noble*, 246 F.3d 946, 951 (7th Cir. 2001).

It is plain that the district court committed at least one of these errors, and both are "arithmetic" within the meaning of the plea agreement. The error affected the Guideline range and should be reversed.

ARGUMENT AND AUTHORITIES

I. The district court made a plain mathematical error in determining the defendant's drug quantity.

A. Effect of appeal waiver

This Court reviews *de novo* whether a waiver provision bars an appeal. *See United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002). The applicability of an appeal waiver is reviewed in "a two-step inquiry: (1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement." *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). The present case involves application of the second step: whether the plain language of the agreement bars the appeal.

For the purposes of a plea agreement reserving the right to appeal "an arithmetic error at sentencing," this Court holds the term "arithmetic error" to "mean simply 'an error involving a mathematical calculation.'" *United States v. Minano*, 872 F.3d 636 (5th Cir. 2017)(quoting *United States v. Logan*, 498 Fed. Appx. 445, 446 (5th Cir. 2012)(unpublished)). An error is not "arithmetic" if it involves the district court's "exercise [of] judgment in assessing a nonexhaustive list of factors rather than to apply a strict mathematical formula." *Id*. But that is not what the court did wrong in this case.

Here, the court multiplied the seven pound quantity referenced by the defendant by a marijuana equivalency ratio of 20 kilograms for each gram of methamphetamine. That ratio is reserved for "ICE." This is not an "exercise of judgment in assessing a nonexhaustive list of factors." Rather, it is a use of the wrong number in a "strict mathematical formula."

Importantly, the PSR appears *actually to have found* that the seven pounds referenced by the defendant were "methamphetamine," not "ICE," nor even "methamphetamine (actual)." *See* (ROA.165). Yet it mistakenly multiplied those seven pounds (3,175.2 grams) by a ratio of 20 kilograms to 1 gram, rather than 2 kilograms to 1 gram. *See* (ROA.165).

The nature of the PSR's mistake – one of math, rather than fact or law – appears clearly from its drug calculation chart:

- Four entries in this chart are described as "**actual methamphetamine**" and each receives the appropriate 20kg:1g conversion ratio. *See* (ROA.165).
- Six entries in this chart are described as "**d-methamphetamine hydrochloride**." *See* (ROA.165). Each of these six entries receives the 20kg:1g ratio appropriate to "ICE." *See* (ROA.165). Further, the PSR's narrative section makes clear that all six batches indeed possessed the requisite 80% purity to

qualify as "ICE." *See* (ROA.160-164). "D-methamphetamine hydrochloride," in other words, is the PSR's term for "ICE."

- Three entries, including the seven pound quantity at issue here, are described merely as "**methamphetamine**." *See* (ROA.165). Two of these three receive the 2kg:1g ratio appropriate to methamphetamine mixtures of less than 80% purity. *See* (ROA.165). But for reasons the table does not explain, the critical seven pound quantity – constituting approximately two-thirds of the total drug weight attributed to the defendant – receives a 20kg:1g ratio. *See* (ROA.165).

All of this is reflected in the following chart, constructed by the undersigned for this Brief, but reflecting the information in the PSR:

Quantity	Purity	Designation	Ratio Applied
74.4 grams	92%	actual methamphetamine	20kg/1g
27.3 grams	99%	actual methamphetamine	20kg/1g
93.9 grams	90%	actual methamphetamine	20kg/1g
434.4 grams	98%	d-methamphetamine hydrochloride	20kg/1g

534.68 grams	unseized	methamphetamine	2kg/1g
87.65 grams	87%	d-methamphetamine hydrochloride	20kg/1g
7.18 grams	84%	d-methamphetamine hydrochloride	20kg/1g
69.68 grams	95%	d-methamphetamine hydrochloride	20kg/1g
3,175.2 grams	**unseized**	**methamphetamine**	**20kg/1g**
453.6 grams	unseized	methamphetamine	2kg/1g
416 grams	97%	d-methamphetamine hydrochloride	20kg/1g
1.77 grams	93%	d-methamphetamine hydrochloride	20kg/1g
35.01grams	51%	actual methamphetamine	20kg/1g

As can be seen, the PSR regarded the seven pound delivery as "methamphetamine," but applied a ratio applicable to a different substance. That is a pure error of math.

