United States Court of Appeals for the Fifth Circuit

No. 20-10569

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

OMAR LEONIDES DIAZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-240-2

ORDER:

IT IS ORDERED that Appellant's motion for leave to file out of time motion for reconsideration is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for leave to file out of time petition for rehearing en banc is DENIED.

ANDREW S. OLDHAM
United States Circuit Judge

United States Court of Appeals for the Fifth Circuit

No. 20-10569

United States Court of Appeals
Fifth Circuit
FILED
June 30, 2021
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

OMAR LEONIDES DIAZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-240-2

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges*.

PER CURIAM:

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

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

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO. 4:19-CR-240-P
	§	
OMAR DIAZ	§	

REPORT OF ACTION AND RECOMMENDATION ON PLEA BEFORE THE UNITED STATES MAGISTRATE JUDGE

This Report of Action on Plea is submitted to the court pursuant to 28 U.S.C. § 636(b)(3). This case has been referred by the United States district judge to the undersigned for the taking of a guilty plea. The parties have consented to appear before a United States magistrate judge for these purposes.

The defendant appeared with counsel before the undersigned United States magistrate judge who addressed the defendant personally in open court and informed the defendant of, and determined that the defendant understood, the admonitions contained in Rule 11 of the Federal Rules of Criminal Procedure.

The defendant pled guilty.

The undersigned magistrate judge finds the following:

1. The defendant, upon advice of counsel, has consented orally and in writing to enter this guilty plea before a magistrate judge subject to final approval and sentencing by the presiding district judge;

2. The defendant fully understands the nature of the charges and penalties;

3. The defendant understands all constitutional and statutory rights and wishes to waive these rights, including the right to a trial by jury and the right to appear before a United States district judge;

4. The defendant's plea is made freely and voluntarily;

5. The defendant is competent to enter this plea of guilty;

6. There is a factual basis for this plea; and

7. The ends of justice are served by acceptance of the defendant's plea of guilty.

Although I have conducted these proceedings, accepted the defendant's plea of guilty, and pronounced the defendant guilty in open court, upon the defendant's consent and the referral from the United States district judge, that judge has the power to review my actions in this proceeding and possesses final decision making authority. Thus, if the defendant has any objections to the findings or any other action of the undersigned he should make those known to the United States district judge within fourteen days of today.

I recommend that defendant's plea of guilty be accepted and that the defendant be adjudged guilty by the United States district judge and that sentence be imposed accordingly.

Signed November 15, 2019.

JEFFREY L. CURETON
UNITED STATES MAGISTRATE JUDGE

NO:_____

IN THE

SUPREME COURT OF THE UNITED STATES

OMAR LEONIDES DIAZ, PETITIONER PRO-SE	§	
V.	§	CASE NO. 4:19-CR-240-2 20-10569
THE UNITED STATES OF AMERICA RESPONDENT	§	

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S

WRIT OF CERTIORARI

COMES NOW, OMAR L. DIAZ, BOP# 59068-177, HEREINAFTER TO BE KNOWN AS PETITIONER AND FILES THIS, HIS MEMORANDUM OF LAW IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI. PETITIONER IS A LAYMAN OF THE LAW, UNSKILLED IN IT'S INNER WORKINGS AND AS SUCH WOULD ASK THIS COURT TO CONSTRUE THIS MEMORANDUM LIBERALLY. HAINES V. KERNER, 404 U.S. 519 (1972).

STATEMENT OF JURISDICTION

PETITIONER-APPELLANT OMAR LEONIDES DIAZ, APPEALS FROM AN AMENDED JUDGEMENT OF CONVICTION AND SENTENCE ENTERED ON THE DOCKET ON DECEMBER 31, 2020. ROA 278-79, 295-99. THE DISTRICT COURT ORALLY PRONOUNCED PETITIONER'S SENTENCE ON JUNE 9, 2020. ROA.8. PETITIONER TIMELY FILED HIS NOTICE OF APPEAL ON JUNE 9, 2020. THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. § 1291 and 18 U.S.C. 3231. PETITIONER THEN FILED HIS DIRECT APPEAL WITH THE FIFTH CIRCUIT COURT OF APPEALS ON FEBRUARY 24, 2021. HOWEVER, PETITIONER'S COUNSEL OF RECORD WITHDREW FROM THE CASE AND PETITIONER FILED A MOTION FOR REHEARING en banc AND WAS FURTHER GRANTED LEAVE TO FILE A FORMAL PETITION FOR REHEARING OUT OF TIME AND A RE-H HEARING. AS OF YET THERE HAS BEEN NO DECISION FROM THE FIFTH CIRCUIT COURT OF APPEALS. PETITIONER NOW EXERCISES HIS RIGHT TO FILE FORA WRIT OF CERTIORARI IN THIS HONORABLE COURT.

STATEMENT OF THE ISSUES

1). WHETHER THE DISTRICT COURT ERRED BY VIOLATING THE PLEA AGREEMENT PROCEDURE SET FORTH IN RULE 11(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

2). WHETHER THE DISTRICT COURT ERRED AND VIOLATED PETITIONER'S 5TH, 6TH, 8TH AND 14TH AMENDMENT RIGHTS TO A FAIR TRIAL AND DUE PROCESS WHEN IT ALLOWED BOTH THE "IMPORTATION" AND THE "CONSPIRACY" TERMS TO BE USED IN IT'S SENTENCING OF PETITIONER.

3). WHETHER COUNSEL FOR TRIAL AND FOR DIRECT APPEAL TO THE FIFTH CIRCUIT WAS SUBSTANTIALLY DEFICIENT AS TO SERIOUSLY DEPRIVE PETITIONER OF A FAIR PROCEEDING WHEN IF FAILED TO RAISE THE GROUNDS AND ARGUMENTS AGAINST THE "IMPORTATION" ENHANCEMENT WHICH VIOLATED PETITIONER'S RIGHTS TO A FAIR TRIAL, INCLUDING THE APPELLATE PROCESS, RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL.

