No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2019

EDWARD MAHAN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
Texas Bar Card No. 02438900
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

ISSUE #1

DID THE DISTRICT COURT ERR BY ALLOWING THE GOVERNMENT TO VIOLATE THE PLEA AGREEMENT ?

ISSUE #2

DID THE DISTRICT COURT ERR BY DENYING MR. MAHAN'S OBJECTION TO THE BASE OFFENSE LEVEL BASED ON DRUG AMOUNTS NOT SUFFICIENTLY PROVEN?

ISSUE #3

DID THE DISTRICT COURT ERR BY DENYING MR. MAHAN'S OBJECTION TO THE DENIAL OF A THREE-LEVEL DOWNWARD ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY?

ISSUE #4

DID THE DISTRICT COURT ERR BY DENYING MR. MAHAN'S OBJECTION TO THE DENIAL OF A DOWNWARD ADJUSTMENT PURSUANT TO BECAUSE HE MET THE CRITERIA FOR "SAFETY VALVE" ?

ISSUE #5

DID THE SENTENCE IMPOSED BY THE DISTRICT COURT UNREASONABLE BECAUSE IT IS GREATER THAN NECESSARY TO ACCOMPLISH THE GOALS OF 18 U.S.C. § 3553(a)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPORTS OF OPINIONS

The decision of the Court of Appeals for the Fifth Circuit is reported as United States v. Edward Mahan, No. 19- 20211 (5th Cir. April 14, 2020)(not published). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Southern District of Texas.

Consequently, Petitioner files the instant Application for a Writ of Certiorari under the authority of Title 28, U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Southern District of Texas because Petitioner was indicted for violations of Federal law by the United States Grand Jury for the Southern District of Texas.

STATEMENT OF THE CASE

1. Procedural History.

On March 2, 2017, the Grand Jury for the Southern District of Texas, Houston Division, returned an 8-count Superseding Indictment against Edward Mahan and co-defendants Leonel Mata Luna, Christian Romero Oseguera, Jorge AlejandroRangel-Plattner, Edna Kara Jacobo-Martinez, Miguel Dominguez-Mendez, Carlos Benjamin Rodriguez-Castillo, and Carlos Manuel Mauricio-Rojas. The Indictment charged Mr. Mahan and the co-defendants with violating federal laws regarding the possession of controlled substances and money laundering. Count Four specifically alleged that Mr. Mahan committed the offense of possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance, on or about March 26, 2015, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B), and 18 U.S.C. § 2. ROA. 139-150.[1]

On February 2, 2018, Mr. Mahan entered a plea of guilty to Count Four of the Indictment, pursuant to a written plea agreement. ROA.316. Mr. Mahan was subsequently sentenced to a term of imprisonment of 60 months. ROA.476. This sentence is to be followed by a term of supervised release of 3 years. ROA.476.

No fine was imposed, but Mr. Mahan was ordered to pay a $100 special assessment. Thereafter, Mr. Mahan filed a Notice of Appeal.

Mr. Mahan appealed. On April 14, 2020, a panel of the Fifth Circuit affirmed the Petitioner's conviction in an unpublished decision.

---

[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

2. Statement of Facts.

Edward James Mahan is a 32-year-old native of Victoria, Texas. He was born on November 9, 1986, to his parents, Edward Mahan and Connie Tijerina. His father is deceased and his disabled mother resides in Victoria, Texas. Mr. Mahan has one daughter and several siblings. Mr. Mahan has no criminal record. His family remains supportive of him despite his legal issues.

On or about March 26, 2016, Mr. Mahan allegedly possessed with intent to distribute a mixture or substance containing a detectable amount of cocaine. That is the conduct that comprised the charge to which he entered a plea of guilty. ROA.316.

The PSR assigned Mr. Mahan a base offense level of 28 for Count Four, based on the amount of cocaine for which he was responsible.[2] No downward adjustments were made for the "safety valve", or acceptance of responsibility.

Mr. Mahan filed objections to the PSR, based upon the amount of cocaine for which he was held responsible, the omission of the adjustment for "safety valve" and the misapplication of the First Step Act. The District Court denied the objections to the PSR regarding "safety valve", relevant conduct, and the First Step Act, but granted a two-level downward adjustment for "minor role". With a total offense level of 26 and a criminal history category of I, Mr. Mahan's advisory guideline range of imprisonment became 63 to 78 months. ROA.476. The District Court subsequently sentenced Mr. Mahan to a total of 60 months imprisonment. ROA. 476.

Mr. Mahan then timely filed a notice of appeal. His conviction and sentence was affirmed by a Panel of the Fifth Circuit on April 14, 2020.

---

[2]"PSR" refers to the Presentence Investigation Report filed by the United States Probation Department (under seal).

REASONS WHY CERTIORARI SHOULD BE GRANTED

Issue #1

The plea agreement in this case has been breached. The PSR found Mr. Mahan responsible for 4 kilograms of cocaine. At sentencing, the Government argued that Mr. Mahan should also be responsible for additional amounts of cocaine beyond the amount encompassed by the Mr. Mahan's understanding of the plea agreement. Mr. Mahan negotiated and entered into the plea agreement in good faith. The government in effect promised that it would not advocate that Mr. Mahan should be held responsible for additional amounts of cocaine connected to the overall conspiracy. The District Court erred when it allowed the Government to violate the plea agreement.