Alternatively, if the PSR meant to say that the seven pound delivery actually involved the 80% purity required for "ICE" – perhaps on theory that the lesser quantities seized on June 11, 2018 came from this seven pound delivery, and that their purity may be attributed to the whole batch – the court will still have made an arithmetic error. In that case, the court will have double-counted the quantities actually seized on June 11, 2018 from Appellant's residence. Specifically, it will have added them once to account for the quantities actually seized and tested, and once as a part of the seven pound delivery.

Double-counting a drug quantity falls within the plain definition of "arithmetic error." *See Edgewater Walk Apartments v. Mony Life Ins. Co.*, 1993 U.S. Dist. LEXIS 17679 (N.D. Ill. Dec. 10, 1993)("Debtor first maintains that our November 3 order contains certain ***arithmetic errors, namely, a double counting*** of certain unsecured claims and an overstatement of necessary capital expenditures.")(emphasis added). A double-counting claim assails the district court's mathematical reasoning, namely the erroneous addition of two drug quantities, when one includes the other. The claim of

error does not contest the sufficiency of evidence in support of a factual finding, the legal standard applied, or the procedural regularity of the sentencing hearing.

This case is thus plainly distinguishable from this Court's decision in *United States v. Logan*, 498 Fed. Appx. 445 (5th Cir. 2012)(unpublished). The *Logan* panel concluded that claims of insufficient evidence to support a drug quantity determination do not constitute arithmetic error:

> While Logan may be challenging the court's factual findings regarding drug quantity, she is not challenging the court's arithmetic; even if the drug quantities the court relied on were inaccurate, Logan does not claim it erred in adding those quantities. Therefore, Logan's claim does not fall within the "arithmetic error" exception of her appeal waiver.

Logan, 498 Fed. Appx. at 446.[4]

Here, by contrast, the district court erred in effectively adding a quantity to itself. These kinds of errors are not the same. An insufficiency of the evidence claim involves an error in ascertaining the facts, while a double-counting claim involves an inappropriate conclusion as to the total quantity on the basis of undisputed facts. *See United States v. Shreffler*, 170 Fed. Appx. 796, 799 (3rd Cir. 2006)(unpublished)("We share Shreffler's concern that the District Court may have double-counted certain quantities of drugs.... [O]ur concern is not that the District Court lacked evidence to support its estimate, but rather that it reached an erroneous result based on the

[4]To like effect is *United States v. Cerda*, 749 Fed.Appx. 255 (5th Cir. 2018)(unpublished).

evidence that was actually before it. There may be sufficient evidence in the record to support a finding that Shreffler distributed over 100 grams of heroin.")

This case is likewise distinguishable from *United States v. Barrett*, 403 F. Appx. 963 (5th Cir. 2010)(unpublished). The *Barrett* panel rejected the defendant's effort to claim arithmetic error, but that case involved no mathematical formula. *See Barrett*, 403 F. Appx. at 965. Rather, it involved a district court's failure to apportion punishment between an underlying fraud offense and a criminal enhancement for committing that offense on pretrial release. *See id.* Notably, the *Barrett* panel contrasted the error in that case with "miscalculat[ion] of the adjusted Guideline range," suggesting that error of the latter kind would indeed fall within the scope of "arithmetic error." *Id.* The error at issue here is not merely a "miscalculation of the adjusted Guideline range," but a Guideline miscalculation of drug quantity, arising from an error of arithmetic reasoning.

If there any doubt persists about the application of the waiver to the instant case, it ought to be resolved in favor of review on the merits. For it is well settled that plea agreements are "construed strictly against the government as the drafter." *United States v. Ihsan Elashi*, 554 F.3d 480, 501 (5th Cir. 2008); *see United States v. Somner*, 127 F.3d 405, 407 (5th Cir. 1997)(ambiguous appeal waiver "must be construed against the government"). This principle derives from basic principles of contract law,

which hold the drafter of a contract accountable for ambiguity to minimize incentives for avoidable ambiguity. *See Spacek v. Maritime Ass'n*, 134 F.3d 283, 298-299 (5th Cir. 1998); *Restatement (Second) of Contracts* §206 and comment a (1981); Murray, John Edward, *Murray on Contracts* §88(G)(3rd ed. 1990). The rule that plea agreements are construed strictly in favor of the right to appeal stems as well from the "special due process concerns" associated with plea bargaining, (*United States v. Bradbury*, 189 F.3d 200, 206 (2d Cir. 1999)), and "the government's tremendous bargaining power" in plea negotiations (*United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000)). Narrow construction of the plea agreement to exclude Appellant's claims of error would contravene this principle.