4). WHETHER THE PLAIN ERROR OF THE DISTRICT COURT AFFECTED PETITIONER'S SUBSTANTIAL RIGHTS, WHICH SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY AND PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS WHEN IT VIOLATED THE PLEA AGREEMENT PROCEDURE.

5). WHETHER THE DISTRICT COURT'S REJECTION OF THE GOVERNMENT'S PROMISED PERFORMANCE TERMINATED THE PLEA AGREEMENT AND RESULTED IN A LENGTHIER SENTENCE AND VIOLATION OF PETITIONER'S 5TH AMENDMENT RIGHTS TO A FAIR TRIAL, INCLUDING SENTENCING AND PETITIONER'S 8TH AMENDMENT RIGHTS TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT AND UNLAWFUL RESTRAINT.

6). WHETHER PETITIONER'S PLEA WAIVER DID OR DID NOT BAR THESE CLAIMS BECAUSE THE DISTRICT COURT REJECTED THE PLEA AGREEMENT. THE COURT ADVISED PETITIONER HE "HAD A RIGHT TO APPEAL HIS SENTENCE" WITHOUT ANY SPECIFICITY AS TO CONDITIONS.

STATEMENT OF THE CASE

ON NOVEMBER 7, 2019, PETITIONER WAS CHARGED BY WAY OF A ONE-COUNT SUPERSEDING INFORMATION. ROA.53. THE SUPERCEDING INFORMATION READ IN PART AS FOLLOWS:

* COUNT ONE: POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE (VIOLATION OF 21 U.S.C. §841). ON OR ABOUT JULY 24, 2019, IN THE FORT WORTH DIVISION OF THE NORTHERN DISTRICT OF TEXAS, AND ELSEWHERE, PETITIONER OMAR LEONIDES DIAZ POSSESSED WITH INTENT TO DISTRIBUTE AT LEAST FIFTY (50) GRAMS OF A MIXTURE OR A SUBSTANCE CONTAININGAA DETECTABLE AMOUNT OF METHAMPHETAMINE, A SCHEDULE II CONTROLLED SUBSTANCE. IN VIOLATION OF 21 U.S.C. § 841(a)(1) and (b)(1)(B). ROA 53.

ON NOVEMBER 15, 2019, PETITIONER PLEADED GUILTY TO COUNT ONE OF THE SUPERSEDING INFORMATION, PURSUANT TO A WRITTEN PLEA AGREEMENT. ROA.6, 143-48.

THE PLEA AGREEMENT REQUIRED PETITIONER TO WAIVE APPEAL IN EXCHANGE FOR THE GOVERNMENT'S AGREEMENT TO (1) NOT BRING ANY ADDITIONAL CHARGES AGAINST HIM BASED UPON THE CONDUCT UNDERLYING AND RELATED TO HIS PLEA OF GUILTY AND (2) TO MOVE TO DISMISS ANY REMAINING COUNTS AT THE TIME OF SENTENCING. COMPARE ROA.146 (PLEA AGREEMENT ¶10) WITH ROA.145 (PLEA AGREEMENT ¶7) THE APPEAL WAIVER READ AS FOLLOWS:

DEFENDANT WAIVES HIS RIGHTS, CONFERRED BY 28 U.S.C. § 1291 AND 18 U.S.C. §3742, TO APPEAL FROM HIS CONVICTION AND SENTENCE. HE FURTHER WAIVES HIS RIGHT TO CONTEST HIS CONVICTION AND SENTENCE IN ANY COLLATERAL PROCEEDING, INCLUDING PROCEEDINGS UNDER 28 U.S.C. §2241 and 28 U.S.C §2255. DEFENDANT HOWEVER **RESERVES THE RIGHTS TO** (A) 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. 146 (PLEA AGREEMENT ¶10).

ON JUNE 9, 2020, THE DISTRICT COURT SENTENCED PETITIONER. ROA.8. AT SENTENCING THE DISTRICT COURT ANNOUNCED THAT "[T]HE PLEA OF GUILTY WAS NOT MADE PURSUANT TO A PLEA AGREEMENT." ROA.119. THE DISTRICT COURT CONCLUDED THE SENTENCING HEARING WITH THE FOLLOWING ADMONITION:

"MR. DIAZ, YOU DO HAVE A RIGHT TO APPEAL YOUR SENTENCE SIR. IF YOU DO DECIDE TO APPEAL YOU ALSO HAVE THE RIGHT TO APPLY FOR WHAT'S CALLED LEAVE TO

FILE 'IN FORMA PAUPERIS' IF YOU ARE UNABLE TO PAY FOR THE COST OF AN APPEAL.

THE DISTRICT COURT'S "NOTICE OF RIGHT TO APPEAL SENTENCE" DID NOT MENTION THE PLEA AGREEMENT. ROA.75. THE DISTRICT COURT DID NOT INFORM PETITIONER THAT THE AGREED DISPOSITION SET FORTH IN THE PLEA AGREEMENT WOULD BE INCLUDED IN THE JUDGEMENT. FINALLY, THE DISTRICT COURT DID NOT STATE ON THE RECORD THAT THE REMAINING CHARGES ADEQUATELY REFLECTED THE SERIOUSNESS OF THE ACTUAL OFFENSE BEHAVIOR AND THAT ACCEPTING THE PLEA AGREEMENT WOULD NOT UNDERMINE THE STATUTORY PURPOSES OF SENTENCING OR THE SENTENCING GUIDELINES.