Issue #2

The District Court erred by including drug amounts from alleged relevant conduct in Mr. Mahan's base offense level. The PSR officer included three additional kilograms of cocaine that should not have been attributable to Mr. Mahan. There is insufficient evidence of reliability to justify the inclusion of the cocaine in Mr. Mahan's base offense level calculations.

Issue #3

The District Court erred by failing to assign Mr. Mahan an adjustment for acceptance of responsibility.

Issue #4

The District Court erred by its determination that Mr. Mahan was not eligible for the "safety valve".

Issue #5

The District Court imposed a procedurally unreasonable sentence when it sentenced Mr. Mahan to the five-year sentence. First, the sentence was procedurally unreasonable because the record indicates that the District Court relied upon unfounded assumptions about the nature of the offense, and also declined to consider potential mitigating factors. The record indicates that the District Court erred in its balancing of the sentencing factors.

As its fundamental principle, 18 U.S.C. §3553(a) requires the district court to impose a sentence that is sufficient, but not greater than necessary, to comply with Congress' sentencing goals. The 60- month term of imprisonment imposed by the District Court in this case was substantially more than was necessary for the District Court to comply with Congress' sentencing goals, particularly given Mr. Mahan's lack of any prior criminal history and his stated reason for committing the offense-his dire financial situation involving his wife's illness and medical bills. It is also a disparate given the sentence imposed on his similarly situated co-defendant.

The District Court's sentencing decision in this case did not account for a factor that should have received significant weight, to wit: the correctly calculated guideline range. Mr. Mahan's sentence, at 60 months, is greater than necessary to achieve the purposes of § 3553(a) and thus, is unreasonable. The errors in calculating the sentencing guidelines constitute an abuse of discretion. Accordingly, this Court should vacate Mr. Mahan's sentence and remand the case to the district court for resentencing.

ARGUMENTS AND AUTHORITIES

ISSUE #1

I. DID THE DISTRICT COURT ERR BY ALLOWING THE GOVERNMENT TO VIOLATE THE PLEA AGREEMENT ?

Plea bargain agreements are contractual in nature, and are to be construed accordingly. Hentz v. Hargett, 71 F.3d 1169, 1173 (5th Cir.), cert. denied, 517 U.S. 1225 (1996); United States v. Ballis, 28 F.3d 1399, 1409 (5th Cir.1994). It is well settled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257 (1971); see also United States v. Peglera, 33 F.3d 412, 414 (4th Cir.1994) ("Because a government that lives up to its commitments is the essence of liberty under law, the harm generated by allowing the government to forego its plea bargain obligations is one which cannot be tolerated."). "Allowing the government to breach a promise that induced a guilty plea violates due process." Mabry v. Johnson, 467 U.S. 504, 509 (1984). "[W]ith respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights--to concerns for the 'honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.' " United States v. Harvey, 791 F.2d 294, 300 (4th Cir.1986).

In interpreting terms of a plea agreement, courts are to apply general principles of contract law. United States v. Long, 722 F.3d 257, 262 (5th Cir. 2013). "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." United States v. Saling, 205 F.3d 764,

767 (5th Cir. 2000). To determine whether the terms of the plea agreement have been violated, the court must consider "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." Pizzolato , 655 F.3d at 409. The court should also consider both express and implied terms of the plea agreement. See United States v. Munoz, 408 F.3d 222, 227 (5th Cir. 2005). Additionally, in determining whether a breach has occurred, this Court must consider "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." United States v. Valencia, 985 F.2d 758, 761 (5th Cir.1993). When a defendant claims that the government breached a plea agreement, the Court must consider the nature of the agreement and whether the government has breached the agreement. See United States v. Corsentino, 685 F.2d 48, 51 (2d Cir.1984). If a breach has in fact occurred, the sentence must be vacated without regard to whether the judge was influenced by the government's actions. Santobello, 404 U.S. at 262-63; United States v. Grandinetti, 564 F.2d 723 (5th Cir.1977).

Mr. Mahan contends that the Government breached the plea agreement in this case.[3] The PSR included four kilograms of cocaine in Mr. Mahan's base offense level. Mr. Mahan objected to the base amount. During the sentencing hearing, the Government urged the Court to adopt the PSR officer's base offense level.

Because the Government advocated that the cocaine amounts be included in the base offense level, the plea agreement was breached. See United States v. Goldfaden, 959 F.2d 1324, 1327-28

[3]Although Mr. Mahan pled guilty pursuant to a plea agreement containing an appellate waiver, this appeal should proceed notwithstanding the waiver. *See United States v. Purser* , 747 F.3d 284, 289 (5th Cir. 2014) (stating a claim for breach of a plea agreement may be raised despite the waiver provision of the plea agreement); and *United States v. Roberts* , 624 F.3d 241, 244 (5th Cir. 2010). An appeal waiver also does not bar an attack on the voluntariness of a plea. *United States v. White* , 307 F.3d 336, 343 (5th Cir. 2002).