B. Standard of Review

Unpreserved error is reviewed under the plain error standard, which requires a showing of clear or obvious error, that affects a party's substantial rights, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings, meriting discretionary remand. *See United States v. Jones*, 527 U.S. 373, 389 (1999).

C. Discussion

1. The district court plainly erred.

Guideline 2D1.1 provides a staggered base offense level for drug offenses, depending on the defendant's drug quantity. *See* USSG §2D1.1(c). When defendants

traffic in multiple kinds of a controlled substance, the Guidelines convert each type of drug into a marijuana equivalent, using the table found at Application Note 8D to Guideline 2D1.1. Methamphetamine mixtures exceeding 80% purity are called "ICE." *See* USSG §2D1.1(c), comment. (n. (C)). They are converted at the rate of 200 kilograms of marijuana for each gram of "ICE." *See* USSG §2D1.1, comment. (n. (8)(D)). The actual methamphetamine content extracted from a lesser purity mixture is defined as "methamphetamine (actual)" and it is converted using the same ratio. *See* USSG §2D1.1(c), comment. (n. (B)) & USSG §2D1.1, comment. (n. (8)(D)). Assuming a purity of less than 80%, however, the mixture itself is converted using a ratio of only 20 kilograms of marijuana to 1 gram. *See* USSG §2D1.1, comment. (n. (8)(D)). The Guidelines term this mixture of lesser or unspecified purity simply "Methamphetamine." USSG §2D1.1(c), comment. (n. (B)).

The PSR multiplied a quantity of drugs it described as "methamphetamine" by 20 kilograms, rather than 2 kilograms. *See* (ROA.165). That is plainly contrary to the conversion table, and thus amounts to clear or obvious error. *See* USSG §2D1.1, comment. (n. (8)(D)).

Alternatively, if the PSR (and district court) actually regarded the seven pound quantity as "ICE" rather than "methamphetamine," then they plainly erred in double-counting the other, smaller batches actually seized on June 11, 2018. *See* (ROA.164-

165). If the PSR or district court determined the purity of the seven pound delivery based on the assumption that other quantities of "ICE" on hand came from that delivery, then it follows that those quantities have been counted twice. *See* (ROA.164-165). They were counted once as the lesser seized quantities taken from the defendant's residence. *See* (ROA.164-165). Then, they were counted again as a part of the seven pounds separately added by the PSR. *See* (ROA.164-165). It is clear mathematical error to add a quantity twice. *See United States v. Shreffler*, 170 Fed. Appx. 796, 798-799 (3d Cir. 2006)(unpublished)(admonishing district court not to double count quantities sold by the defendant by adding them to quantities received by him); *United States v. Agis-Meza*, 99 F.3d 1052, 1055 (11th Cir. 1996)(reversing a double-counting error in which the court both converted cash to marijuana sales, and added marijuana that may have gone into those sales); *United States v. Noble*, 246 F.3d 946, 951 (7th Cir. 2001)(reversing a double-counting error in a drug case).

2. The error affected the defendant's substantial rights.

The PSR's drug quantity calculation of 90,420.36 kilograms only just exceeds the quantity threshold of 90,000 kilograms (marijuana equivalent). *See* USSG §2D1.1(c). If the PSR had applied the 2 kilogram:1 gram ratio appropriate to "Methamphetamine," the result would have been to add the equivalent of 6,350.4 kilograms of marijuana from the seven pound delivery, rather than 63,504 kilograms.

This would have produced a total drug quantity just above 33,000 kilograms (marijuana equivalent) and a two level reduction in the base offense level. *See* USSG §2D1.1(c); (ROA.164-167)..

