APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12451
Non-Argument Calendar

D.C. Docket No. 1:17-cr-20904-UU-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL A. RODRIGUEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 25, 2021)

Before JORDAN, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

Daniel Rodriguez ("Rodriguez") appeals his conviction and his 400-month sentence for conspiracy to possess with intent to distribute a controlled substance and controlled substance analogues, in violation of 21 U.S.C. § 846, conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), possession with intent to distribute a controlled substance analogue, in violation of 21 U.S.C. §§ 802(32)(A), 841(a)(1), 841(b)(1)(C), and 813, possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and 18 U.S.C. § 2, and money laundering, in violation of 18 U.S.C. § 1957. Rodriguez raises eleven issues on appeal, which we will address in turn.

I.

Rodriguez argues that the district court erred when it accepted his guilty plea because there was an insufficient factual basis for his plea. Specifically, he argues that the proffer merely mirrored the indictment and did not contain the essential elements of the charges against Rodriguez.

Normally, we review a district's court's decision to accept a guilty plea for abuse of discretion and review for clear error the district court's factual findings that the requirements of Federal Rule of Criminal Procedure 11 were satisfied. *United States v. Houser*, 70 F.3d 87, 89 (11th Cir. 1995). Under Rule 11(b), the district court "must determine that there is a factual basis for the plea" before entering a judgment of guilt. Fed. R. Crim. P. 11(b)(3). The standard for evaluating a challenge

to the factual basis for a guilty plea is simply whether the trial court was presented with evidence such that "a court could reasonably find that the defendant was guilty." *United States v. Rodriguez*, 751 F.3d 1244, 1255 (11th Cir. 2014) (quoting *United States v. Owen*, 858 F.2d 1514, 1516–17 (11th Cir.1988)). However, when a defendant does not object to a Rule 11 violation in the district court, we will review for plain error only. *Id.* at 1251. In order to demonstrate this plain error, the defendant must demonstrate that: (1) there was error; (2) the error was plain; and (3) the error affected his substantial rights. *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1285-86 (11th Cir. 2015) If these elements are satisfied, we may reverse the error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Here, we conclude that the district court did not commit either clear error or plain error when it determined that there was a sufficient factual basis for Rodriguez's guilty plea because the factual proffer provided sufficient evidence for the district court to reasonably find that Rodriguez was guilty of the charges in the superseding indictment. *See Rodriguez*, 751 F.3d at 1255; *see also Puentes-Hurtado*, 794 F.3d at 1287 (holding that knowing participation in a conspiracy can be shown through proof of surrounding circumstances, such as acts committed by the defendant that furthered the purpose of the conspiracy). Accordingly, we affirm the district court's acceptance of the guilty plea.

II.

Rodriguez argues that the district court erred when it denied his motion to withdraw his guilty plea because he had alleged sufficient facts to justify such a withdrawal. Rodriguez argues that his change of plea was unknowing and involuntary because the government had used information in violation of *Kastigar*[1] and his attorney had provided ineffective assistance of counsel.

We review a district court's denial of a request to withdraw a guilty plea for abuse of discretion. *United States v. Freixas*, 332 F.3d 1314, 1316 (11th Cir. 2003). "It is well settled, however, that there is no absolute right to withdraw a guilty plea prior to imposition of a sentence." *United States v. Buckles*, 843 F.2d 469, 471 (11th Cir. 1988). The decision to grant a withdrawal is left to the sound discretion of the district court and we may only reverse if a denial was arbitrary or unreasonable. *Id.* Under Rule 11, a defendant may withdraw his guilty plea if he can show a "fair and just reason" for requesting the withdrawal. Fed. R. Crim. P. 11(d)(2)(B).

In determining whether a defendant has met his burden of showing a "fair and just reason" to withdraw his guilty plea, the district court may consider the totality of circumstances surrounding the plea, including: "(1) whether close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be

[1] *Kastigar v. United States*, 406 U.S. 441 (1972).

prejudiced if the defendant were allowed to withdraw his plea." *Buckles*, 843 F.2d at 471-72 (internal citation omitted). If the first two factors weigh against a defendant, the district court need not give "considerable weight" or "particular attention" to the remaining factors. *See United States v. Gonzalez-Mercado*, 808 F.2d 796, 801 (11th Cir. 1987).

When analyzing a challenge under Rule 11, there is a strong presumption that statements made during the plea colloquy are true. *See United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). A defendant may not withdraw his guilty plea based on dissatisfaction with an anticipated sentence and we may consider the timing of a defendant's motion to withdraw his guilty plea to determine the true motive for withdrawal. *See Gonzalez-Mercado*, 808 F.2d at 801.

We will "not generally consider claims of ineffective assistance of counsel raised on direct appeal where the district court did not entertain the claim nor develop a factual record." *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002); *see also United States v. Souder*, 782 F.2d 1534, 1539-40 (11th Cir. 1986) (stating that this issue must be raised by a collateral attack in district court, such as an action under 28 U.S.C. § 2255). An exception exists in rare instances where the record is sufficiently developed to allow review on direct appeal. *United States v. Tyndale*, 209 F.3d 1292, 1294 (11th Cir. 2000).

As an initial matter, we will not consider any of Rodriguez's claims of ineffective assistance of counsel because the record is not sufficiently developed to address this issue on direct appeal. *See Bender*, 290 F.3d at 1284. Here, the district court did not abuse its discretion when it denied Rodriguez's motion to withdraw his guilty plea because Rodriguez failed to present a "fair and just reason" for the withdrawal of his guilty plea. *See Buckles*, 843 F.2d at 471-72. Moreover, the district court's decision to deny the withdrawal of the guilty plea is neither arbitrary nor unreasonable. *See id.* During the plea colloquy, Rodriguez swore under oath that he was satisfied with the representation and advice of his attorneys, that he had a full opportunity to discuss the charges, that it was his intention to plead guilty to all the charges, that he knew his sentence might be more severe than anticipated, and that he had reviewed and signed the factual proffer. Rodriguez's claim that ADB-FUBINACA was not a controlled substance or controlled substance analogue is not supported by the record, as he conceded these facts in the factual proffer and the record evidence demonstrates that ADB-FUBINACA was added to the list of schedule I controlled substances on April 10, 2017, and before then, it was substantially similar to AB-FUBINACA, a controlled substance. Accordingly, we affirm the district court's denial of the motion to withdraw the guilty plea.

III.

Rodriguez argues that the district court erred when it did not grant his motions for recusal because the recusal order from 1994 was still applicable and, alternatively, the same reasons for recusal in 1994 still exist in this case because Judge Ungaro served on the Southern District of Florida at the same time as Judge Highsmith.

"Generally, a voluntary, unconditional guilty plea waives all nonjurisdictional defects in the proceedings." *United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003). The denial of a motion for recusal pursuant to 28 U.S.C. § 455(a) is a "pretrial defect which is sublimated within a guilty plea" such that a defendant waives the right to appeal the denial when he has entered an unconditional guilty plea. *Id.* at 1322 Section 455(a) provides that: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). When we review a § 455(a) motion, the standard "is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality . . . and any doubts must be resolved in favor of recusal." *Patti*, 337 F.3d at 1322 (internal quotation marks and citations omitted).

Here, we conclude that the plain wording of the 1994 recusal order which Rodriguez seeks to enforce demonstrates that the order applied only to the proceeding for which it was issued. Moreover, Rodriguez waived any argument concerning his § 455(a) motion when he entered a voluntary and unconditional guilty plea in the district court. *See Patti*, 337 F.3d at 1320. Accordingly, we affirm the district court's denial of the motions to recuse.

IV.

Rodriguez argues that the district court erred when it denied his motion to suppress evidence because the government learned of the location of the storage unit through a breach of attorney-client privilege and the government engaged in coercive behavior to procure consent from his attorney to search the storage unit. He also argues that the government lacked probable cause to search the storage unit and no exigent circumstances existed at the time of the search and seizure.

Generally, the "district court's denial of a motion to suppress is a mixed question of law and fact." *United States v. Barsoum*, 763 F.3d 1321, 1328 (11th Cir. 2014). Accordingly, "we review a district court's factual findings for clear error and review its application of law to the facts *de novo*." *Id.* However, a defendant waives the right to challenge a district court's ruling on a motion to suppress after he enters an unconditional guilty plea. *United States v. McCoy*, 477

F.2d 550, 551 (5th Cir. 1973); *see also United States v. Charles*, 757 F.3d 1222, 1227 n.4 (11th Cir. 2014).