(5th Cir.1992)(finding breach, under plain error standard, of promise to make no recommendation on sentencing, where government took position on sentencing in four memoranda submitted to probation office even though no indication its position was presented to court); United States v. Cook, 668 F.2d 317, 319-21 (7th Cir.1982)(finding breach of promise not to offer anything in aggravation of defendant's sentence, where government allowed information in its possession to be included in presentence report).

The Fifth Circuit rejected Mr. Mahan's argument, stating:

> By failing to provide any details regarding the Government's alleged unwritten promise, Mahan has failed to show his guilty plea was induced by such a promise. Further, the plea agreement and Mahan's assurances to the court at rearraignment do not support the existence of the alleged unwritten promise. United States v. Mahan, No. , p.2.

The Ninth Circuit recently held in United States v. Brannum, No. 19-30126, at *5 (9th Cir. May. 12, 2020):

> Because "the only issue is whether the prosecutor's statements as a matter of law constituted" a breach of the plea agreement, our "review is de novo." *United States v. Mondragon*, 228 F.3d 978, 980 (9th Cir. 2000). "Plea agreements are contractual by nature and are measured by contract law standards." *United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir. 2002). We "enforce the literal terms of the plea agreement, but construe ambiguities in favor of the defendant." *Id*. (cleaned up).
>
> The tax-loss stipulation in the plea agreement is unambiguous. The government's reliance on a higher figure at sentencing was a breach of that agreement. We reject the government's contention that the stipulation about "total tax loss" referred only to so-called "criminal" losses for Guidelines purposes, not the actual total "civil" loss of tax revenue, which the government contends could be used in applying the 18 U.S.C. § 3553(a) factors. The plea agreement, however, makes no such distinction, referring to the stipulated figure as the "total tax loss to the Government." Nor did the government's reservation in the plea agreement of a right to allocute in favor of a Guidelines sentence allow it to do so in a manner at odds with other express stipulations. *See Franco-Lopez*, 312 F.3d at 986-88, 991-92.

The government did not cure the problem by asking the district court to disregard the larger tax-loss figure if it found breach. Only "some breaches may be curable upon timely objection," such as a "mere slip of the tongue or typographical error." *United States v. Heredia*, 768 F.3d 1220, 1235 (9th Cir. 2014) (first quoting *Puckett v. United States*, 556 U.S. 129, 140 (2009)) (second quoting *United States v. Alcala-Sanchez*, 666 F.3d 571, 576 (9th Cir. 2012)). This case involved a more serious breach. Although the government's sentencing memorandum noted "the agreed-to restitution figure of $101,550.00," it also cited the $3.3 million figure in support of its recommendation of a sentence harsher than that recommended in the PSR. At the sentencing hearing, the government repeatedly sought to defend its use of both figures. "These equivocations left room for doubt about the government's position on the issue." Alcala-Sanchez, 666 F.3d at 576.

"[E]ven if the government had acknowledged its error in its supplemental memorandum, doing so would not have cured the breach." Heredia, 768 F.3d at 1235. "What the defendant wants and is entitled to is the added persuasiveness of the government's support regardless of outcome." United States v. Camarillo-Tello, 236 F.3d 1024, 1028 (9th Cir. 2001). "[O]ne really cannot calculate how the government's error and breach may have affected the perceptions of the sentencing judge." Alcala-Sanchez, 666 F.3d at 577. "That the district court claimed not to have been influenced by the government's sentencing memorandum is simply 'irrelevant.'" Heredia, 768 F.3d at 1235 (quoting Camarillo-Tello, 236 F.3d at 1028).

"Considering the government's breach of the plea agreement, we vacate appellant's sentence and remand for resentencing. As we are required to do, we remand for resentencing before a different judge." Mondragon, 228 F.3d at 981. We "emphasize that this is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge." Id. (quoting Santobello v. New York, 404 U.S. 257, 263 (1971)). We "intend no criticism of the district judge by this action, and none should be inferred." Alcala- Sanchez, 666 F.3d at 577 n.2 (quoting United States v. Johnson, 187 F.3d 1129, 1136 n.7 (9th Cir. 1999)).

We note that on appeal, Brannum seeks not simply a resentencing, but also that his conviction be vacated. We express no opinion regarding whether the appropriate remedy in this case is "rescission" of the plea agreement or "a resentencing at which the Government would fully comply with the agreement—in effect, specific performance of the contract." Puckett, 556 U.S. at 137.

Brannan also conflicts with United States v. Frazier, No. 18-2183 (2d Cir. Mar. 5, 2020).

A promise to take no position on an issue (which, to a defendant, is the functional equivalent of a promise not to oppose) is a promise not to attempt to influence the defendant's sentence on that particular issue. See United States v. Brye, 146 F.3d 1207 (10th Cir.1998) (finding breach of plea agreement based on statements by government which implicitly argued against downward departure when government had promised to take no position). As the Tenth Circuit noted in Brye, "The government breaches an agreement 'not to oppose' a motion when it makes statements that do more than merely state facts or simply validate facts found in the Presentence Report and provide a legal characterization of those facts or argue the effect of those facts to the sentencing judge." Brye, 146 F.3d at 1211; United States v. Hawley, 93 F.3d 682, 693 (10th Cir.1996).