AFTER DENYING PETITIONER'S MOTION FOR A DOWNWARD VARIANCE, THE DISTRICT COURT IMPOSED A GUIDELINE SENTENCE OF 336 MONTHS AND 5 YEARS SUPERVISED RELEASE. ROA.80-84, 136-38. FURTHER, THE DISTRICT COURT GRANTED THE GOVERNMENT'S MOTION TO DISMISS "THE INDICTMENT". ROA.140. PETITIONER FILED A NOTICE OF APPEAL ON JUNE 9, 2020. ROA.8, 76-77/

THE WRITTEN JUDGEMENT INITIALLY ENTERED BY THE DISTRICT COURT CONTAINED A CLERICAL ERROR. ROA.283-88. WHILE IT CORRECTLY NOTED THAT PETITIONER PLED GUILTY TO "COUNT ONE OF THE SUPERSEDING INFORMATION FILED ON NOVEMBER 7, 2019," IT INCORRECTLY DESCRIBED THE CHARGE AS "CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE," IN VIOLATION OF "21 U.S.C. §846." ROA.80-84. IN THIS COURT, PETITIONER FILED A MOTION TO REMAND FOR ENTRY OF AN AMENDED JUDGEMENT, MOTION TO SUPPLEMENT RECORD ON APPEAL, AND MOTION TO SUSPEND BRIEFING SCHEDULE. ROA.283-88. ON REMAND, THE DISTRICT COURT CORRECTED THE CLERICAL ERROR IN THE WRITTEN JUDGEMENT. ROA.295-99. THE AMENDED JUDGEMENT IDENTIFIES THE CHARGE THAT PETITIONER PLED GUILTY TO AS "POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE" IN VIOLATION OF "21 U.S.C. §841." ROA.295-99.

ARGUMENT ONE

1) THE DISTRICT COURT ERRED BY VIOLATING THE "PLEA AGREEMENT PROCEDURE"

BECAUSE PETITIONER DID NOT OBJECT TO ANY OF THE DISTRICT COURT'S VIOLATIONS OF THE "PLEA AGREEMENT PROCEDURE" SET FORTH IN RULE 11(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, THIS COURT'S REVIEW IS FOR PLAIN ERROR. TO ESTABLISH

PLAIN ERROR, PETITIONER MUST SHOW THAT (1) THERE IS ERROR; (2) THE ERROR WAS CLEAR AND OBVIOUS, NOT SUBJECT TO REASONABLE DISPUTE; AND (3) THE ERROR AFFECTED HIS SUBSTANTIAL RIGHTS. PUCKETT V. UNITED STATES, 556 U.S. 129, 135 (2009). IF THE FIRST THREE PRONGS ARE SATISFIED, THIS COURT MAY REMEDY THE ERROR, BUT ONY IF IT SERIOUSLY AFFECTS THE FAIRNESS, INTEGRITY AND PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS. Id.

THE EVALUATION OF WHETHER A GUILTY PLEA WAS ACCEPTED IS A QUESTION OF LAW, SUBJECT TO de novo REVIEW. SEE: UNITED STATES V. CESSA, 626 Fed. Appx. 464, 467 (5TH CIR. 2015) (INVOKING A POLICY OF de novo REVIEW FOR "ANY QUESTIONS OF LAW UNDERLYING THE DISTRICT COURT'S DECISION" (QUOTING YESH MUSIC V. LAKEWOOD CHURCH, 727 F.3d 356, 359 (5TH CIR. 2013)) ;SEE ALSO UNITED STATES V. ANDREWS, 857 F.3d 7347 739 (6TH CIR. 2017). ("WE WILL TREAT THE EVALUATION OF WHETHER A GUILTY PLEA WAS ACCEPTED AS A QUESTION OF LAW SUBJECT TO de novo REVIEW: (CITING UNITED STATES V. JONES 472 F.3d 905, 908-09 (D.C. CIR. 2007); JONES, 472 F.3d AT 908-09 (ENDORSING de novo REVIEW AND FINDING THAT AN ABUSE-OF-DISCRETION STANDARD MAKES LITTLE SENSE GIVEN THAT THE COURT IS REVIEWING THE DISTRICT COURT's INTERPRETATION OF ITS OWN WORDS.)

SIGNIFICANTLY, THE COURT HAS HELD THAT "AN APPEAL WAIVER IN THE PLEA AGREEMENT DOES NOT WAIVE THE DISTRICT COURT'S COMPLIANCE WITH RULE 11..." UNITED STATES V. VANEGAS, 633 FED. Appx. 288, 289 (5TH CIR. 2016)(PER CURIAM).

2) APPLICABLE LAW

"PLEA BARGAIN AGREEMENTS ARE CONTRACTUAL IN NATURE, AND ARE TO BE CONSTRUED ACCORDINGLY." HENTZ V. HARGETT, 71 F.3d 1169, 1173 (5TH CIR. 1996); SEE ALSO RICKETTS V. ADAMSON, 483 U.S. 1, 16-21, 107 S.CT. 2680, 97 L.Ed.2d 1 (1987) "THEY BIND THE PARTIES, AND MORE IMPORTANTLY, THE COURT, TOO, IS BOUND 'ONCE [IT] ACCEPTS THE PLEA AGREEMENT." UNITED STATES V. GARCIA, 606 F.3d 209, 215 (5 (5TH CIR. 2010) (ALTERATION IN ORIGINAL)(CITATION OMITTED). RULE 11(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE SETS OUT THREE TYPES OF PLEA AGREEMENTS. ONLY THE FIRST ONE IS RELEVANT TO THE PLEA AGREEMENT IN THIS CASE.