Here, Rodriguez waived the right to appeal the district court's denial of his motion to suppress evidence when he entered a voluntary and unconditional guilty plea. *See McCoy*, 477 F.2d at 551. Accordingly, we affirm the district court's denial of the motion to suppress.

V.

Rodriguez argues that the district court erred in applying the two-level enhancement under U.S.S.G. § 2D1.1(b)(15)(A) because the record clearly demonstrates that he did not maintain the storage facility for the purpose of manufacturing or distributing a controlled substance.

We review for clear error a district court's findings of fact which underlie its determination that a sentencing enhancement applies. *United States v. Duperval*, 777 F.3d 1324, 1331 (11th Cir. 2015). Thus, we will review a district court's determination of whether a defendant maintained a premises for the manufacture or distribution of drugs for clear error. *United States v. George*, 872 F.3d 1197, 1205 (11th Cir. 2017). A district court's factual finding is clearly erroneous when, after a review of the evidence, we are left with "a definite and firm conviction a mistake has been made." *United States v. Dimitrovski*, 782 F.3d 622, 628 (11th Cir. 2015).

Section 2D1.1(b)(12) of the 2016 Sentencing Guidelines provides that: "If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels." U.S.S.G. § 2D1.1(b)(12) (2016). This two-level increase applies to a defendant "who knowingly maintains a premises . . . for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution." *Id.* 2D1.1, cmt. n.17. When determining whether the defendant "maintained" the premises, courts should consider: (1) "whether the defendant held a possessory interest in (e.g., owned or rented) the premises;" and (2) "the extent to which the defendant controlled access to, or activities at, the premises." *Id.* The Sentencing Guidelines further provide that:

> Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

Id.

Here, the district court did not clearly err when it determined that Rodriguez maintained the storage unit for the purpose of manufacturing or distributing a controlled substance because the government provided sufficient evidence to support a finding that one of the primary purposes of the storage unit was to store

ADB-FUBINACA before distribution in the drug trafficking scheme. *See* U.S.S.G. § 2D1.1, cmt. n.17. Reviewing the evidence on the record, one is not left with a "definite and firm conviction a mistake has been made." *See Dimitrovski*, 782 F.3d at 628. Accordingly, we affirm the district court's determination that the enhancement was applicable.

VI.

Rodriguez argues that the two-level enhancement under U.S.S.G. § 2D1.1(b)(15)(A), for using friendship and affection to involve another individual in the illegal conspiracy, is inapplicable because the mere existence of a romantic relationship is insufficient to support the enhancement and there was no evidence that he actively played on Lucia Mendez's ("Mendez") affection or emotions to get her to participate in the drug scheme.

We review for clear error a district court's findings of fact which underlie its determination that a sentencing enhancement applies. *Duperval*, 777 F.3d at 1331. A district court's factual finding is clearly erroneous when, after a review of the evidence, we are left with "a definite and firm conviction a mistake has been made." *Dimitrovski*, 782 F.3d at 628. "The government bears the burden of establishing the facts necessary to support a sentencing enhancement by a preponderance of the evidence." *Id.* The preponderance-of-the-evidence standard "simply requires the

trier of fact to believe that the existence of a fact is more probable than its nonexistence." *United States v. Trainor*, 376 F.3d 1325, 1331 (11th Cir. 2004).

The 2016 Sentencing Guidelines provide for a two-level sentencing enhancement if a defendant received an adjustment under § 3B1.1 and:

> (A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise[.]

U.S.S.G. § 2D1.1(b)(15)(A).

We afford substantial deference to the factfinder's credibility determinations. *United States v. Lewis*, 674 F.3d 1298, 1303 (11th Cir. 2012). We will accept a district court's credibility determination "unless it is contrary to the laws of nature, or is so inconsistent or improbable on its face that no reasonable factfinder could accept it." *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002).

Here, the district court did not commit a clear error when it determined that Rodriguez used friendship and affection to involve Mendez in the drug trafficking conspiracy because there was sufficient evidence on the record to support the district court's finding. Mendez testified that she had never been involved in any criminal activities before entering her relationship with Rodriguez and that she believed Rodriguez used their relationship and psychological manipulation to involve her in

the conspiracy. Importantly, the district court also found Mendez's testimony to be credible and without contradiction, and we will not overturn that determination because there is no evidence that this finding was so improbable that no reasonable factfinder could accept it. *See Ramirez-Chilel*, 289 F.3d at 749. Accordingly, we affirm the district court's determination that the enhancement was applicable.

VII.

Rodriguez argues that the district court erred when it included the weight of the carrier medium in its calculation of the weight of the controlled substance because it leads to the absurd result of disproportionate sentences. He also argues that the district court failed to consider treating the carrier medium in this case in the same manner that the sentencing guidelines treat blotter paper when calculating the weight of LSD. Moreover, he argues that the carrier medium shouldn't be included in the weight calculation because the heavy cardstock paper is inert, not a cutting agent, its weight can consistently be determined and separated from the drug, and it does not expand the amount of drug sold nor exasperate the actual substance.

Unless otherwise specified, the weight of a controlled substance set forth in U.S.S.G. § 2D1.1(c) refers to the weight of any "mixture or substance" containing a detectable amount of the controlled substance. U.S.S.G. § 2D1.1(c)(A). Generally, the weight of a "mixture" or "substance" includes the carrier medium that contains the relevant controlled substance. *United States v. Camacho*, 261 F.3d 1071, 1073

(11th Cir. 2001) (citing *Chapman v. United States*, 500 U.S. 453, 461-68 (1991)). The 2016 Sentencing Guidelines provide that a "[m]ixture or substance does not include materials that must be separated from the drug itself before the drug can be used." U.S.S.G. § 2D1.1, cmt. n.1 (2016).

Our precedent provides that, when calculating the weight of a "mixture or substance" containing a detectable amount of a controlled substance, we follow the market-oriented approach set forth in *Chapman*. *Griffith v. United States*, 871 F.3d 1321, 1335 (11th Cir. 2017) (citing *Chapman*, 500 U.S. at 461). Thus, while unusable portions or waste products are not considered, "[t]he entire weight of drug mixtures which are usable in the chain of distribution should be considered in determining a defendant's sentence." *Id.*

Here, the district court did not commit a clear error by including the weight of the carrier medium when it calculated the weight of the controlled substance. The government provided evidence that the paper impregnated with ADB-FUBINACA, which was utilized in the drug trafficking operation, was either smoked or ingested by inmates to take the drug. Rodriguez provided no evidence that inmates or non-inmates could separate out the ADB-FUBINACA from the impregnated paper in order to take the drug. Following the market-oriented approach we have adopted, because the carrier paper was neither a waste product nor unusable and was used in the chain of distribution, the weight of the carrier paper should be included in the

calculation of the weight of the ADB-FUBINACA in this case. *See Griffith*, 871 F.3d at 1335. Accordingly, we affirm the district court's inclusion of the carrier medium in the calculation of the drug weight.

VIII.

Rodriguez argues that the district court erred when it denied his *Kastigar* claims because the district court improperly credited the government agent's testimony that he had discovered the allegedly defective evidence through independent means. We review a *Kastigar* claim deferentially and will affirm the district court's decision unless it is clearly erroneous. *United States v. Nyhuis*, 8 F.3d 731, 741 (11th Cir. 1993). Under clear error review, we will affirm the district court's decision "so long as it is plausible in light of the record reviewed in its entirety." *United States v. Ladson*, 643 F.3d 1335, 1341 (11th Cir. 2011) (citation omitted). In *Kastigar*, the Supreme Court held that when the government wishes to prosecute a defendant who has given self-incriminating testimony under a grant of immunity, to avoid a Fifth Amendment violation, the prosecution is prohibited from "using the compelled testimony in any respect" that would "lead to the infliction of criminal penalties on the witness." *Kastigar v. United States*, 406 U.S. 441, 453 (1972). When we are presented with a *Kastigar* claim, we must "determine whether any of the evidence used against the defendant was in any way derived from his compelled immunized testimony." *United States v. Hill*, 643 F.3d 807, 877 (11th

Cir. 2011) Moreover, the government bears the burden of demonstrating that all of the evidence it obtained and used against the defendant was untainted by immunized testimony. *Id.*

Here, we conclude that the district court's decision that there was no *Kastigar* violation was not clearly erroneous because the government provided sufficient evidence that it obtained the allegedly tainted evidence through independent means. *See Hill*, 643 F.3d at 877. Because the district court's decision is plausible in light of the record, we will not reverse. *See Ladson*, 643 F.3d at 1341. Accordingly, we affirm the district court's determination that there was no *Kastigar* violation.