In Santobello v. New York, 404 U.S. 257 (1971), this Court said that the principle to be derived from Santobello is that when a guilty plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be to be part of the inducement or consideration, **such promise must be fulfilled**." Id. at 262 (emphasis added). This Court in Santobello reversed and remanded the case even though there was a strong, unequivocal statement by the sentencing court that his sentence was not affected in any way by the prosecutor's recommendation. The Supreme Court said the fault rested with the prosecutor and was not a question of the fairness of the sentencing judge. Id at 262-263.

Because a guilty plea involves a waiver of constitutional rights, it must be made voluntarily. ThisCourt established the standard for voluntariness in Brady v. United States, 397 U.S. 742, 755 (1970), which stated that a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment),

misrepresentation (including unfulfilled or unfulfillable promises) or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). Petition of Geisser at 704-705. A guilty plea if induced by promises or threats which deprive it of the character of a voluntary act is void. A conviction based on such a plea is open to collateral attack. Machibroda v. United States, 368 U.S. 487, 493 (1962). Mr. Mahan's plea of guilty, therefore, was not voluntarily entered because it rested upon the understanding that he would only be held accountable for one kilogram of cocaine and that the government would move for the application of the safety valve.

It is axiomatic [under Santobello] that no guilty plea that has been induced by an unkept plea bargain can be permitted to stand. Id at 705. When a plea agreement is breached, the courts must fashion a remedy that ensures the petitioner what is reasonably due under the circumstances and what is reasonable will vary. The court said that, in Santobello, the case was remanded to state court which had the option of allowing resentencing before a different judge or granting petitioner's request to withdraw his plea.

The plea agreement in the present case was breached. Mr. Mahan understood his plea agreement to encompass one kilogram and **only** one kilogram of cocaine. The PSR held, and the Government advocated, that Mr. Mahan be held responsible for four kilograms of cocaine in violation of the plea agreement. It was clear in plea negotiations that Mr. Mahan understood that the government would not advocate that the any cocaine amounts over 1 kilogram be considered for relevant conduct purposes.

When the issue of a breach of a plea agreement requires identifying the promises the Government made that induced the defendant to enter the plea agreement, the Fifth Circuit

previously held that it must assess the defendant's reasonable understanding of the agreement. *United States v. Barnes*, 730 F.3d 456, 457 (5th Cir. 2013). It was not unreasonable for Mr. Mahan to believe the agreement precluded the Government from supporting more than the one kilogram of cocaine as the base offense level. The plea agreement did not provide Mr. Mahan with a reasonable understanding that the Government would argue for a higher amount of drug quantities upon which to formulate the base offense level.

It is fairly apparent, from the transcripts of the sentencing hearings, that the parties' reasonable understanding of the agreement between them differed. Mr. Mahan's reasonable understanding was that he was going to be sentenced based upon the 1 kilogram of cocaine for which he accepted responsibility. Mr. Mahan had no basis to believe that other drug amounts would be included in the base offense level. Mr. Mahan consistently, throughout the duration of the plea negotiations, took responsibility for the one kilogram of cocaine.

Because his reasonable understanding of the plea agreement was that it limited his responsibility to one kilogram of cocaine, the Government breached the plea agreement by advocating for a drug amount that was 4 times the amount to which he reasonably thought he agreed. He also lost an adjustment for acceptance of responsibility as well a "safety valve" adjustment. This resulted in a sentence twice as long as he reasonably expected. The Government's conduct, therefore, was inconsistent with the defendant's reasonable understanding of the plea agreement. The Government should be bound to the terms of the plea agreement.

ISSUE #2

I. THE DISTRICT COURT ERRED BY DENYING MR. MAHAN'S OBJECTION TO THE BASE OFFENSE LEVEL.

Mr. Mahan timely objected to the base offense level assigned by the PSR officer. This base offense level was based on the amount of drugs for which Mr. Mahanwas held accountable. The amount of drugs determined the base offense level. The District Court erred by assigning Mr. Mahan a base offense level of 28 based upon the calculation that he was responsible for 4 kilograms of cocaine. Mr. Mahan objected to the inclusion of any drug amount exceeding one kilogram of cocaine by the PSR officer in his calculations.

When calculating quantities of drugs upon which to base a sentence, quantities not specified in the indictment, if part of the same scheme, course of conduct, or plan, may be used to determine the base offense level. United States v. Young, 981 F.2d 180, 185 (5th Cir. 1993); U.S.S.G. § 1B1.3 cmt. (backg'd); see also U.S.S.G. § 2D1.1 cmt. n.12 ("Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level").