Alternatively, if the court or the PSR had merely subtracted the quantities seized on June 11, 2018 from the seven pounds, the result would have been to subtract 3,290.6 kilograms (marijuana equivalent) from the ultimate drug weight attributed to Mr. Fuentes. This is because the three quantities actually seized on June 11, 2018 – 87.65 grams, 7.18 grams, and 69.68 grams – total 164.51 grams of "ICE." *See* (ROA.164-165). 164.51 grams of "ICE" converts to 3,290.6 kilograms of marijuana. Finally, subtracting this 3,290.6 kilograms from the ultimate quantity of 90,420.36 kilograms results in a total weight of just under 90,000 kilograms, and a reduced base offense level of 36. *See* USSG §2D1.1(c); (ROA.166).

The district court here calculated a Guideline range of 235-240 months imprisonment, reduced by a two-level departure to 188-235 months imprisonment. *See* (ROA.138). The range should have been 188-235 months imprisonment, reduced to 151-188 months, the consequence of a post-departure offense level of 33, and a criminal history category of II. *See* (ROA.138, 166-169, 173); USSG Ch. 5A.

Guideline error is presumed to affect the defendant's substantial rights. *See Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338, 1346 (2016). This is so

even when the district court intends to sentence outside the Guidelines. *See United States v. Wikkerink*, 841 F.3d 327, 336-338 (5th Cir. 2016). And here, there is a 37 month difference between the high end of the true post-departure Guideline range and the high end of the post-departure range believed applicable by the court. This substantial difference strongly supports the substantial rights finding. *Compare Molina-Martinez*, 136 S.Ct. at 1344 (finding an effect on substantial rights where the low-end of the true and erroneous ranges differed by just seven months, and defendant was ultimately sentenced within the true range).

The PSR does say that "[t]he defendant admitted to law enforcement that he had been selling drugs since 2015," and that "therefore, the drug amount above is substantially less than what he actually distributed." (ROA.165). But of course Guideline 2D1.1 does not simply count up all the drugs the defendant has ever distributed in his lifetime. Extraneous drug quantities enter into the calculation only to the extent that they constitute "relevant conduct" under USSG §1B1.3. Applying those factors requires some information on the record to evaluate the similarity, regularity, and temporal proximity of the putatively relevant conduct. *See* USSG §1B1.3, comment. (n. (5)(B)); *United States v. Rhine*, 583 F.3d 878, 887-890 (5th Cir. 2009). A defendant's statement to law enforcement that he engaged in drug trafficking in the last four years does not show that any of the quantities can pass through the

§1B1.3 filter. Indeed, conduct occurring more than a year prior to the offense of conviction is presumptively irrelevant. *See Rhine*, 583 F.3d at 886.

At a minimum, the district court's error "undermines confidence" in the accuracy of its Guideline calculations, notwithstanding this notation in the PSR, and accordingly satisfies the defendant's burden to show an effect on his substantial rights. *See United States v. Dominguez-Benitez*, 542 U.S. 74, 83, n. 9 (2004)(citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). He need not show the likelihood of a different result by a preponderance of the evidence. *See Dominguez-Benitez*, 542 U.S. at 83, n. 9.

4. The error affects the fairness, integrity, and public reputation of judicial proceedings, meriting discretionary relief.

In the ordinary case, an error calculating the Guidelines will affect the fairness of proceedings and merit remand. *See Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897, 1903 (2018). The defendant need not show that the error shocks the conscience, nor that it calls into question the integrity or competence of the district court, nor that it represents a miscarriage of justice. *See Rosales-Mireles*, 138 S.Ct. at 1906-1907. It is enough that a Guideline error cause erroneous prison time. *See Rosales-Mireles*, 138 S.Ct. at 1907. The lesser impact on judicial resources associated with the correction of sentencing error also presents a strong case for discretionary

remand. *See Rosales-Mireles*, 138 S.Ct. at 1909 ("a decision remanding a case to the district court for resentencing on the basis of a Guidelines miscalculation is far less burdensome than a retrial, or other jury proceedings, and thus does not demand such a high degree of caution.").