IX.

Rodriguez argues that the district court committed a clear and plain error because it randomly decided what to include in the drug amount and engaged in gross speculation and improper guess work when it determined that he was responsible for more than 1,000 kilograms of marijuana.

We review a district court's calculation of drug quantity for clear error. *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir. 2005). Thus, we will only disturb the district court's quantity approximation if we are left with a "definite and firm conviction that a mistake has been committed." *United States v. Almedina*, 686 F.3d 1312, 1315 (11th Cir. 2012). We have held that if the amount of drugs seized does not reflect the scale of the offense, the district court must approximate

the drug quantity attributable to the defendant. *United States v. Dixon*, 901 F.3d 1322, 1349 (11th Cir. 2018). "In estimating the quantity, the trial court may rely on evidence demonstrating the average frequency and amount of a defendant's drug sales over a given period of time." *United States v. Reeves*, 742 F.3d 487, 506 (11th Cir. 2014). "This determination may be based on fair, accurate, and conservative estimates of the drug quantity attributable to a defendant, but it cannot be based on calculations of drug quantities that are merely speculative." *Id.* (alteration adopted) (quoting *Almedina*, 686 F.3d at 1316).

Here, the district court did not clearly err when it calculated the amount of drugs that were attributable to Rodriguez for purposes of sentencing. Because the government had only seized a portion of the mailed packages that constituted the drug trafficking operation, the district court had to approximate the drug quantity attributable to Rodriguez. *See Dixon*, 901 F.3d at 1349. Moreover, the district court was permitted to rely on evidence that demonstrated the average frequency and amount of packages and drugs that Rodriguez distributed from October 2016 to February 9, 2018. *See Reeves*, 742 F.3d at 506.

Reviewing the district court's calculation determination, we are not left with a definite and firm conviction that a mistake was committed. *See Almedina*, 686 F.3d at 1315. The calculation was based on using the average weight of intercepted packages and extrapolating that average to unseized packages that were verified.

Additionally, the district court's assumption that less than 15% of the unseized Barnes & Noble packages contained ADB-FUBINACA appears to be a fair and conservative estimate of the drug quantity. *See Reeves*, 742 F.3d at 506. Accordingly, we affirm the district court's calculation of the drug amount attributable to Rodriquez.

X.

Rodriguez argues that the district court abused its discretion when it issued an order which prohibited both parties from filing motions because that blanket prohibition kept him from being able to present a full defense. Moreover, the prohibition undermined the fairness and integrity of the proceedings.

When a defendant fails to object to an error before the district court, we review the argument for plain error. *United States v. Hall*, 314 F.3d 565, 566 (11th Cir. 2002). Under this standard of review, the appellant must prove: (1) an error occurred; (2) the error was plain; and (3) the error affected substantial rights. *United States v. DiFalco*, 837 F.3d 1207, 1221 (11th Cir. 2016) ("An error is plain where it is 'clear' or 'obvious.'"). If these three conditions are satisfied, we can only notice the forfeited error if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 1221 (citation omitted). "The plain error test is 'difficult to meet' and places 'a daunting obstacle before the appellant,'" such that we should only notice a forfeited error "in those circumstances in which a

miscarriage of justice would otherwise result." *Id.* (citations omitted). The defendant bears the burden of establishing that the plain error prejudiced him by affecting his substantial rights. *United States v. Brown*, 586 F.3d 1342, 1345 (11th Cir. 2009). To establish prejudice on plain error review, the defendant must show there is a reasonable probability that, but for the error, a different outcome would have occurred; and a reasonable probability is a probability "sufficient to undermine confidence in the outcome." *United States v. Garcia*, 906 F.3d 1255, 1267 (11th Cir. 2018)

District courts possess broad discretion to manage their dockets. *United States v. McCutcheon*, 86 F.3d 187, 190 (11th Cir. 1996). A defendant must show prejudice to establish that the district court abused this discretion. *See id.* However, this Court will not reverse an alleged constitutional error which is ultimately harmless. *United States v. Roy*, 855 F.3d 1133, 1167-68 (11th Cir. 2017).

Here, the district court did not commit a plain error by issuing the order which limited the filing of motions by both parties because, even if we were to assume that the district court committed a plain error, Rodriguez cannot demonstrate that the error affected a substantial right or that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See DiFalco*, 837 F.3d at 1221-22. Rodriguez filed over 30 motions between the issuance of the order and the imposition of his sentence and the district court granted or denied many of these

motions on the merits. Furthermore, only four of Rodriguez's motions were stricken, based on filing defects. Thus, Rodriguez cannot demonstrate that he suffered any harm or prejudice from the district court's order, nor can he show that there was a reasonable possibility that if the order had not been issued that the outcome of this proceeding would have been altered. *See Garcia*, 906 F.3d at 1267. Accordingly, we find that the district court did not commit a reversible error.

XI.

Rodriguez argues that the district court clearly erred when it adopted the 1:167 ratio for tetrahydrocannabinol ("THC") to convert the weight of ADB-FUBINACA to an equivalent weight of marijuana because ADB-FUBINACA is not substantially similar to THC.

Because the identification of the "most closely related substance" is a finding of fact, we review the district court's determination for clear error. *See Duperval*, 777 F.3d 1331. When determining the most closely related substance under the Guidelines, the district court must consider "to the extent practicable," the following factors:

> (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.
>
> (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant,

> depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.
>
> (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

U.S.S.G. § 2D1.1, cmt. n.6 (2016). Under U.S.S.G § 2D1.1, THC is converted to an equivalent weight of marijuana using a 1:167 ratio. *Id.* cmt. n.8(D).

Here, we conclude that the district court did not commit clear error by determining that ADB-FUBINACA was most closely related to THC and that the corresponding 1:167 ratio should be utilized. The district court's determination is sufficiently supported by expert testimony and evidence. Furthermore, the evidence provided by Rodriguez does not establish that the district court committed a clear error but merely provides a plausible alternate finding. *See United States v. Saingerard*, 621 F.3d 1341, 1343 (11th Cir. 2010) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Accordingly, we affirm the district court's determination that ADB-FUBINACA is most closely related to THC and its adoption of the 1:167 conversion ratio.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12451-CC

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DANIEL A. RODRIGUEZ,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CR-20904-UU

UNITED STATES OF AMERICA,

vs.

DANNY ANGEL RODRIGUEZ,

Defendant(s).

Miami, Florida
August 20, 2018

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CHANGE OF PLEA
BEFORE THE HONORABLE URSULA UNGARO
UNITED STATES DISTRICT JUDGE

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(Case called to order of the court at 1:40 p.m.)

THE COURT: Calling 17-20904. I think we are here for for a change of plea.

Who is here for the United States?

MS. MAXWELL: Cristina Maxwell on behalf of the United States.

MS. TELFAIR: Breezye Telfair on behalf of the United States.

MS. VALENTI: Carlee Valenti on behalf of the United States. And Adrienne Rosen.

THE COURT: You can have a seat.

Who is here for Mr. Rodriguez?

MR. A. HERNANDEZ: Ramon Hernandez, Arturo Hernandez, and Ana Davide on behalf of the defendant, Danny Rodriguez.

THE COURT: Are we changing our plea?

MS. DAVIDE: Yes, your Honor, we are. He is ready to plead to the superseding indictment, and then we ask this court, respectfully, to set it for sentencing. We will have a litigated sentencing.

THE COURT: So let's swear the defendant in, please.

Is there -- is there a plea agreement or is he pleading straight up?

MS. DAVIDE: He is pleading straight up. There is a factual proffer that we provided your Honor with a copy of, but he is pleading straight up to the superseding indictment.

THE COURT: Let me just make sure I understand a couple of things about -- let me make sure I understand what there is about these charges.

There is no minimum mandatory in this case?

MS. MAXWELL: No, your Honor.

THE COURT: It's all 20 years on each count?

MS. MAXWELL: That's correct.