There are limits, however, to what may be considered in calculating the base offense level. "Where the amount is uncertain, the court is urged 'to err on the side of caution and hold the defendant responsible for that quantity of drugs for which the defendant is more likely than not actually responsible.' " United States v. Meacham, 27 F.3d 214, 216 (6th Cir.1994); United States v. Baro, 15 F.3d 563, 568-69 (6th Cir.1994); see also United States v. Zimmer, 14 F.3d 286, 290 (6th Cir.1994) (The sentencing court "is not free to estimate the 'highest' number possible" or to create an amount "from whole cloth"). The sentencing court must base its relevant conduct approximation on reliable information, and the conduct approximation must be supported by a preponderance of

evidence. Meacham, 27 F.3d at 216; Zimmer, 14 F.3d at 290. While the sentencing court need not consider the rules of evidence when making this determination, the evidence must have "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a). Furthermore, particularized sentencing and "differentiation between coconspirators is required" under the sentencing guidelines. United States v. Jenkins, 4 F.3d 1338, 1347 (6th Cir.1993), cert. denied, 511 U.S. 1034 (1994).

Mr. Mahan testified that he made only one trip. The amount of drugs that can be readily attributable to Mr. Mahan is one kilogram of cocaine.

U.S.S.G. § 6A1.3 provides that any information considered in sentencing determinations must have a "sufficient indicia of reliability to support its accuracy." In this case there is insufficient indicia of reliability that Mr. Mahan intentionally and knowingly possessed or distributed the other three kilograms of cocaine for which he was held responsible. Mr. Mahan should only be held accountable for one kilogram of cocaine for which he accepted responsibility. The District Court erred by assigning the base offense level of 28.

Mr. Mahan acknowledges that the plea agreement that he signed contained a waiver of his appellate rights. Although the Fifth Circuit has held appellate waivers enforceable, it has explicitly noted that "there may be sound policy reasons for refusing to accept such waivers, and that district courts might disagree with the policy choice made by the court in this case to accept a plea agreement appeal waiver." United States v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992).

This Circuit provides that a defendant may, by knowingly and voluntarily entering into a valid plea agreement, waive the statutory right to appeal his sentence. *See* United States v. Story, 439 F.3d 226, 231 (5th Cir. 2006). The Federal Rules of Criminal Procedure require the district court

"must address the defendant personally in open court" and verify that the defendant understands "the terms of any plea-agreement provision waiving the right to appeal. . ." Fed. R. Crim. P. 11(b)(1)(N).

Although the District Court discussed the appellate waiver with Mr. Mahan during the re-arraignment, there was no discussion that the waiver would cover misinterpretation of the Guidelines. *See* ROA. 309-310. To determine the validity of an appeal waiver, this Court conducts a two-step inquiry. United States v. Bond, 414 F.3d 542, 544 (5th Cir. 2005). "Specifically, this Court considers whether the waiver was made knowingly and voluntarily and whether, under the plain language of the plea agreement, the waiver applies to the circumstances at issue." *Id.* at 544. "In determining whether a waiver applies, this Court employs ordinary principles of contract interpretation, construing waivers narrowly and against the Government." United States v. Palmer, 456 F.3d 484, 488 (5th Cir.2006).

However, "[s]ome courts also conduct a third step, inquiring whether this court's 'failure to consider [the defendant's] claim will result in a miscarriage of justice,' though this court has not found it necessary to adopt or reject this step." United States v. Powell, 574 Fed. Appx. 390, 394 (5th Cir. 2014) (*per curiam*) (*unpublished*). In United States v. Snelson, 555 F.3d 681 (8th Cir. 2009), the Eighth Circuit held that "[t]he government bears the burden of establishing (1) that the appeal is clearly and unambiguously within the scope of the waiver, (2) that the defendant entered into the waiver knowingly and voluntarily, and (3) that dismissing the appeal based on the defendant's waiver would not result in a miscarriage of justice." *Id. at* 685; *see* also United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001) ("if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver"). Moreover, refusing to consider Mr. Mahan's claim here because of the appellate waiver language would seriously affect

the fairness, integrity, or public reputation of judicial proceedings. Appellate courts are rightfully protective of these qualities. The Fifth Circuit recognizes the need to intervene when a significant mistake is present in a case.

For example, in United States v. Douglas, ___ F.3d ___ (17-30884) (5th Cir. 2018), the Fifth Circuit held that a Guideline miscalculation was such a serious error as to warrant appellate attention even though the issue was not raised at the trial level or in the appellant's opening brief. This Court found that the district court's miscalculation of Douglas's sentencing range constituted plain error. *See also* United States v. Lewis, 907 F.3d 891, 894 (5th Cir.2018) (setting forth plain error standard). This Court exercised its discretion to remedy the error because it "seriously affects the fairness, integrity or public reputation of judicial proceedings." Citing Rosales-Mireles v. United States, 138 S. Ct. 1897, 1905 (2018).

The District Court's error in this case is a miscalculation that "seriously affects the fairness, integrity or public reputation of judicial proceedings." Indeed, leaving a guideline miscalculation uncorrected solely because of an appeal waiver would cause additional damage to the "fairness, integrity or public reputation of judicial proceedings" beyond the underlying error itself. Here, the district court miscalculated the guideline range and Mr. Mahan objected to the error. This guideline miscalculation should also be addressed for the same reason this Court relied on in Douglas.