Here, the error resulted in a difference of more than three years between the tops of the true and erroneous Guideline ranges. This strongly supports a discretionary remand. While slight extensions of the defendant's sentence might be overlooked for want of an objection, *see United States v. Akande*, 594 Fed. Appx. 239, 241 (5th Cir. 2014) (unpublished), more substantial increases in the Guidelines tend to justify discretionary remand, *see United States v. Andino-Ortega*, 608 F.3d 305, 311-12 (5th Cir. 2010)("[B]ecause the district court's error clearly affected Andino-Ortega's sentence, we also find that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."), *overruled on other grounds by United States v. Reyes-Contreras*, 910 F.36 169 (5th Cir. 2018)(*en banc*); *United States v. Price*, 516 F.3d 285, 290 (5th Cir. 2008)("Finally, the sentencing error seriously affects the fairness, integrity, or public reputation of judicial proceedings because it clearly affected the defendant's sentence.").

Errors in the nature of a mere technicality may be overlooked on plain error review. *Compare United States v. Cotton*, 535 U.S. 625, 634 (2002)(correction of

indictment error does not compel discretionary remand on plain error where evidence is overwhelming). But a mathematical error in the application of USSG §2D1.1 is not a mere technicality. Rather, it results in sentencing the defendant as though he had done something more culpable, a substantial injustice.

CONCLUSION

Appellant David Fuentes respectfully requests that his sentence be vacated and his cause be remanded for resentencing, or for such relief as to which he may justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin Joel Page, hereby certify that on this the 28th day of January, 2020 the Appellant's Brief was served via ECF to counsel for the Plaintiff-Appellee, Assistant U. S. Attorney Leigha Simonton at Leigha.Simonton@usdoj.gov. I further certify that: 1) all privacy redactions have been made pursuant to 5th Cir. Rule 25.2.13; 2) the electronic submission is an exact copy of the paper documents pursuant to 5th Cir. Rule 25.2.1; and 3) the document has been scanned for viruses with the most recent version of Norton Anti-virus and is free of viruses. Further I certify that I sent a paper copy via regular mail to Mr. Fuentes.

/s/ Kevin Joel Page
Kevin Joel Page

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portion in 5th Cir. R. 32.2.7(b)(3), this brief contains 4,542 words.
2. This brief has been prepared in proportionally spaced typeface using Word Perfect 9.0 in Times New Roman typeface and 14 point font size.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s/ Kevin Joel Page
Kevin Joel Page

APPENDIX D

19-10258

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

DAVID FUENTES,
Defendant - Appellant

Appeal from the United States District Court
Northern District of Texas, Amarillo Division
District Court No. 2:18-CR-077-D

UNITED STATES' MOTION TO DISMISS THE APPEAL OR, ALTERNATIVELY, FOR AN EXTENSION OF TIME

The government moves to dismiss Fuentes's appeal because he waived his right to bring it. His attempt to avoid his bargained-for appellate waiver relies on an interpretation and application of "arithmetic error" that this Court has consistently rejected. The district court's determination of the amount of methamphetamine involved in his offense, including the purity level of same, is not a pure mathematical calculation and thus does not qualify under the waiver's limited "arithmetic error at sentencing" exception. Should the Court

deny this motion, the government requests an extension of 30 days to file a brief on the merits.

Fuentes pleaded guilty to a one-count superseding information charging him with distribution and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(C). (ROA.157.) His plea agreement included a comprehensive waiver of his right to appeal or otherwise challenge his conviction and sentence. (ROA.147.) It is well-established that a defendant may waive his right to appeal his sentence.

When analyzing the enforcement of an appellate waiver, the Court engages in a two-step inquiry. *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). First, it considers whether the waiver was knowing and voluntary. *Id.* Second, it determines "whether the waiver applies to the circumstances at hand, based on the plain language of the agreement." *Id.* Fuentes concedes that the first prong is met. (Brief at 9.) Because the record demonstrates that the waiver applies to the circumstances at hand, this Court should dismiss his appeal.

1. The appellate waiver bars Fuentes's challenge to the drug-quantity determination.

Fuentes's plea agreement included an unambiguous waiver of his right to appeal from his conviction and sentence. Specifically, the waiver states:

> The defendant waives the defendant's rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal the conviction, sentence, fine and order of restitution or forfeiture in an amount to be determined by the district court. The defendant further waives the defendant's right to contest the conviction, sentence, fine and order of restitution or forfeiture in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. The defendant, however, reserves the rights (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic error at sentencing, (b) to challenge the voluntariness of his plea of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.