THE COURT: Followed by a maximum of life supervised release, right?

MS. MAXWELL: That's correct.

THE COURT: And a minimum of three years?

MS. MAXWELL: Correct.

THE COURT: Okay. It's a fine of -- is it 250 or a million?

MS. MAXWELL: 250.

THE COURT: 250,000 on each count.

Let's swear in the defendant, please.

(Defendant sworn in)

THE DEPUTY CLERK: State your name and your age.

THE DEFENDANT: Daniel Angel Rodriguez, 46.

THE COURT: So Mr. Rodriguez, you have been placed under oath. I am going to ask you some questions, and it's important that you understand that if you answer my questions falsely, you could later be prosecuted for perjury or for making a false statement. Do you understand that?

THE DEFENDANT: Yes, ma'am.
THE COURT: How far did you go in school?
THE DEFENDANT: GED.
THE COURT: Have you ever been treated for a mental illness or for an addiction to narcotics or alcohol?
THE DEFENDANT: Yes.
THE COURT: Can you tell me about that?
THE DEFENDANT: Mental illness.
THE COURT: And do you have a diagnosis?
THE DEFENDANT: No, ma'am. It was when I was younger.
THE COURT: How much younger?
THE DEFENDANT: Teens.
THE COURT: And were you institutionalized?
THE DEFENDANT: No, ma'am.
THE COURT: Have you been under the care of a psychologist or a psychiatrist or some kind of mental health professional since then?
THE DEFENDANT: Through that period, yes.
THE COURT: So when did that period end?
THE DEFENDANT: When I went to prison.
THE COURT: And that was when?
THE DEFENDANT: 1994.
THE COURT: Are you currently -- how old were you when you went to prison?
THE DEFENSE: Twenty-two.

THE COURT: I am sorry, how old are you now?
THE DEFENDANT: Forty-six.
THE COURT: Okay. And are you thinking clearly today?
THE DEFENDANT: Excuse me?
THE COURT: Are you thinking clearly today?
THE DEFENDANT: Yes, ma'am.
THE COURT: Do you have any delusions or hallucinations, anything like that?
THE DEFENDANT: No. No, ma'am.
THE COURT: And are you currently under the influence of any drugs, alcohol, or medication?
THE DEFENDANT: No, your Honor.
THE COURT: Have you received a copy of the superseding indictment? That's the document that currently has the written charges against you in it.
THE DEFENDANT: No. I got a copy here. I haven't received one, no.
THE COURT: Okay. But have you had a full opportunity to discuss the charges --
THE DEFENDANT: Yes, ma'am.
THE COURT: Wait. Let me finish. Have you had a full opportunity to discuss the charges and your case in general including any defenses that you might have with your attorneys?
THE DEFENDANT: Yes, ma'am.
THE COURT: And are you fully satisfied with the

counsel representation and advice that you have received from your attorneys in this case?

THE DEFENDANT: Yes, ma'am.

THE COURT: Now, as I understand it from them, it is your intention today to plead guilty to each of the counts in the indictment, Count 1 being conspiracy to possess with intent to distribute ADB-FUBINACA; Count 2 -- in violation, by the way, of Title 21, United States Code, Section 841(a)(1) and 802 (32)(A) and 813 -- conspiracy to commit money laundering in violation of Title 18, United States Code, Section 1956(h); possession with intent to distribute ADB-FUBINACA in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2; possession with intent to distribute ADB-FUBINACA in violation of Title 21, United States Code, Section 841(a)(1) on each of the dates listed in Counts 4 through 20 of the indictment; and then money laundering in violation of Title 18, United States Code, Section 1957 on each of the occasions set forth in Counts 21 through 24 of the indictment. And then there are -- there is a forfeiture count in which the United States is seeking forfeiture of any property which is forfeitable on account of the criminal conduct described in the indictment.

So is it your intention to plead guilty to all of those charges today?

THE DEFENDANT: Yes, ma'am.

THE COURT: And also to agree to the forfeiture?

MS. DAVIDE: Give me one minute, Judge.

(Pause)

THE COURT: Do you also intend to agree to the forfeiture?

MS. DAVIDE: Okay. Could you give me one moment?

THE COURT: Yes, you could have a second.

(Pause)

MS. MAXWELL: Your Honor, the 250,000 on the drugs is -- I was incorrect. It's 1 million on the level of the drugs.

THE COURT: And on the money laundering?

MS. MAXWELL: And the money laundering --

THE COURT: -- is 250?

MS. MAXWELL: It's 500 -- I just had it. One second. The money laundering is 500,000 or twice the value of the property involved in the transaction.

THE COURT: Okay. Thank you.

MS. DAVIDE: Judge, we are ready to proceed.

THE COURT: And so are you also intending to agree to the forfeiture?

THE DEFENDANT: Yes, ma'am.

THE COURT: And has anybody offered you anything, promised you anything, or assured you of anything in order to induce you to -- actually, let me go back.

So do you understand if I accept your guilty plea today, you will be sentenced at a later date after a presentence report has been prepared by the probation office? Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you also understand that if you -- if I accept your guilty plea today and you are sentenced at a later date, at that time I will also be considering the advisory federal sentencing guidelines as they apply to your case?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you also understand that by pleading guilty you are agreeing that I have the jurisdiction and the authority to impose any sentence up to the maximum permitted by law for each of these offenses?

THE DEFENDANT: Yes, your Honor.

THE COURT: And has anybody offered you anything, promised you anything, or assured you of anything in order to induce you to enter a plea of guilty to the charges?

THE DEFENDANT: No, your Honor.

THE COURT: And has anybody threatened you, coerced you, or forced you in any way to get you to enter a plea of guilty to the charges?

THE DEFENDANT: No, ma'am.

THE COURT: Do you understand that the offenses to

which you are pleading guilty are felonies, and that if your plea is accepted by the court you will be adjudged guilty of felonies, and as a result you will lose valuable civil rights such as the right to possess a firearm, the right to vote, the right to hold public office, and the right to serve on a jury?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, with respect to the drug charges that are in Count 1, Count 3, and Counts 4 through 20 the maximum possible penalty provided by law on each count is 20 years in prison. Any term of imprisonment would have to be followed by a term of supervised release, which could be as long as life and would have to be at least three years in length. The court could impose a fine of up to $1 million on each count, and a $100 assessment -- well, $100 assessment on each of those counts will be imposed.

In addition, as to the money laundering counts, the maximum possible penalty provided by law with respect to Count 2 and Counts 21 through 24 is 20 years in prison on each count. Any term of imprisonment would have to be followed by a term of supervised release not exceeding three years. The court could impose a fine of up to $500,000 or twice the amount involved in each transaction, whichever is greater, on each count, and also a $100 assessment on each count will be imposed against you.

So let's just look at the worst-case scenario here. So there are 24 counts -- is that right -- 24 counts in this

indictment, and arguably the court could impose a maximum penalty of 480 months. Right? Is that right? Twenty-four times 20, 480 months in prison. And the court could impose a maximum term of supervised release of life. And then, of course, there are the assessments. There is $100 assessment on each count, so that's $2,400, and then there is the potential for a fine depending on your ability to pay. And so the fine would also be something in the neighborhood of $20 million.

So do you understand that those are the maximum consequences that could result from your entering a plea of guilty to these charges in this case?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, have you and your lawyers talked about how the advisory Federal Sentencing Commission guidelines might apply in your case?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you understand that I will not be able to determine the guideline sentence for your case until after the presentence report has been prepared by the probation office and you and the government have had the opportunity to challenge the facts reported by the probation office and the application of the guidelines recommended by the probation office. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you understand that the sentence

ultimately imposed could be different from any estimate that your lawyers or anybody else may have given you, and that if it's harsher than you expect, you will still be bound by your guilty plea and you will not be able to withdraw it?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you understand that I have the authority, in some circumstances, to impose a sentence that is more severe or less severe than the sentence called for by the guidelines?

THE DEFENSE: Yes, your Honor.

THE COURT: And do you understand that parole has been abolished, and that if you are sentenced to prison, you will not be released early on parole?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you also understand that you and the government will have the right to appeal any sentence that I impose to a higher court?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, the law requires that we go over the rights you would have had had you gone to trial to make sure you understand those rights and that you are voluntarily giving them up.

Do you understand that you have the right to plead not guilty to any charge against you and to persist in that plea, and that then you would have the right to a trial by jury?