RULE 11(c)(1)(A) PROVIDES THAT THE GOVERNMENT AND A CRIMINAL DEFENDANT MAY ENTER INTO A PLEA AGREEMENT THAT SPECIFIES THAT THE GOVERNMENT WILL "NOT BRING, OR WILL MOVE TO DISMISS, OTHER CHARGES." FED. R. CRIM. P. 11(c)(1)(A). IF SUCH AN AGREEMENT IS REACHED, A DISTRICT COURT "MAY ACCEPT THE AGREEMENT, REJECT IT OR DEFER A DECISION UNTIL THE COURT HAS REVIEWED THE PRESENTENCE REPORT. FRCP 11(c)(3)(A); see also U.S.S.G. §6B1.2(a). MOREOVER, "IF THE COURT ACCEPTS THE PLEA AGREEMENT, IT MUST INFORM THE DEFENDANT THAT...THE AGREED DISPOSITION WILL BE INCLUDED IN THE JUDGEMENT." F.R.C.P. 11(c)(4). IF THE COURT REJECTS THE PLEA AGREEMENT, IT MUST INFORM THE PARTIES, "ADVISE THE DEFENDANT PERSONALLY THAT THE COURT IS NOT REQUIRED TO FOLLOW THE PLEA AGREEMENT: GIVE THE DEFENDANT AN OPPORTUNITY TO WITHDRAW THE PLEA; AND...ADVISE THE DEFENDANT PERSONALLY THAT IF THE PLEA IS NOT WITHDRAWN, THE COURT MAY DISPOSE OF THE CASE LESS FAVORABLY TOWARD THE DEFENDANT THAT THE PLEA AGREEMENT CONTEMPLATED." F.R.C.P. 11(c)(5); SEE ALSO U.S.S.G. §6B1.3.

AS THE SUPREME COURT HAS RECONGNIZED, ALTHOUGH A GUILTY PLEA AND A PLEA AGREEMENT ARE "NOT WHOLLY INDEPENDENT;" "THE RULES NOWHERE STATE THAT THE GUILTY PLEA AND THE PLEA AGREEMENT MUST BE TREATED IDENTICALLY." UNITED STATES V. HYDE, 520 U.S. 670, 677 (1997). INDEED, ALTHOUGH A DEFENDANT PLEADS GUILTY WELL BEFORE A SENTENCING HEARING, "THE DECISION WHETHER TO ACCEPT THE PLEA AGREEMENT WILL OFTEN BE DEFERRED UNTIL THE SENTENCING HEARING, AT WHICH TIME THE PRESENTENCE REPORT WILL HAVE BEEN SUBMITTED TO THE PARTIES, OBJECTED TO, REVISED, AND FILED WITH THE COURT." Id. AT 678 (CITATIONS OMITTED); SEE ALSO F.R.C.P. 11(c)(3)(A).

HERE, THE PLEA AGREEMENT WAS FOR TWENTY (20) YEARS AND INCLUDED THE GOVERNMENT'S AGREEMENT NOT TO BRING ANY ADDITIONAL CHARGES AGAINST PETITIONER BASED UPON THE CONDUCT UNDERLYING AND RELATED TO HIS PLEA OF GUILTY AND TO MOVE TO DISMISS ANY REMAINING COUNTS AT THE TIME OF SENTENCING. ROA.145 (PLEA AGREEMENT ¶7). ACCORDINGLY IT FELL UNDER RULE 11(c)(1)(A). SEE F.R.C.P 11(c)(1)(A). AS DISCUSSED BELOW, THE DISTRICT COURT PLAINLY ERRED BY REJECTING THE RULE 11(c)(1)(A) PLEA AGREEMENT WITHOUT ADVISING PETITIONER PERSONALLY THAT IT

IT WAS NOT REQUIRED TO FOLLOW THE PLEA AGREEMENT AND THAT IT COULD DISPOSE OF THE CASE LESS FAVORABLY TOWARDS PETITIONER THAT THE PLEA AGREEMENT CONTEMPLATED.

2). **THE ERROR**

AT SENTENCING, THE DISTRICT COURT ANNOUNCED THAT "THE PLEA OF GUILTY WAS **NOT** MADE PURSUANT TO A PLEA AGREEMENT." ROA.119 (EMPHASIS ADDED). THE DISTRICT COURT CONCLUDED THE SENTENCING HEARING WITH THE FOLLOWING ADMONITION:

"MR. DIAZ, YOU DO HAVE A RIGHT TO APPEAL YOUR SENTENCE, SIR. ..." SIGNIFICANTLY, THE DISTRICT COURT'S "NOTICE OF RIGHT TO APPEAL SENTENCE" DID NOT EVEN MENTION THE PLEA AGREEMENT. ROA.75. FURTHER, THE DISTRICT COURT DID NOT INFORM PETITIONER THAT THE AGREED DISPOSITION SET FORTH IN THE PLEA AGREEMENT WOULD BE INCLUDED IN THE JUDGEMENT. CF. F.R.C.P. 11(c)(4). FINALLY THE DISTRICT COURT DID NOT STATE ON THE RECORD THAT THE REMAINING CHARGES ADEQUATELY REFLECTED THE SERIOUSNESS OF THE ACTUAL OFFENSE BEHAVIOR AND THAT ACCEPTING THE PLEA AGREEMENT WOULD NOT UNDERMINE THE STATUTORY PURPOSES OF SENTENCING OR THE SENTENCING GUIDELINES. Cf. U.S.S.G. §6B1.2(a).

IN SHORT, BY STATING THAT "THE PLEA OF GUILTY WAS **NOT** MADE PURSUANT TO A PLEA AGREEMENT," ROA.119 (EMPHASIS ADDED), BY TELLING PETITIONER THAT HE HAD THE "RIGHT TO APPEAL HIS SENTENCE" WITHOUT ANY OF THE RESTRICTIONS SET FORTH IN THE PLEA AGREEMENT. ROA .75, 140-41, BY NOT INFORMING PETITIONER THAT THE AGREED DISPOSITION SET FORTH IN THE PLEA AGREEMENT WOULD BE INCLUDED IN THE JUDGEMENT, AND BY NOT MAKING A STATEMENT ON THE RECORD IN ACCORDANCE WITH U.S.S.G. §6B1.2(a), THE DISTRICT COURT IMPLICITLY REJECTED THE RULE 11(c)(1)(A) PLEA AGREEMENT CONTAINING THE APPEAL WAIVER.