Further, Mr. Mahan urges the Court to adjust the manner in which it reviews appeal waivers and to utilize the three-prong analysis employed by the First and Tenth Circuits. Specifically: (1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the

waiver would result in a miscarriage of justice. See United States v. Ter-Esayan, 570 F.3d 46 (1st Cir. 2009); United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004).

Mr. Mahan implores the Court to direct the Courts of Appeal to adopt this third-step or at least to apply it in this case, in light of the issues raised above, and permit his appeal to proceed. The Fifth Circuit did not even consider Mr. Mahan's sentencing arguments given that it found no breach of the plea agreement. A sentence of five years in federal prison (over twice as much as co-defendant Mr. Oseguera, who received a 24-month sentence) in this case , however, constitutes a miscarriage-of-justice, and thus the appeal waiver should not be enforced.

ISSUE #3

I. THE DISTRICT COURT REVERSIBLY ERRED WHEN IT FAILED TO ASSIGN A THREE-LEVEL DOWNWARD ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY.

Mr. Mahan objected to the PSR because he was not assigned a three-level downward adjustment for acceptance of responsibility. The District Court overruled his objection and made no downward adjustments for acceptance of responsibility. Mr. Mahan pleaded guilty to all conduct alleged in the indictment and he did so in a timely fashion. He notified the Government of his intent to do so prior to the time that any efforts were required by the Government toward preparation for trial. He admitted the offense conduct. Mr. Mahan fully cooperated with Pre-Trial services, unequivocally accepted his responsibility for the criminal conduct, and occasioned no delay of any kind in the disposition of his case.

Guideline 3E1.1 ("Acceptance of Responsibility" provides for the reduction of a defendant's advisory guideline range in exchange for a defendant's guilty plea:

> **§3E1.1. Acceptance of Responsibility**
>
> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level. U.S.S.G. § 3E1.1.

Here, Mr. Mahan did not deny any facts, file any motions, frivolously contest any relevant conduct, or put the government to any type of proof regarding the offense to which he entered his plea of guilty. He did contest, however, contest the extraneous drug amounts which were tacked on in violation of his understanding of the plea agreement. Mr. Mahan's conduct cannot be viewed as "inconsistent" with his overall acceptance of responsibility for his criminal conduct. His contesting of the extraneous drug amounts cannot be said to outweigh his guilty plea and truthful admission to that charged conduct, as required by Application Note 3. *Cf. United States v. Diaz-Corado*, No. 10-40179, 2009 WL 8239170, at *2 (5th Cir. Aug. 2, 2011) (unpublished)(relevant commentary in the *Guidelines Manual* is generally authoritative). Accordingly, the District Court erred by not assigning the downward adjustment for acceptance of responsibility.

ISSUE #4

I. THE DISTRICT COURT ERRED BY FINDING THAT MR. MAHAN WAS NOT ELIGIBLE FOR A SAFETY VALVE ADJUSTMENT.

A defendant is eligible for the safety valve reduction when the sentencing court finds that: *"not later than the time of sentencing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude a determination by the Court that the defendant has complied with this requirement."*

USSG 5C1.2(5).

The Safety valve provision of ' 5C1.2 allows for a reduction below the mandatory minimum sentence if a defendant meets five criteria. U.S.S.G. ' 5C1.2(a)(1)-(5). The purpose of the ' 5C1.2 safety-valve provision is to allow defendants who otherwise qualify to obtain a lesser sentence--including one below the statutory minimum—if, before the sentencing hearing, they fully and truthfully debrief with the Government and "provide the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." U.S.S.G. ' 5C1.2(a)(5); 18 U.S.C. ' 3553(f).

Mr. Mahan debriefed with the Government for safety valve purposes on March 9, 2018. The defendant was truthful and admitted his role in the offense of conviction and his relevant conduct. Namely, the defendant told agents that on March 26, 2015, he was sent by an unindicted co-conspirator to pick up two kilograms of cocaine in Houston, which he was to transport back to the co-conspirator in Victoria. There was conflicting evidence regarding

The use of Mr. Mahan's alleged statement about other trips also violations the provisions of The First Step Act. In Section D, of Section 402 of the Act states in particular, the Act follows:

SEC. 402. BROADENING OF EXISTING SAFETY VALVE.

(a) AMENDMENTS.-Section 3553 of title 18, United States Code, is amended-

(1) in subsection (f)-

(A) in the matter preceding paragraph (1)-

(I) by striking "or section 1010" and inserting ", section 1010"; and

(ii) by inserting ", or section 70503 or 70506 of title 46" after "963)";

(B) by striking paragraph (1) and inserting the following:

"(1) the defendant does not have-

"(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

"(B) a prior 3-point offense, as determined under the sentencing guidelines; and

"©) a prior 2-point violent offense, as determined under the sentencing guidelines;"; and

(D) by adding at the end the following:

"Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.*"; and*

(2) by adding at the end the following:

"(g) DEFINITION OF VIOLENT OFFENSE.-As used in this section, the term 'violent offense' means a crime of violence, as defined in section 16, that is punishable by imprisonment." ***emphasis added.***

Section D effectively eliminates any consideration of what Mahan may or may not have told the agents, as the only purpose of the use of those alleged statements is to attempt to enhance the punishment a Court may assess against a Defendant, and therefore not permitted, by law, under The First Step Act.