THE DEFENDANT: Yes.

THE COURT: What's the matter?

MS. MAXWELL: It's 4,800 months, not 480 months.

THE COURT: You are right. I am so sorry. Okay.

So do you understand that, Mr. Rodriguez, the court could potentially sentence you to as much as 4,800 months in prison?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, going back to your rights to a trial, do you understand that if you were to go to trial, you would be presumed to be innocent, and the United States would be required to prove your guilt beyond a reasonable doubt?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you also understand that at such a trial you would have the right to the assistance of counsel for your defense, you would have the right to see and hear all of the witnesses and have them cross-examined on your behalf, you would have the right on your own part not to testify unless you voluntarily elected to do so in your own defense, and you would have the right to the issuance of subpoenas, or compulsory process, to compel the attendance of witnesses to testify on your behalf?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you further understand that by entering a plea of guilty, you are giving up your right to a

trial as well as those other rights associated with a trial that I just described to you?

THE DEFENDANT: Yes.

THE COURT: Now, I have in front of me another document -- it's called a factual proffer -- in which the United States has set forth the facts that the prosecutor say that they would be able to prove beyond a reasonable doubt in order to obtain a conviction against you on each of the 24 counts in the indictment.

Did you sign the proffer?

THE DEFENDANT: Yes, your Honor.

THE COURT: And before you signed the proffer, did you have a full opportunity to review it and to go over the with your lawyers?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you agree with each and every fact contained in the proffer, and is that why you signed it?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, how do you plead to each of the charges in the indictment, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: And that's knowing -- correct me if I am wrong -- that the court arguably could sentence you -- theoretically, the court could sentence you to as much as 4,800 months in prison. Yes? No? You understand that, yes or no?

THE DEFENDANT: Yes.

THE COURT: Okay. And you still want to plead guilty?

THE DEFENDANT: Yes.

THE COURT: Then it's the finding of the court in the case of the United States v. Danny Angel Rodriguez in case number 17-20904-Criminal that the defendant is fully competent and capable of entering an informed plea, that the defendant is aware of the nature of the charges and the consequences of his plea, that his plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offenses.

His plea is therefore accepted, and the defendant is now adjudged guilty of all the charges in the indictment and has agreed to the forfeiture.

So sentencing is scheduled for November 29, 2018 at 11:00 a.m.

Now, Mr. Rodriguez, you need to keep in mind that between now and the time of sentencing the probation office is going to prepare the presentence report for my consideration at your sentencing. In order to prepare the report, the probation office will need information from you. You always have the right to have your lawyers present when providing information to the probation office.

Also, you and your lawyers will have an opportunity to review the presentence report in advance of the sentencing

hearing and to follow written objections to anything you disagree with, and at the sentencing hearing your lawyers will have an opportunity to speak on your behalf, and you will have an opportunity to speak, if you wish to do so.

So I know that -- what's the matter, Ms. --

MS. MAXWELL: I was consulting with counsel at table here. I am not sure that -- and I may be wrong because I was looking at the statute book -- that we went over the rights that had he gone to trial, compulsory process.

THE COURT: I did.

MS. MAXWELL: I am sorry. I apologize if I missed it.

THE COURT: It's okay.

So, anyway, I know there's going to be litigation over the amount or the -- I know there's going to be litigation over this issue about the analogue, and I don't know -- has the motion been filed yet? Has anything -- what is the situation? What is the status of that right now?

MS. MAXWELL: Well, he has pled guilty. So he is admitting that it is an analogue. He is going to litigate, it's my understanding, what your Honor should use as a multiplier.

The government will contend that it should be a multiplier of 167, which is the THC equivalent, which is consistent with the new guidelines that will be coming out in November, and I am -- based on my conversations with opposing

counsel, they will be opposing that. I haven't been made aware of their expert or what the expert's opinion is yet.

THE COURT: How are you going to go about this? You are going to wait for the PSI? How did -- what's your plan?

MS. DAVIDE: We do have an expert that we have already retained, Judge. Now that he has entered into a plea, I will provide -- I will discuss with the expert his preparation of a report. I will then disclose it, and I will do a defense witness list.

But we do anticipate bringing in Gregory Dudley from West Virginia University who has been involved in this case since the very beginning.

THE COURT: So my plan was to have Judge O'Sullivan do the evidentiary hearing and then to deal with it on an R and R. Can you call Judge O'Sullivan? I think maybe -- have you already scheduled the time in front of Judge O'Sullivan or not?

THE DEPUTY CLERK: No.

THE COURT: Can you do me the favor of calling Judge O'Sullivan? We have given him a heads-up that we thought that there would be litigation over this, but can you call his office and try to reserve the time?

MS. DAVIDE: Just so I am clear, so he is going to make the decision as to what he believes is the appropriate ratio?

THE COURT: Right. It will come to me on an R and R,

but he will hold the evidentiary hearing, at least in the first instance. Obviously, if there were credibility issues, then I'd have to rehear it, but I doubt that there will be credibility issues with the expert.

MS. DAVIDE: Right, Judge, but I don't know if -- maybe I should explain it a little bit better.

I don't know if it's really the one to 167 that we are challenging legally. I think Dr. Dudley will testify more as to the actual ratio that he believes is appropriate because of the type of drug it is as it relates to that ratio. It's really not a legal issue. So it would be something that I think this court would need to consider at time of sentencing.

THE COURT: Well, I will definitely be considering it.

MS. DAVIDE: Can you give me two minutes so I can consult?

THE COURT: Sure.

(Pause)

THE DEFENSE: Judge, our concern, to be quite candid with the court, is that there is a legal issue, and there is also a downward departure that we would -- that we may make to this court --

THE COURT: Well, the departure --

MS. DAVIDE: -- as it relates to that.

THE COURT: Well, the departure is obviously something that only falls into my lap. It has nothing to do with Judge

O'Sullivan. Right? But if there is -- when it comes to the scientific evidence, I don't see why Judge O'Sullivan can't take the first cut at it while I turn my attention to other things because, you know, we are a little busy. We are down five judges. You know, there is a lot of stuff going on around here.

So it was my intention to have Judge O'Sullivan handle the hearing that involves the scientific experts, and then, of course, I will handle the sentencing and any departure motions, and of course I will be looking at the objections and the transcript from the hearing. It's not like I will be ignoring it.

MS. DAVIDE: No, no, no. I just think that it may overlap. That same testimony from the doctor may --

THE COURT: I can see that that's a possibility, but I will have the benefit of the transcript, and then, of course, you will, you know, assuming you have a good reason to do so, you might want to bring him to the sentencing.

MS. DAVIDE: There is also a second issue that we believe is also a legal issue. We'd like to make the court aware of it.

The actual carrier, whether or not we believe that the drug should be weighed on the medium that they were presented in, is another issue that we believe is a legal issue. We would also be bringing in witnesses for that. I don't know if

Dr. Dudley will also be testifying, but I will be bringing in evidence at that hearing.

THE COURT: As to the weight?

MS. DAVIDE: As to the weight, yes, ma'am, carrier weight.

THE COURT: It sounds to me like it could all be part, at least initially, it could all be part of the same hearing in front of Judge O'Sullivan. After all, it's not going to be terrible to have two eyes looking at it, right, two sets of eyes looking at it?

MS. DAVIDE: Just so the court is aware that, again, they may overlap again for downward departure, that same argument that we present, the legal argument before Judge O'Sullivan.

THE COURT: That's fine. I don't see the problem.

MR. A. HERNANDEZ: Judge, I just have a question about how that would operate procedurally because, I mean, would we be filing --

THE COURT: This is -- I am trying to work this. Actually, I was having a conversation with Katherine about this because, you know, normally the PSI comes out ten days before the sentencing hearing. So in this particular case that's not going to work too well, right?

MS. DAVIDE: No.

THE COURT: I think what I need to do, I need to get

in touch with probation to see what they could do about getting the presentence report done sooner rather than later, or at least conveying to them that they need it done by a certain date, and then we will adjust the sentence, the actual sentencing date, as we need to.

MR. A. HERNANDEZ: That's what I contemplated, your Honor. Originally we sort of had the idea of challenging all this through our objections to the PSR.

THE COURT: I don't know how else you would do it, really.

MR. A. HERNANDEZ: But we do have -- our argument is already pretty defined. So it won't take us a lot of time to get those objections in.