THE DISTRICT COURT POSSESSED DISCRETION TO REJECT THE PLEA AGREEMENT. SEE: F.R.C.P 11(c)(3)(A); U.S.S.G. §6B1.2(a). HOWEVER, THE DISTRICT COURT ERRED BY FAILING TO "ADVISE PETITIONER PERSONALLY THAT THE COURT IS NOT REQUIRED TO FOLLOW THE PLEA AGREEMENT..." F.R.C.P 11(c)(5)(B). FURTHER, THE DISTRICT COURT ERRED BY FAILING TO "ADVISE PETITIONER THAT IF THE PLEA IS NOT WITHDRAWN, THE COURT MAY DISPOSE OF THE CASE LESS FAVORABLY TOWARDS HIM. F.R.C.P. 11(c)(5)(C)

3) **THE ERROR WAS PLAIN**

TO AMOUNT TO PLAIN ERROR, AN ERROR "MUST BE CLEAR OR OBVIOUS, RATHER THAT SUBJECT TO REASONABLE DISPUTE." PUCKETT, 556, U.S. AT 135. HERE, THE DISTRICT COURT CLEARLY FAILED TO "ADVISE PETITIONER PERSONALLY THAT THE COURT IS NOT REQUIRED TO FOLLOW THE PLEA AGREEMENT..." F.R.C.P. 11(c)(5)(B). FURTHER, THE DISTRICT COURT CLEARLY FAILED TO "ADVISE PETITIONER PERSONALLY THAT IF THE PLEA IS NOT WITHDRAWN, THE COURT MAY DISPOSE OF THE CASE LESS FAVORABLY TOWARDS HIM, THAN THE PLEA AGREEMENT CONTEMPLATED. F.R.C.P 11(c)(5)(C). AS TO THE DISTRICT COURT'S FAILURE TO MAKE THE ADMONITIONS REQUIRED UNDER RULE 11(c)(5), THERE IS NOTHING SUBJECT TO REASONABLE DISPUTE. ACCORDINGLY, THE DISTRICT COURT'S ERROR IN THIS CASE WAS PLAIN.

4). **THE ERROR AFFECTED PETITIONER'S SUBSTANTIAL RIGHTS**

UNDER THE THIRD PRONG OF PLAIN ERROR REVIEW, PETITIONER MUST SHOW THAT THE DISTRICT COURT'S ERROR AFFECTED HIS SUBSTANTIAL RIGHTS. PUCKETT, 556 U.S. @ 135. THIS TYPICALLY MEANS THAT THE ERROR IS PREJUDICIAL, ALTHOUGH THE SUPREME COURT HAS RECOGNIZED THAT "THERE MAY BE A SPECIAL CATEGORY OF FORFEITED ERRORS THAT CAN BE CORRECTED REGARDLESS OF T HEIR EFFECT ON THE OUTCOME." UNITED STATES V. OLANO, 507 U.S. 725, 735 (1993). IN OTHER WORDS, PREJUDICE MAY BE PRESUMPTIVE. Id. AT 739; SEE ALSO UNITED STATES V. PALACIOS, 844 F.3d 527, 532 (5TH CIR. 2016); UNITED STATES V. REYNA, 358 F.3d 344, 348-50 (5TH CIR. 2004) (en banc)

WITH MUCH RESPECT TO PRESUMPTIVE PREJUDICE, PREJUDICE SHOULD BE PRESUMED IN THIS CASE. THE COURT HAS PRESUMED PREJUDICE WHEN A DEFENDANT SHOWS A VIOLATION OF THE RIGHT TO ALLOCUTE AND THE OPPORTUNITY FOR SUCH VIOLATION TO HAVE PLAYED A ROLE IN THE DISTRICT COURT'S SENTENCING DECISION. UNITED STATES V. FIGUEROA-COELLO, 920 F3d 260, 265 (5TH CIR. 2019)(QUOTING REYNA, 358 F.3d AT 351-52). IN SHORT, "THIS COURT ASSUMES PREJUDICE FOR CERTAIN VIOLATIONS WHERE IT WOULD BE DIFFICULT FOR THE DEFENDANT TO PROVE THAT SUCH PREJUDICE OCCURED." UNITED STATES V. MAGWOOD, 445, F.3d 826, 829 (5TH CIR. 2006)(CITING REYNA, 358 F.3d AT 350)).

HERE, ONE CAN ONLY SPECULATE AS TO WHAT PETITIONER MAY "HAVE SAID OR ARGUED" IF THE DISTRICT COURT HAD ADVISED HIM PERSONALLY THAT THE COURT WAS NOT REQUIRED TO FOLLOW THE PLEA AGREEMENT. FURTHER, ONE CAN ONLY SPECULATE AS TO WHAT PETITIONER "MAY HAVE SAID OR ARGUED" IF THE DISTRICT COURT HAD ADVISE HIM PERSONALLY THAT IF THE PLEA IS NOT WITHDRAWN, THE COURT MAY DISPOSE OF THE CASE LESS FAVORABLY TOWARDS HIM THAT THE PLEA AGREEMENT CONTEMPLATED. BECAUSE IT WOULD BE DIFFICULT IF NOT IMPOSSIBLE FOR PETITIONER TO PROVE WHAT PREJUDICE RESULTED FROM THE DISTRICT COURT'S VIOLATIONS OF RULE 11(c), THIS COURT SHOULD ASSUME PREJUDICE FOR SUCH VIOLATIONS, AND REMAND FOR THE GROSS VIOLATIONS OF PETITIONER's 5TH AND 6TH AMENDMENT RIGHTS VIOLATIONS.

4). THE ERROR SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY AND PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS.

FINALLY, UNDER PLAIN ERROR REVIEW, PETITIONER MUST SHOW THAT THE ERROR SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS. PUCKETT, 556, U.S. AT 135. HERE, THE PERCEPTION OF FAIRNESS IS MARRED BY AT LEAST A COUPLE OF CONSIDERATIONS.