. There is no evidence that Mr. Mahan had not finally truthfully provided all information he had concerning this offense, and use of any such information was improper under the First Step Act. Therefore; Mr. Mahan was entitled to a 2 level decrease under the safety valve. United States v. McCrimmon, 443 F2d 454 (5th Cir. 2006).

ISSUE #5

I. THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS UNREASONABLE BECAUSE IT IS GREATER THAN NECESSARY TO ACCOMPLISH THE GOALS OF 18 U.S.C. § 3553(a).

Under United States v. Booker, 543 U.S. 220 (2005), a defendant's sentence is reviewed for reasonableness. Under the reasonableness review mandated by Booker, "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard." Gall v. United States, 552 U.S. 38, 51 (2007). United States v. Smith, 440 F.3d 704, 706 (5th Cir. 2006). A sentence within a Sentencing Guideline range is presumptively reasonable, while sentences outside the Guideline range require more explanation. Id. at 707. This Court " review[s] the district court's interpretation or application of the Sentencing Guidelines de novo and its factual findings for clear error." United States v. Trujillo, 502 F.3d 353, 356 (5th Cir. 2007) See, e.g., United States v. Ronquillo, 508 F.3d 744, 748 (5th Cir. 2007).

This court reviews sentencing decisions in the district court for reasonableness under the two step abuse of discretion standard. Gall v. United States, 552 U.S. 38, 50--51 (2007); United States v. Cisneros-- Gutierrez, 517 F.3d 751, 764 (5th Cir. 2008). In the first step, this court analyzes whether the district court committed procedural error, such as "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." Gall,

552 U.S. at 51, 128 S.Ct. 586. If the sentence is procedurally sound, this court moves to the second step and considers the substantive reasonableness of the sentence. Id.

Mr. Mahan objected to the sentence and made specific objections at the sentencing hearing. Mr. Mahan contends that the sentence, at 60 months, is unreasonable.

18 U.S.C. § 3553(a) reads:

> (a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed–
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> © to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines ...;
> (5) any pertinent [sentencing guidelines] policy statement ... [;]
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense.

The District Court's sentence was substantively unreasonable, as "it (1) does not account for factor[s] that should have received significant weight, (2) gives significant weight to irrelevant or improper factor[s], and (3) represents a clear error of judgment in balancing the sentencing factors." United States v. Smith, 440 F.3d 704, 708 (5th Cir. 2006). Mr. Mahan's sentence is substantively

unreasonable, and the district court should have granted his request for a downward variance based upon sentencing disparities between he and Mr. Oseguera, among other reasons.

The record does not indicate that the District Court considered Mr. Mahan's mitigating factors. Since the record is devoid of any indication that these factors were considered, it appears that the District Court failed to consider and weigh the appropriate factors.

The District Court was required to consider "the nature and circumstances of the offense" and to treat Mr. Mahan "as an individual" and his "case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." Gall, 552 U.S. at 52. The sentence thus was unreasonable because it did not account for how Mr. Mahan's dire financial circumstances and the need to pay for his wife's medical treatments made him less culpable, and more deserving of leniency, than the typical defendant. In light of Mr. Mahan's issues, the District court should have considered whether and how the circumstances of his offense made him more deserving of leniency under 18 U.S.C. §3553(a).

As the Ninth Circuit has explained:

> In the "broader appraisal" available to district courts after *Booker*, courts can justify consideration of family responsibilities, an aspect of the defendant's "history and characteristics,"18 U.S.C. §3553(a)(1), for reasons extending beyond the Guidelines. "District courts now... have the discretion to weigh a multitude of mitigating and aggravating factors that existed at the time of mandatory Guidelines sentencing, but were deemed 'not ordinarily relevant,' such as age, education and vocational skills, mental and emotional conditions, employment record, and family ties and responsibilities." United States v. Menyweather, 447 F.3d 625, 634 (9th Cir. 2006).

The record does not indicate that the District Court considered Mr. Mahan's financial circumstances and the role that they played in Mr. Mahan's commission of the offense. Instead, the District Court was silent regarding the consideration of the reasons for Mr. Mahan's commission of

the offense. Because the District Court thus erroneously failed to consider the dire circumstances that motivated the offense -- that is, "the history and characteristics of the defendant,"18 U.S.C. § 3553(a)(1) -- and thus to consider a sentence that was "sufficient, but not greater than necessary, to comply" with the purposes of sentencing, 18 U.S.C. §3553(a), and "the need for the sentence imposed... to reflect the seriousness of the offense." 18 U.S.C. § 3553(a)(2)(A).

In Rita v. United States, 551 U.S. at 356, this Court mandated that, "The sentencing judge should set forth enough to satisfy the appellate court that it has considered the parties arguments and has a reasoned basis for exercising his own legal decision making authority." In United States v. Merced, 603 F.3d 203, 215 (3rd Cir. 2010), the Third Circuit held that, "it is not enough for the district court to carefully analyze the sentencing factors. A separate and equally important procedural requirement is demonstrating that it has been done...".