THE COURT: Okay. Well, so I think, actually -- I mean, the easiest, simplest way to do this is we have a sentencing date right now -- I don't even know if I have announced it -- of October 26th.

THE DEPUTY CLERK: No, November.

MS. DAVIDE: November 29th.

THE COURT: What? November -- okay, fine. I am sorry. So Katherine just spoke to probation. So we are going to move the sentencing date, but we don't really mean it, to October 26th to force them to get the PSI done. Then we will adjust -- once we have the PSI we will adjust the actual sentencing date to take into account these hearings that we

need to get done.

MS. DAVIDE: Yes, because originally Katherine had said November 29th. So I guess --

THE COURT: Right. So the problem is if we do that, then probation won't get the PSI done until 10 days before the 29th. So, instead, let's tell them it's an earlier date, let's get all the background information to them, let's get all of that out of the way, and then we will -- once we have the PSI we will adjust the actual date for the sentencing hearing.

MS. DAVIDE: That's fine.

THE COURT: Okay?

MS. DAVIDE: We are good.

THE COURT: Thank you.

(Proceedings concluded.)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

October 30, 2018

/s/ Jill M. Felicetti
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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 17-20904-Cr-UNGARO

UNITED STATES OF AMERICA,
Plaintiff,
-v-
DANNY ANGEL RODRIGUEZ,
Defendant.

Miami, Florida
February 5, 2019
2:48 p.m.

Pages 1-15

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE URSULA UNGARO

U.S. DISTRICT JUDGE

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(Call to order of the Court)

THE COURT: So the case before the Court is the United States versus Danny Angel Rodriguez, 17-20904.

Who's here for the United States?

MS. MAXWELL: Good afternoon, Your Honor. Cristina Maxwell for the United States.

THE COURT: Okay. Good afternoon. You can have a seat.

Who's here for the defendant?

MS. DAVIDE: Good afternoon, Your Honor. Ana Davide on behalf of Mr. Rodriguez. He is ready to proceed.

THE COURT: I hope you're ready to proceed.

MS. DAVIDE: Excuse me?

THE COURT: I hope you are ready to proceed.

MS. DAVIDE: Oh, yes.

THE COURT: Thank you.

And who else is here for Mr. Rodriguez?

MR. REIZENSTEIN: Good afternoon. Philip Reizenstein on behalf of Mr. Rodriguez. He is present.

THE COURT: Okay. Fine. You can have a seat.

So let me just make it clear. I am not going to allow Mr. Rodriguez to participate as cocounsel. I have complete discretion in this matter and I am exercising it against Mr. Rodriguez's request.

So now the issue is does Mr. Rodriguez want to

represent himself, something which I personally believe would be as foolish as anything could possibly be given the technical issues in this case.

So where you left off with Judge O'Sullivan was Judge O'Sullivan gave you an opportunity to consult with Mr. Rodriguez and for Mr. Rodriguez to think about it and for Mr. Rodriguez to come to court and say what it is that he wishes.

MS. DAVIDE: Judge, there is something else that may change everything that I think I need to bring to the Court's attention. I brought it to Ms. Maxwell's attention this morning.

In Mr. Rodriguez's original case in 1994, which is 94-402, there were two recusal orders not only recusing the judge but recusing the entire Southern District of Florida. That was back in 1994.

THE COURT: We're talking about Judge Highsmith's case?

MS. DAVIDE: Yes.

THE COURT: Yes.

MS. DAVIDE: I didn't know this. In 2016, an appellate court, actually the Ninth Circuit, ruled that that order was still in effect as it related to Mr. Rodriguez, obviously, in relation to the 1994 case.

We are trying to actively get a copy of that recusal

order. I went to the clerk's office this morning. I requested it in archives. I will hopefully have it, I suspect, in 48 hours. It's the national archives and it really doesn't give me a time.

My concern is -- and I've done some preliminary research -- is if you read the opinion in the --

THE COURT: What a gift. What a gift this would be.

MS. DAVIDE: Yes.

I don't know, Judge, quite honestly. The opinion talks a lot about due process. It talks about the defendant being entitled to a neutral person listening to the case. I don't know if it is still in effect or not. I'm being quite candid with the Court. I did some research last night. Roy, my husband, did some research for a couple of hours.

THE COURT: That's fine. Right now the Court's position is no cocounsel and I'm not going to wait. All right. If it turns out that this Court -- neither I nor any of my colleagues can sit on this case -- so be it.

But right now we're not waiting. We've waited long enough in this case.

This case has been pending since when, Ms. Maxwell?

MS. MAXWELL: Since December of the year before last. So December of '17.

THE COURT: Right. So we're going to plow ahead. Got it?

MS. DAVIDE: Yes, Judge.

Just to advise the Court -- I think it's important -- we do plan by the end of this week to file a motion based on the recusal order saying this Court and any judge in the Southern District has no jurisdiction to hear this case.

THE COURT: Please do so.

MS. DAVIDE: I will do that. As soon as I get the order so I can attach it, I will definitely file it. Then Ms. Maxwell can respond and we can address that. But I wanted to bring that to the Court's attention sooner or later.

THE COURT: And please do it in the manner which will require Judge Moore to make the decision.

MS. DAVIDE: I will do that, Judge. I will file it. As soon as I get the orders from the national archives, I will file the motion and the goal is to have it to Your Honor by Friday.

THE COURT: And Judge Moore.

MS. DAVIDE: Yes.

THE COURT: Because, you know, there are two alternative ways for moving for recusal, and I think since you are trying to disqualify the entire Court, it would be a good idea to follow the procedures that would take it directly to Judge Moore.

MS. DAVIDE: I will do that. I'm trying to see if that original order that was signed by Judge Davis is still in

effect or not. It was in 2016 in the case before, and I guess people smarter than me will make that decision. I don't know. But I will want to advise the Court, I'm going to file the it.

THE COURT: Okay. Enough, Ms. Davide.

So, in the meantime, we're plowing ahead.

MS. MAXWELL: Your Honor.

THE COURT: Yes, Ms. Maxwell.

MS. MAXWELL: As far as the Faretta, I just want to make sure that because Judge O'Sullivan was hearing it initially, he was going to give Your Honor a report and recommendation as to his finding of competency.

He hasn't done that. And if Your Honor rules --

THE COURT: I have read the transcript.

MS. MAXWELL: All right. Thank you.

THE COURT: I read the entire transcript last night.

When you say competency, competent to waive his --

MS. MAXWELL: Correct.

THE COURT: -- waive representation.

MS. MAXWELL: That finding hasn't been made. And so I wanted to make sure Your Honor put that on the record.

THE COURT: So I would like to know right now, does Mr. Rodriguez wish to represent himself.

MS. DAVIDE: Can I ask one more question before he answers that?

THE COURT: Ask me or ask him?

MS. DAVIDE: No, no. Judge, I've already spoken to him about it. What I was not able to advise him of is what does this Court permit us to do as standby counsel.

THE COURT: Just what Judge O'Sullivan said, which is, if he has a question about procedure or evidence, he can turn to you and ask your advice.

MS. DAVIDE: Okay. But the rest of the proceeding --

THE COURT: The rest of it he's on his own.

MS. DAVIDE: So we would not be able to step in and argue something if we believe Mr. Rodriguez --

THE COURT: That's right. And I want you to know something too. I think this is important for everybody to know. With his criminal history background, he's going to stay shackled. So he's not going to be able to move freely around the courtroom.

MS. DAVIDE: Okay. Better that we know the parameters so he understands them.

THE COURT: Did you want to say something, Ms. Maxwell?

MS. MAXWELL: Nothing, Your Honor.

(Inaudible discussion off the record at the defense table)

MS. DAVIDE: Judge, I have been designated to ask you all the questions today.

Is there a possibility that we can remain on the case

to file the recusal motion since we believe in good faith it needs to be filed sooner than later, and then if Mr. Rodriguez decides to represent himself, then we will then step back?

But I think for purposes of filing that motion and actually responding to the R&R by Judge O'Sullivan, I believe that we're better equipped to do it just because it deals with a lot of legal issues that need to be responded to.

THE COURT: How many legal issues could possibly be involved?

MS. DAVIDE: At least six, four, five.

THE COURT: Why?

MS. DAVIDE: There's a spinoff of each one, because, remember, in the R&R he not only dealt with the weight of the paper, he dealt --

THE COURT: No, no. I mean with respect to the issue of the recusal.