THE FIRST IS THAT PETITIONER WAS CONVICTED WITHOUT THE DISTRICT COURT ADVISING HIM PERSONALLY THAT IT WAS "NOT REQUIRED TO FOLLOW THE PLEA AGREEMENT" OR THAT BECAUSE THE PLEA WAS NOT WITHDRAWN, THE DISTRICT COURT COULD "DISPOSE OF THE CASE LESS FAVORABLY TOWARD HIM THAT THE PLEA AGREEMENT CONTEMPLATED." IN OTHER WORDS, THE VIOLATIONS BY THE COURT OF RULE 11(c) WERE CLEARLY INDICATIVE OF UNCONSTITUTIONALLY ENTERING A GUILTY PLEA UNKNOWING AND/OR INVOLUNTARILY.

ANOTHER CONSIDERATION IS THAT IF THE DISTRICT COURT HAD MADE ALL ADVISEMENTS REQUIRED UNDER RULE 11(c)(5)(B), and (C) PETITIONER MAY HAVE DECIDED TO WITHDRAW HIS GUILTY PLEA. BUT BECAUSE THE COURT FAILED TO MAKE SUCH ADVISEMENTS, AND PETITIONER'S COUNSEL FAILED TO ADVISE HIM ACCORDINGLY, PETITIONER SAW NO REASON TO WITHDRAW HIS GUILTY PLEA.

IN SUM, THE FACTS OF THE CASE WARRANT REMAND. SEE: UNITED STATES V. JOHN, 597 F.3d 263, 288 (5TH CIR. 2010) ("WHETHER AN ERROR SERIOUSLY AFFECTS THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS IS DEPENDANT

UPON THE DEGREE OF THE ERROR AND THE PARTICULAR FACTS OF THE CASE.")

ARGUMENT TWO

THERE IS NO INFORMATION WITH SUFFICIENT INDICIA OF RELIABILITY TO SUPPORT THE DISTRICT COURT'S CONCLUSION THAT THE METHAMPHETAMINE WAS IMPORTED FROM MEXICO, THIS FINDING CONSTITUTED CLEAR ERROR.

A). STANDARD OF REVIEW

IN APPLYING U.S.S.G. § 2D1.1(b)5), THE DISTRICT COURT'S LEGAL INTERPRETATIONS OF THE GUIDELINES ARE REVIEWED de novo, AND ITS FACTUAL FINDINGS ARE REVIEWED FOR CLEAR ERROR. SEE: UNITED STATES V. SERFASS, 684 F.3d 548, 550 (5TH CIR. 2012). IN DOCUMENT 127, PGS. 384-385 (pgs. 5-6 OF APPELLANT'S RECORD EXCERPTS) PETITIONER RAISED SEVERAL OBJECTIONS TO THE PSR. THE OBJECTIONS TO THE QUANTITY OF DRUGS ATTRIBUTED TO PETITIONER, THE OBJECTION TO THE "DRUG LEDGER" AND SPECIFICALLY PETITIONER'S OBJECTION TO THE "IMPORTATION ENHANCEMENT" WERE OVERRULED, WERE DONE SO AT THE DISCRETION OF THE DISTRICT COURT JUDGE, AND DONE SO ERRONEOUSLY AND IN CONTRAVENTION OF PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS. THE CONTENTION OF THE U.S. ATTORNEY THAT THE METHAMPHETAMINE IN QUESTION CAME FROM MEXICO WAS NEVER PROVEN, OR SHOWN IN COURT AND WAS AN UNFOUNDED FACTOR IN THE SENTENCING OF PETITIONER, CLEARLY A VIOLATION OF HIS RIGHTS. FURTHER, PETITIONER CONTENDS THAT THE U.S. ATTORNEY PAINTED HIM WITH A BRUSH OF AFFILIATION WITH "ZETA'S" , A MEXICAN CARTEL GANG AND EVEN WITH THE "CONSPIRACY" REMOVEN FROM THE INFORMATION, THE RANGE OF PUNISHMENT SHOULD AND WOULD HAVE BEEN CONSIDERABLY LOWER.

WHILE COUNSEL OF RECORD FILED HIS DIRECT APPEAL WITH THE FIFTH CIRCUIT, HE WAS INEFFECTIVE IN NOT BRINGING THESE SPECIFIC OBJECTIONS AND RAISING THEM AS GROUNDS IN HIS APPEAL. THE ERRONEOUS CALCULATION OF THE OFFENSE OCCURED WHEN PETITTIONER WAS SENTENCED ON HIS SUPERSEDING INDICTMENT, CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE. THE ERRONEOUS CALCULATION AND ENHANCEMENT OCCURS WHEN THE JUDGEMENT WAS RENDERED. IT CORRECTLY NOTED THAT PETITIONER PLED GUILTY TO COUNT ONE OF THE SUPERSEDING INDICTMENT FILED ON NOVEMBER 7, 2019, BUT IT

INCORRECTLY DESCRIBES THE CHARGE AS CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE. WHILE THE DESCRIPTION OF THE OFFENSE IN THE JUDGEMENT "CONSPIRACY"TO POSSESS..." MAY HAVE BEEN A CLEAR CLERICAL ERROR, PETITIONER CONTENDS THAT THE SENTENCING GUIDELINE RANGE WAS ARTIFICIALLY ENHANCED BECAUSE OF THIS ERROR. PETITIONER IS A LAYMAN OF THE LAW, AND RELIED ON COUNSEL TO PROTECT HIS RIGHTS AT TRIAL AND SENTENCING, AND WITH COUNSEL'S FAILURE TO DO SO, IT IS A CLEAR CASE OF INEFFECTIVE ASSISTANCE. THE TWO PRONG TEST OF STRICKLAND V. WASHINGTON, 466, U.S. 668 104 S.CT. 2052 IS CLEARLY SHOWN.AND READILY EVIDENT.