(ROA.147.) Fuentes argues that the appellate waiver does not apply to his appeal because his unpreserved objection falls within the exception allowing him to bring a direct appeal of an arithmetic error at sentencing. (*See* Brief at 10-16.) In reality, his claim amounts to nothing more than a forfeited post hoc challenge to the district court's factual determinations regarding drug purity and quantity at sentencing. Thus, his arguments fall outside the waiver's limited arithmetic-error exception, and his appeal should be dismissed.

"Arithmetic error" is neither a broad term nor an ambiguous one in the instant context. The meaning of "arithmetic error" is "an error involving a mathematical calculation." *United States v. Minano*, 872 F.3d 636, 636 (5th Cir.

2017); *see also United States v. Barrett*, 403 F. App'x 963, 965 (5th Cir. 2010) (same). An arithmetic error occurs when a district court applies an arithmetic task—e.g., adds, subtracts, multiplies, or divides—to numbers and arrives at an answer that is mathematically incorrect. *United States v. Akande*, 594 F. App'x 239, 240 (5th Cir. 2014). For example, in *Akande*, the Court found that an arithmetic error occurred when the district court, adjusting a sentence for time served in state custody, calculated the time between two dates as 26 months when it was actually 26 months and 5 days. *Id.* The arithmetic-error exception was met there because the district court arrived at a mathematically incorrect number when it subtracted one date from another. *See id.*; *see also United States v. Martinez-Rios*, 143 F.3d 662, 675 (2d Cir. 1998) ("[D]ue apparently to an arithmetic error, the Court determined 28 percent of $804,104.94 to be $255,149.38 rather than the correct figure, $225,149.38.").

In this appeal, Fuentes challenges the district court's treatment of a certain quantity of methamphetamine as over 80% pure when converting that

quantity to its marijuana-equivalent.[1] But this argument hardly raises an arithmetic error—rather, Fuentes merely disputes the district court's substantive determination regarding the purity and quantity of the drugs involved in his offense. Attempting to avoid his appellate waiver, Fuentes misapplies the common understanding of what it means to commit an arithmetic error. Findings made by the district court with regard to the PSR do not constitute arithmetic error. *United States v. Holt*, 333 F. App'x 814, 816 (5th Cir. 2009) (alleged failure to make factual findings concerning drug quantity and cash not "arithmetic error"). Likewise, any determination made by the court related to calculating the sentence is not "arithmetic" under any common understanding.

In fact, this Court has repeatedly declined to apply the arithmetic-error exception merely because the alleged error involves numbers or alleges that some mathematical calculation should have been performed differently. *See*

[1] This argument would not survive plain error review in any event. The questions of whether a preponderance of the evidence supported that certain methamphetamine quantities exceeded 80% purity or whether certain quantities should have been excluded to avoid double-counting constitute fact questions that can never amount to plain error. *See United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991). Further, Fuentes cannot satisfy the third or fourth prongs of plain error review where the PSR explains that the drug-quantity calculation was extremely conservative given that Fuentes admitted to law enforcement that he had been selling drugs since 2015. (ROA.165.) In addition, Fuentes confirmed after his first arrest that he was expecting a 20-pound shipment from his supplier the following Saturday, that he "was the one who was going to pick it up," and that the supplier had him "rent a shop for loads of methamphetamine" in the coming months. (ROA.160.) This amount was not included in the drug calculation. Fuentes's argument cannot hurdle plain error review.

United States v. Logan, 498 F. App'x 445, 446 (5th Cir. 2012). In *Logan*, for example, the defendant sought to get around her waiver by arguing that the district court committed arithmetic error when it calculated the drug quantity used to compute her guidelines range. *Id*. Specifically, she argued that the court should not have included certain amounts in the drug quantity—i.e., it should not have added those numbers—because those amounts were based on unreliable information. *Id.* The Court determined, however, that this argument did not challenge the district court's arithmetic. *Id.* ("[E]ven if the drug quantities the court relied on were inaccurate, Logan does not claim it erred in adding those quantities.").