MS. DAVIDE: The issue of the recusal is whether or not it's still in effect or not. I just don't know, since we want to do it sooner than later.

THE COURT: And do you know who entered the order?

MR. REIZENSTEIN: Yes.

MS. DAVIDE: Yes.

THE COURT: Who entered the order?

MS. DAVIDE: Judge Davis, Edward Davis.

THE COURT: Oh, Judge Davis did.

MS. DAVIDE: The original one -- and I have the docket -- the case number -- do you want me to repeat it or do you have that?

THE COURT: No. I'm not interested.

MS. DAVIDE: Okay. Judge, the first one was issued on 8-11-1994 and it was order of recusal. And then there's a subsequent order recusing all of the District Judges in the Southern District of Florida, and that is also by Judge Davis and that was entered 8-16-1994.

THE COURT: And then what happened? And then the defendant was convicted.

MS. DAVIDE: He was convicted.

THE COURT: How did this end up in the Ninth Circuit?

MR. REIZENSTEIN: Judge, if I may.

THE COURT: Yes.

MR. REIZENSTEIN: So what happened was, he was sentenced and he served his time. There was a judge from Alabama that presided over the case.

THE COURT: Right.

MR. REIZENSTEIN: There became an issue as to the amount of credit time served he was entitled to.

MR. REIZENSTEIN: Right.

THE COURT: The Bureau of Prisons sent an inquiry to this district, and Judge Moreno, as the Chief Judge at the time, answered it. That then was raised in a habeas petition

in the Ninth Circuit.

THE COURT: Why is it the Ninth Circuit?

MR. REIZENSTEIN: I believe because that's where he was housed. He was in a prison in the Ninth Circuit.

THE COURT: Oh, right. That makes sense.

MR. REIZENSTEIN: That's why a Public Defender was appointed, it was argued, and the Court opined at that time that the recusal order was still in effect.

THE COURT: So it sounds a little indirect to me. It sounds like there was an issue about credit time served.

Judge Moreno issued an order or wrote a letter?

MR. REIZENSTEIN: He responded to the Bureau of Prisons.

THE COURT: So he wrote a letter to the Bureau of Prisons?

MR. REIZENSTEIN: Yes.

THE COURT: So they basically said he shouldn't have weighed in?

MR. REIZENSTEIN: Right.

THE COURT: Because the Court remained recused with respect to matters regarding Judge Highsmith.

MR. REIZENSTEIN: I would say with respect to all matters in the '94 case is probably a better way.

THE COURT: Right. Relating to the Judge Highsmith assault.

MR. REIZENSTEIN: Yes.

THE COURT: So my guess is going to be this is going to go nowhere.

MR. REIZENSTEIN: We don't know. We want to see the order. I've reviewed the recusal statute. There's two parts to it.

THE COURT: You may want to move to recuse because of his history in the district, although you should have done that a long time ago if that was what you wanted. Right? Because the situation is no different now than it was two years ago, and you knew at the time, you knew the judges of this Court were recused.

MR. REIZENSTEIN: This is an issue that came to our attention recently.

THE COURT: Well, what I'm saying to you is it seems to me are there are two different issues here. There's this speculation about the Ninth Circuit, and then there's another issue as to whether or not the entire Court should be recused in any event because this defendant is so -- I assume you would take the position; I would not take that position -- but you would take the position he's notorious in the district because of his assault on Judge Highsmith.

MR. REIZENSTEIN: I think that would be part of the argument, yes.

THE COURT: Okay. But that's not just a whole other

kettle of fish. And that has nothing really to do with the Ninth Circuit order.

MR. REIZENSTEIN: I don't think we feel comfortable saying this to you until we see the order from Judge Davis in '94. That would give us a better idea of what we can and can't argue to this Court, which is why, once the issue came to our attention, we didn't just automatically file something. We wanted to proceed.

THE COURT: Well, I want to know whether the defendant wants to represent himself.

MR. REIZENSTEIN: Okay.

THE COURT: So what do you want to do, Mr. Rodriguez?

THE DEFENDANT: Your Honor, in light of everything that's happened in my case, I do want to represent myself. There's just been too much going on with my other counsel, with these counselors, and I'm just concerned. So in desperation, I do want to represent myself.

As I spoke to Magistrate, Mr. O'Sullivan, Judge O'Sullivan, it's just too many things gone, lab reports. Just a lot of it I outlined on my filing, my pro se filing to this Court, and I'm just very concerned and I'm just -- out of desperation I do, ma'am, I just do.

Even this issue. I've never waived recusal. To me it was a standing recusal order, and I've had -- I was violated on my probation officer by a judge that was recused

from my case. And everything, it's one thing after another, and I just -- I just need to be involved.

I mean, the issues that I outlined in my motion to Your Honor, they're clear. What I'm going through is, I can't even outline to you now. But it's just too much. And I stand to file my motion to withdraw my plea and everything else in lieu of what I filed, ma'am.

And I understand that I'll have a fool for a client and I've read it. But I just can't move forward as it is.

THE COURT: Okay. Well, this is what we're going to do. I'm going to give you ten days to file this motion. I'm going to give the lawyers -- I'm not going to allow -- so what we're going to do is I'm going to postpone the decision whether to allow him to represent himself.

I'm going to give you ten days to file the motion. If the motion is colorable, I'll extend the time. I'll continue to defer in ruling on this while it's being litigated. If it's not colorable, then we're just going to go forward. But I do need to see the motion.

Do you want to weigh in, Ms. Maxwell?

MS. MAXWELL: No. I was curious. The motion for recusal.

THE COURT: Yes, the motion for recusal. Right.

MS. DAVIDE: Okay. And just to clarify, the time --

THE COURT: So I'm deferring my decision as to

whether to allow him to represent himself. I'm giving you ten days to file a motion to recuse. Once I see the motion, I'll make up my mind as to whether or not I'm going to continue to delay.

MS. DAVIDE: Yes, ma'am.

THE COURT: Okay?

MS. DAVIDE: Yes, ma'am.

THE COURT: But I need to see whether it's a colorable argument.

MS. DAVIDE: Yes, ma'am.

What he's asking me is if I know exactly when the order will be here. I requested it from the national archives. They don't give you an exact date. But I hope it be will be ASAP. It's already been ordered. That's how to get it. So I'm sure, as soon as I have it, we will file the motion.

Can I ask him one question about something else?

Judge, I need to clarify with Your Honor. The time for the R&R for us to respond is ticking.

THE COURT: The R&R on what?

MS. DAVIDE: The R&R that Judge O'Sullivan did on the objections and the issues that he dealt with. It would actually be due -- we got it last week -- I think it's due by the beginning of next week.

THE COURT: I'll give you a two-week extension.

MS. DAVIDE: Okay. That's fine.

THE COURT: Okay?

MS. DAVIDE: Thank you.

THE COURT: All right. Thank you.

(Recessed at 3:04 p.m.)

* * * * * * * * * *

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:17-cr-20904-UU-1

UNITED STATES OF AMERICA,

v.

DANNY ANGEL RODRIGUEZ,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court upon the Defendant's Motion for Recusal Pursuant to 28 U.S.C. § 455 (D.E. 280) and the Defendant's Motion to Enforce Recusal Order (D.E. 277) (collectively, the "Motions").

THE COURT has considered the Motions and pertinent parts of the record and is otherwise fully advised in the premises.

Both Motions seek the same relief: for all judges in the Southern District of Florida, including the undersigned, to be recused from presiding over this case *nunc pro tunc*. For the following reasons, both Motions are DENIED.

As a preliminary matter, there was absolutely no reason for Defendant to seek the same relief in two different motions. The motion for recusal was filed by Defendant's counsel Ana M. Davide, Esq., while the motion to enforce the prior recusal order was filed by Defendant's counsel Philip L. Reizenstein, Esq. At best, the two Motions set forth alternative grounds for recusal. In reality, the Motions are entirely duplicative. The Court expects that co-counsel will confer with one another before filing motions, to avoid duplication of effort and a waste of the Court's time.