ARGUMENT THREE

INEFFECTIVE ASSISTANCE OF COUNSEL

THE IMPORTATION ENHANCEMENT WAS NEVER PROVEN, IT WAS JUST AN ALLEGATION MADE BY THE U.S$ ATTORNEY. IT WAS NOT BASED ON ANY FACTUAL INFORMATION, SIMPLY A CONCLUSORY STATEMENT MADE BY THE GOVERNMENT. PETITIONER'S OBJECTION WAS STRENUOUS BUT COUNSEL FAILED TO RAISE IT IN HIS DIRECT APPEAL. A CLEAR VIOLATION OF EFFECTIVE ASSISTANCE.

THROUGHOUT THE UNITED STATES, THE DISTRICT COURTS HAVE CONTINUOUSLY USED THE "CONSPIRACY" AND "IMPORTATION" TERMS IN DRUG CASES TO EXCESSIVELY ENHANCE SENTENCES IN DRUG CASES. FURTHERMORE, THE USE OF "CONSPIRACY" BY THE GOVERNMENT TO ARTIFICIALLY ENHANCE PETITIONER'S OFFENSE LEVEL AND SENTENCING GUIDELINES RANGE MUST BE CONSIDERED PREJUDICIAL AND DEROGATORY AT THE VERY LEAST. THE UNITED STATES ATTORNEY MUST BE ABLE TO PROVE THESE SLANDEROUS ALLEGATIONS, NOT SIMPLY THROW AROUND PREJUDICIAL TERMS TO PAINT PETITIONER WITH AN ERRONEOUS LABEL. ASSUMING FACTS NOT IN EVIDENCE IS A CLEAR AND PLAIN ERROR THAT RESULTS IN VIOLATIONS OF PETITIONERS 5TH, 6TH, 8TH and 14TH AMENDMENT RIGHTS.

ARGUMENT FOUR

THE GOVERNMENT CONTENDS THAT PETITIONER'S PLEA AND PLEA AGREEMENT WERE ONE IN THE SAME.

THE GOVERNMENT CONTENDS THAT PETITIONER"S PLEA AND PLEA AGREEMENT WERE ONE IN THE SAME. HOWEVER, "THE RULES NOWHERE STATE THAT THE GUILTY PLEA AND THE

AND THE PLEA AGREEMENT MUST BE TREATED IDENTICALLY." UNITED STATES V. HYDE, 520 U.S. 670, 677 (1997).

IN TRUTH OF FACT, THE GOVERNMENT'S ARGUMENT THAT THE DISTRICT COURT ACCEPTED PETITIONER'S GUILTY PLEA AND PLEA AGREEMENT AT THE SAME TIME IS ERRONEOUS. THE ACCEPTANCE OF A CRIMINAL DEFENDANT'S GUILTY PLEA IS A JUDICIAL ACT, DISTINCT FROM THE ACCEPTANCE OF THE PLEA AGREEMENT ITSELF." IN RE ELLIS, 356 F.3d 1198, 1200 (9TH CIR. 2004).

THE GOVERNMENT"S FIRST OFFER OF 20 YEARS WAS NEVER DISMISSED BY PETITIONER, AND SHOULD HAVE BEEN THE AGREED UPON SENTENCE. THE DISTRICT COURT REJECTED THE GOVERNMENT'S PROMISED PLEA, THEREFORE NEGATING THE PLEA AGREEMENT. FURTHERMORE, THE COURT SAID THAT THE PLEA OF GUILTY WAS NOT MADE PURSUANT TO THE PLEA AGREEMENT. THE DISTRICT COURT FAILED TO INFORM PETITIONER THAT THE AGREED UPON DISPOSITION SET FORTH IN HIS ORIGINAL PLEA AGREEMENT WOULD BE INCLUDED IN THE JUDGEMENT AND THAT THE "IMPORTATION" ENHANCEMENT WAS STILL IN PLACE, WITHOUT ANY SHRED OF PROOF OR FINDING OF FACT OR INDICIA.

THESE ACTIONS BY THE COURT RESULTED IN A CONSIDERABLY LONGER SENTENCE, RESULTING IN A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

ARGUMENT FIVE

TERMINATION OF PLEA AGREEMENT

THE DISTRICT COURT'S REJECTION OF THE GOVERNMENT'S PROMISED PERFORMANCE TERMINATED THE PLEA AGREEMENT. SEE: HYDE, 520 U.S. 677-78 (HOLDING THAT "IF THE COURT REJECTS THE GOVERNMENT'S PROMISED PERFORMANCE, THEN THE AGREEMENT IS TERMINATED AND THE DEFENDANT HAS THE RIGHT OT BACK OUT OF HIS PROMISED PERFORMANCE. (THE GUILTY PLEA) JUST A BINDING CONTRACTUAL DUTY MAY BE EXTINGUISHED BY THE NONOCCURANCE OF A CONDITION SUBSEQUENT." UNITED STATES V. BELMONTE-MARTIN, 127 Fed. Appx. 719, 720 (5TH CIR. 2005). BECAUSE THE DISTRICT COURT REJECTED PETITIONER"S PLEA AGREEMENT, PETITIONER'S GUILTY PLEA BECAME A NAKED PLEA, UNENCUMBERRED BY THE WAIVER OF HIS RIGHT TO APPEAL. SEE: IN RE VASQUEZ-RAMIREZ, 443, F.3d 692, 697, (9TH CIR. 2006). ("NOW THAT THE PLEA AGREEMENT

HAS BEEN REJECTED, DEFENDANT'S GUILTY PLEA ISA NAKED PLEA, UNENCUMBERED BY WAIVERS OF HIS RIGHT TO APPEAL OR COLLATERALLY CHALLENGE THE PROCEEDINGS...")