The Court dismissed a similar argument in *United States v. Barrett*, 403 F. App'x 963 (5th Cir. 2010). There, the defendant convicted of access device fraud argued that his challenge to the district court's application of USSG § 3C1.3 and 18 U.S.C. § 3147 implicated the arithmetic-error exception "because the guideline requires the district court to divide the sentence." *Id.* at 965. Barrett contended that because "the district court failed to *divide* the sentence and *subtract* the penalty provision from the total punishment, the district court's error here was a mathematical error." *Id.* (emphasis in original). But, the Court held, his challenge did not allege a mathematical miscalculation implicating the arithmetic-error exception. *Id.* He instead

argued that there had been a "misapplication" of the guidelines and a statutory "violation." *Id.* The Court dismissed the appeal. *Id.*[2]

The same result should obtain here where Fuentes is *not* claiming, for example, that the district court added or subtracted numbers and arrived at a mathematically incorrect answer. The success of his argument instead relies on whether the district court correctly determined that the seven-pound transaction involved methamphetamine with at least 80% purity and that those seven pounds were unique to his other transactions. That is, he challenges the factual findings and legal conclusions that the district court necessarily reached in computing the drug quantity, not the mathematical calculation involving the application of arithmetic. *Cf. United States v. Bazemore*, 839 F.3d 379, 387 (5th Cir. 2016) (distinguishing between challenges to the method of calculating the loss amount and challenges to the underlying factual determinations).

The principle that the Court interprets contracts in accordance with the parties' obvious intentions further weakens any claim that "arithmetic error" encompasses the issues Fuentes raises. *See United States v. Cortez*, 413 F.3d 502,

[2] *See also United States v. Cerda*, 749 F. App'x 255, 256 (5th Cir. 2018) (dismissing appeal that alleged "errors of fact or law" about the status of the defendant's state-court sentences and the application of a sentencing guideline because they did not "fit within [the Court's] narrow definition of arithmetic error"); *Minano*, 872 F.3d at 636-37 (dismissing appeal that alleged the district court failed to subtract from the total loss amount money that the government owed to taxpayers as refunds because it did not challenge the "correctness of [the court's] arithmetic").

503 (5th Cir. 2005) ("The language in [an] appellate waiver must be afforded its plain meaning in accord with the intent of the parties at the time the plea agreement was executed."); *see also Barrett*, 403 F. App'x at 965 (same, in context of a claim of "arithmetic error"). An appeal waiver is intended by both parties to have some effect, i.e., to preclude the defendant from raising sentencing issues in all but specified circumstances. Yet, if the "arithmetic error" exception is read as broadly as Fuentes suggests it must be, the exception would largely swallow the waiver. To accept Fuentes's arguments here would limit a defendant's ability to negotiate a plea agreement because appeal waivers would no longer be construed by their plain terms.

Additionally, this Court should not credit the unreasonable belief that plea agreements routinely include appellate waivers with few exceptions while simultaneously intending wholesale review of run-of-the-mine sentencing determinations as long as they involve numbers, such as loss amount, drug quantity, or the number of victims. That the other waiver exceptions—i.e., a sentence above a statutory maximum, ineffective assistance of counsel, and an involuntary plea—occur infrequently corroborates that the parties did not intend for the arithmetic-error exception to be so broad as to cover any guideline (or other) determination routinely made so long as it somehow involves numbers or math.

Because no exception to the waiver applies the claim should be dismissed. *United States v. Hoctel*, 154 F.3d 506, 508 (5th Cir. 1998) (dismissing the appeal based on an appellate waiver); *see also United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005) (same).

CONCLUSION

Given the above facts and authorities, this Court should enforce the appellate waiver and dismiss the appeal. Should the Court deny this motion, the government requests an extension of time of 30 days from the denial to respond to Fuentes's brief.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that I conferred with Kevin Joel Page, counsel for Fuentes, regarding this motion. Fuentes is opposed to dismissal, but unopposed to the alternative request for an extension of time.

s/Amber M. Grand
Amber M. Grand

CERTIFICATE OF SERVICE

I certify that this document was served on Fuentes's attorney, Kevin Joel Page through the Court's ECF system on February 27, 2020, and that: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/Amber M. Grand
Amber M. Grand

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,834 words.

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s/Amber M. Grand
Amber M. Grand
Assistant United States Attorney
Date: February 27, 2020

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10258

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DAVID FUENTES,

Defendant - Appellant

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

Before HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellee's opposed motion to dismiss appeal is GRANTED.

IT IS FURTHER ORDERED that Appellee's unopposed alternative motion for an extension of thirty (30) days from the denial of the motion to dismiss to file its brief is DENIED AS MOOT.