In United States v. Ausburn 502 F.3d 313, 329 (3d Cir. 2007), the Court stated that, "we have stated at least one concrete requirement to establish that the sentencing court gave meaningful consideration to the relevant §3553(a) factors: the court must acknowledge and respond to any properly presented sentencing argument which has colorable legal merit and a factual basis." In United States v. Harris, 567 F.3d 846, 854 (7th Cir. 2009), the court found that, "when a court has 'passed over in silence the principal argument made by the defendant even though the argument is not so weak as not to merit discussion,' we do not have the assurance we need to satisfy ourselves that the defendant's individual circumstances have been thoroughly-considered."

In United States v. Cantu-Ramirez, 669 F.3d 619, 630 (5th Cir. Feb 2012), the District Court's failure to mention the defense's 3553(a) arguments and rejecting the arguments with no

explanation forced the government to concede plain error under both Rita and United States v. Mondragon-Santiago, 564 F.3d 357 (5th Cir. 2009).

In sum, the District Court's sentence was substantively unreasonable. This Court should remand the case because the "district court's sentence in this case is based on clearly erroneous factual determinations, puts significant weight on irrelevant factors, and ignores factors that should be given significant weight." United States v. Guidry, 462 F.3d 373, 378 (5th Cir. 2006).

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Amy R. Blalock
AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
(903) 262-7520
amyblalock@outlook.com
Texas Bar Card No. 02438900
Attorney for Petitioner

RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Amy R. Blalock
AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
(903) 262-7520
amyblalock@outlook.com
Texas Bar Card No. 02438900
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 11th day of September, 2020, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Carmen Castillo Mitchell
US Attorney's Office
Southern District of Texas
Houston, Texas

EDWARD MAHAN
USM # 13624-479
FCI BEAUMONT LOW
FEDERAL CORRECTIONAL INSTITUTION
P.O. BOX 26020
BEAUMONT, TX 77720

/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 2019

EDWARD MAHAN,

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

April 14, 2020

Lyle W. Cayce
Clerk

No. 19-20211
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

EDWARD MAHAN,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CR-4-5

Before BARKSDALE, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:[*]

Pursuant to a written plea agreement with an appeal waiver, Edward Mahan pleaded guilty to possession, with intent to distribute, 500 grams or more of a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 841(a)(1). He was sentenced to, *inter alia*, 60-months' imprisonment.

[*] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Mahan asserts the Government breached the plea agreement by violating an unwritten promise to recommend that his relevant conduct be limited to one kilogram of cocaine for purposes of determining his base offense level under Sentencing Guideline § 2D1.1 (offense conduct). (Mahan has abandoned any claim that the appeal waiver is invalid. *See United States v. Scroggins*, 599 F.3d 433, 446–47 (5th Cir. 2010) (citations omitted). Again, he asserts that it was breached. And, premised on this alleged breach's opening the way to being able to appeal, he challenges: the substantive reasonableness of his below-Guidelines, statutory minimum sentence; and the court's application of Guidelines §§ 2D1.1, 3E1.1 (acceptance of responsibility), and 5C1.2 (limitations on statutory-minimum sentences). Because his claim of breach fails, we do not reach these issues.)

Our court may consider whether the Government breached the plea agreement, despite Mahan's appeal waiver, because a breach by the Government would release Mahan from the waiver. *See United States v. Purser*, 747 F.3d 284, 289 & n.11 (5th Cir. 2014) (citations omitted). Generally, our court reviews *de novo* whether the Government breached a plea agreement. *United States v. Cluff*, 857 F.3d 292, 297 (5th Cir. 2017) (citations omitted). But, plain-error review applies if defendant failed to object to any breach in district court. *Id.* (citations omitted).

The parties dispute whether Mahan preserved his linchpin breach contention. We need not decide the applicable standard of review, however, because Mahan has not shown a breach of the plea agreement. *See United States v. Mesquiti*, 854 F.3d 267, 275 (5th Cir. 2017) (noting the court "need not determine the applicable standard of review" when appellant "fails to establish reversible error even under the less demanding . . . standard").

The Government breaches a plea agreement if its conduct was inconsistent "with . . . defendant's reasonable understanding of the agreement". *United States v. Munoz*, 408 F.3d 222, 226 (5th Cir. 2005) (citations omitted). Appellant "has the burden of demonstrating a breach by a preponderance of the evidence". *United States v. Casillas*, 853 F.3d 215, 217 (5th Cir. 2017) (citation omitted).

By failing to provide any details regarding the Government's alleged unwritten promise, Mahan has failed to show his guilty plea was induced by such a promise. Further, the plea agreement and Mahan's assurances to the court at rearraignment do not support the existence of the alleged unwritten promise.

DISMISSED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 14, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-20211 USA v. Edward Mahan
USDC No. 4:16-CR-4-5

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

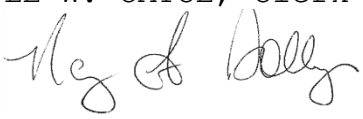
Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Ms. Audrey Lynn Maness
Ms. Carmen Castillo Mitchell