ARGUMENT SIX

UNENFORCEABLE PLEA WAIVER

THE PLEA WAIVER IN THIS CASE WAN UNENFORCEABLE BECAUSE THE DISTRICT COURT STATED THAT PETITIONER HAD A RIGHT TO APPEAL WITHOUT IDENTIFYING ANY RESTRICTIONS AND THE GOVERNMENT MADE NO OBJECTIONS TO THE DISTRICT COURT'S STATEMENTS.

PETITIONER CONTENDS THAT THE APPEAL WAIVER IS UNENFORCEABLE BECAUSE THE DISTRICT COURT'S CLEAR STATEMENTS TRUMPED THE WAIVER LANGUAGE IN THE PLEA AGREEMENT AND THE GOVERNMENT MADE NO OBJECTION TO THE DISTRICT COURT'S STATEMENTS. AS NOTED BY THE FIFTH CIRCUIT, LITIGANTS NEED TO BE ABLE TO TRUST THE ORAL PRONOUNCEMENTS OF THE DISTRICT COURT JUDGES. NAGIB. V. CONNER, 192, F.3d 127, 1999 WL 686168 AT 4 (5TH CIR. 1999). "IN BUCHANAN, A DEFENDANT ENTERED INTO A PLEA AGREEMENT IN WHICH HE WAIVED THE RIGHT TO APPEAL SENTENCING FINDINGS, YET WHEN HE APPEARED IN COURT TO ENTER THE PLEA, THE COURT STATED TWICE THAT HE DID HAVE A RIGHT TO APPEAL THE FINDINGS." Id. AT 4 N.5 (CITING BUCHANAN, 59 F.3d AT 916-917). ACCORDINGLY, JUST AS IN BUCHANAN, THE APPEAL WAIVER IN THIS CASE IS UNENFORCEABLE BECAUSE THE COURT STATED THAT THE PETITIONER HAD A RIGHT TO APPEAL WITHOUT IDENTIFYING ANY RESTRICTIONS. SEE: EVERARD V. UNITED STATES, 102, F.3d 763, 766 (6TH CIR. 1996).

ARGUMENT SEVEN

GOVERNMENT CLAIMS THE DISTRICT COURT ACCEPTED GUILTY PLEA AND PLEA AGREEMENT AT THE SAME TIME.

EVEN THOUGH THE DISTRICT COURT ACCEPTED PETITIONER'S PLEA AGREEMENT PRIOR TO SENTENCING, IT DID NOT ACCEPT OR REJECT THE PLEA AGREEMENT UNTIL SENTENCING ITSELF. THE GOVERNMENT CLAIMS THAT THE DISTRICT COURT ACCEPTED PETITIONER'S GUILTY PLEA AND HIS PLEA AGREEMENT AT THE SAME TIME, PRIOR TO SENTENCING.

YES, THE DISTRICT COURT DID ACCEPT THE PETITIONER'S GUILTY PLEA PRIOR TO SENTENCING, BUT AS EXPLAINED PREVIOUSLY, THE ACCEPTANCE OF THE GUILTY PLEA IS

A JUDICIAL ACT, DISTINCT FROM THE ACCEPTANCE OF THE PLEA AGREEMENT ITSELF. A REVIEW OF THE RECORD DEMONSTRATES THAT THE GOVERNMENT'S ARGUMENT IS NOT ACCURATE. THE SENTENCING COMMISSION RECOMMENDS THAT A COURT DEFER ACCEPTANCE OF THE PLEA AGREEMENT UNTIL THE COURT HAS REVIEWED THE PRESENTENCE REPORT. U.S.S.G.§6B1.1. HERE, IN THIS INSTANT CASE IT APPEARS THAT THE DISTRICT COURT HEEDED HTIS ADVICE BECAUSE IT DID NOT REJECT PETITIONER'S PLEA AGREEMENT UNTIL SENTENCING. FURTHER, DESPITE THE APPEAL WAIVER, A DEFENDANT MAY BE ABLE TO CHALLENGE A GUILTY PLEA IF THE DISTRICT COURT DID NOT ADEQUATELY COMPLY WITH RULE 11 OF THE F.R.C.P., AND IN THIS CASE, IT WAS CLEARLY NOT JUST A HARMLESS ERROR.

ARGUMENT EIGHT

RECORD REFLECTS A CLERICAL ERROR IN THE WRITTEN JUDGEMENT

PETITIONER CONTENDS THAT THE RECORD REFLECTS A CLERICAL ERROR IN THE WRITTEN JUDGEMENT, AND THAT HE WAS CONVICTED OF CONSPIRACY TO POSSESS WITH THE INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, WITH AN IMPORTATION ENHANCEMENT, AND THAT HIS OFFENSE LEVEL WAS ERRONEOUSLY ENHANCED BECAUSE OF THIS ERROR. THE SENTENCING WAS CONDUCTED IN SUCH A WAY TO REFLECT THESE ERRORS AND TO BOLSTER THIS CLAIM PETITIONER WOULD SIMPLY POINT TO THE DISTRICT COURT JUDGE"s COMMENTS ON WHETHER THE FIFTH CIRCUIT WOULD REVIEW ITS APPLICATION OF THE IMPORTATION ENHANCEMENT TO PETIONER'S SENTENCE, WHEN IT MAD THE FOLLOWING COMMENTS...

> "I BELIEVE THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO ESTABLISH THAT THE METHAMPHETAMINE IN THIS CASE WAS IMPORTED. AND I"M SURE IF I'M WRONG, THE FIFTH CIRCUIT WILL TELL ME SO."

CONCLUSION

PETITIONER PRAYS THAT FOR THE ABOVE AND FOREGOING REASONS, HIS WRIT OF CERTIORARI WILL BE GRANTED.

RESPECTFULLY SUBMITTED,

OMAR LEONIDES DIAZ
PETITIONER PRO-SE