Now, to the merits. In case number 94-cr-402, the Defendant was indicted and charged with crimes arising from his alleged "pistol-whipping," "beating," and robbing then-sitting U.S. District Judge Shelby Highsmith. *See* D.E. 277, ¶1, p. 5–6; D.E. 277-3; D.E. 280 ¶¶ 1–2, 4, 6 & p. 6. Because the alleged victim in the case was a sitting judge of this district, the Honorable Judge Wilkie D. Ferguson, Jr., to whom the case was originally assigned, entered an order recusing himself from the case. The recusal order reads in its entirety:

> PURSUANT to 28 U.S.C. § 455(a), the undersigned judge, to whom **the above-styled cause** has been assigned, hereby recuses himself **from that cause** in the interest of justice and refers it to the Clerk of the Court for reassignment pursuant to Rule 3.6 of the Local Rules of the United States District Court for the Southern District of Florida.
>
> Accordingly, it is
>
> ORDERED AND ADJUDGED that the undersigned is recused from consideration **of this cause**. It is
>
> FURTHER ORDERED AND ADJUDGED that **this cause** is referred to the Clerk of the Court for permanent reassignment to another Judge in accordance with the blind assignment system.

D.E. 277-1, p. 1; D.E. 281, p. 5 (emphasis added). Thereafter, then-Acting Chief Judge Edward B. Davis entered a further recusal order, which reads in its entirety:

> PURSUANT to 28 U.S.C. § 455(a), the undersigned judge, as acting Chief Judge of the Southern District of Florida, hereby recuses all District Judges in the Southern District of Florida **from that cause** in the interest of justice.
>
> Accordingly, it is
>
> ORDERED AND ADJUDGED that all District Judges in the Southern District of Florida are recused from consideration **of this cause**.

D.E. 277-1, p. 2; D.E. 281, p. 7 (emphasis added). Because all the Southern District of Florida judges had been recused from "that cause," the Chief Judge of the Eleventh Circuit appointed Judge Robert Propst of the Northern District of Alabama to sit by designation and preside over that case in this District. Ultimately, Defendant was acquitted of assault, but was convicted for

felon-in-possession-of-a-firearm charges. Judgment was entered on April 21, 1995. *See* Case No. 94-cr-402, D.E. 140.

Fast-forward more than 22 years: the Defendant was indicted in the instant case on December 19, 2017. D.E. 14. The charges in this case have nothing to do with an alleged assault on anyone, let alone on a sitting judge of this District. Rather, this case deals with Defendant's schemes to mail ADB-FUBINACA to inmates housed in federal detention facilities across the country in exchange for money, which proceeds were then laundered. *See generally* D.E. 14; D.E. 58; D.E. 166. Nevertheless, Defendant relies on the prior recusal orders to urge this Court, and all Southern District of Florida judges, to recuse.

In so urging, Defendant places heavy emphasis on the actions of former Chief Judge of this District, Federico A. Moreno, in 2010. For background, Defendant had been in state custody before the federal Bureau of Prisons ("BOP") took custody of him to serve his federal sentence. Defendant sought to get credit *nunc pro tunc* toward his federal sentence for the time he spent in state custody before being transferred to the BOP. What transpired next is recounted in the Ninth Circuit's opinion in *Rodriguez v. Copenhaver*, 823 F.3d 1238 (9th Cir. 2016). The then-acting chief of the BOP's Designation and Sentence Computation Center sent a letter to Judge Propst, but mailed it to the Southern District of Florida instead of to Alabama. The letter solicited Judge Propst's position on whether Defendant should receive the *nunc pro tunc* credit. On March 18, 2010, then-Chief Judge Moreno replied to the BOP to state his opposition to the credit. He explained that the allowing the credit, which would shorten Defendant's sentence by approximately three years, would be "not only dangerous to the public but an insult to the victim in the federal case, Judge Shelby Highsmith, let alone the victims of the armed robbery in the state case." 823 F.3d at 1241; *see also* D.E. 277-2; D.E. 281, p. 9. Judge Moreno copied "All Southern

District and Magistrate Judges" on the letter. D.E. 277-2; D.E. 281, p. 9. The BOP relied on Judge Moreno's letter in denying Defendant the credit. Upon collateral review, the Ninth Circuit determined that the BOP erred in considering Judge Moreno's letter for two reasons: "First, he was not the judge who imposed the sentence, as 18 U.S.C. § 3621(b)(4) contemplates; and second, he had been recused from the case and should not have participated in it in any way." 823 F.3d at 1243.

Defendant's current Motions advance two bases for recusal: (1) the district-wide recusal order is still in effect and should be applied and enforced in this case; and (2) even if the prior recusal order does not apply, Defendant's "notoriety" as evidenced by Judge Moreno's letter, copies of which were sent to all judges in the district, and the undersigned's working relationship with Judge Highsmith require recusal now. Neither of these bases succeeds.

First, as is evident by the emphasized language above, the district-wide recusal order applied only to the alleged-assault case involving Judge Highsmith in 1993. The recusal order is not a perpetual blanket order; it does not apply to any and all causes involving this Defendant for all time. Therefore, there is no standing applicable recusal order to be enforced.

Next, the mere fact that the undersigned served with Judge Highsmith and was copied on then-Chief Judge Moreno's letter does not mean that a "well-informed, thoughtful observer" would find this Court to be biased in the instant drug case. *Cf. Cintron v. United States*, 2009 WL 10698423, at *7 & nn.6–7 (S.D. Fla. Aug. 7, 2009) (recusal not warranted where "[t]he perceived bias was too remote in time to warrant a reasonable concern about the Court's fairness" and where defendant's subjective fears were not necessarily those of an objective observer). Defendant is correct that courts must not only be, but must seem to be, free of bias or prejudice. *See, e.g., United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986). However, a competing policy also

exists: "a judge, having been assigned to a case, should not recuse [her]self on unsupported, irrational, or highly tenuous speculation. If this occurred the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges." *Id.* Indeed, "[i]f a party could force recusal of a judge by factual allegations, the result would be a virtual 'open season' for recusal." *Id.* (citing *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review of State of Miss.*, 637 F.2d 1014, 1019 n.6 (5th Cir. 1981)).

Further, one judge's "long-term working relationship" with other judges whose interests may be implicated in a case does not provide grounds for recusal. *See Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000). "To the extent that our hypothetical lay observer might have a possible doubt about the ability of any federal judge to fairly adjudicate" any case involving a defendant who was previously alleged to have attacked "another federal judge, such a doubt would be based on the notion that federal judges might tend to view an attack on one as an attack on all. But such a doubt would extend to all federal judges—regardless of their circuit or district—and would, if disqualifying, prevent [the defendant] from having a federal forum" over his case. *In re Moody*, 755 F.3d 891, 897 (11th Cir. 2014). The Eleventh Circuit's analysis in *Moody* is even more compelling here. In *Moody*, all judges of the Eleventh Circuit declined to recuse, and affirmed the district court's refusal to recuse, in the habeas corpus case of a defendant who had been convicted of murdering a federal judge 24 years earlier. *See generally id.* *Moody* arguably was a closer call, given the connection of the habeas action to the underlying murder case. Here, the connection of this case to the case involving Defendant's alleged attack on Judge Highsmith is non-existent.

In sum, recusal is not warranted here. More than 22 years have passed since judgment in the Judge Highsmith case and the indictment in this case. Nothing in this case implicates any threats or attacks upon a federal Judge. It is true that the Ninth Circuit ruled that the recusal order precluded Judge Moreno from providing input to the BOP in calculating Defendant's sentence in the alleged assault case. But the instant drug case does not implicate that case in any way. There is no reason for this Court to hold that Defendant is immune from any adjudication by a judge who happened to serve alongside Judge Highsmith, no matter how removed (temporally and in subject matter) the new case is from the 1993 action. Defendant has not satisfied his burden under § 455(a).[1]

DONE AND ORDERED in Chambers at Miami, Florida, this _6th__ day of March, 2019.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record via CM/ECF

[1] Moreover, as the Government correctly asserts (D.E. 285), Defendant waived his right to assert any the recusal motion for two reasons: (1) he has waited too long to raise the issue, and (2) recusal relief is waived by entry of an unconditional guilty plea. *See United States v. Patti*, 337 F.3d 1317, 1320–23 (11th Cir. 2003) (refusal to recuse is a "pretrial defect which is sublimated with a guilty plea" and, because a voluntary, unconditional plea waives all nonjurisdictional defects in the proceedings, the defendant waived his right to appeal the denial of his recusal motion when he entered his plea); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits."); *accord United States v. Kelly*, 888 F.2d 732, 747 (11th Cir. 1989).