IN THE
SUPREME COURT OF THE UNITED STATES

Christopher Dominguez

v.

United States of America

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX A

Tenth Circuit's order denying Mr. Dominguez's petition for rehearing en banc and Judge Hartz's accompanying dissent

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

September 17, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER DOMINGUEZ,

Defendant - Appellant.

Nos. 19-8021 & 19-8022
(D.C. Nos. 2:18-CR-00186-NDF-1 &
2:17-CR-00098-NDF-3)
(D. Wyo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HARTZ**, **HOLMES**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, and **CARSON**, Circuit Judges.

These matters are before the court on appellant's *Petition for En Banc and Panel Rehearing*. We also have a response from the appellee.

Upon consideration, the request for panel rehearing is denied by the panel that rendered the decision. The request for rehearing and the response were also circulated to all of the judges of the court who are in regular active service. A poll was called, and a majority voted to deny rehearing en banc. *See* Fed. R. App. P. 35(a). Consequently, the request for en banc consideration is also denied.

Chief Judge Tymkovich and Judge Hartz voted to grant rehearing en banc. Judge Hartz has prepared the attached written dissent from the denial of en banc reconsideration.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

19-8021, 19-8022 – United States v. Dominguez

HARTZ, **J**., Circuit Judge, dissenting

I would grant en banc review of the panel opinion in this case because I believe it sets an unfortunate precedent. The panel opinion states that a defendant can make an intelligent decision to accept a plea bargain rather than going to trial even if the defendant has been grossly misinformed about the risks attendant to going to trial.

Mr. Dominguez entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) that set his term of imprisonment at 28 years. Among the pending charges against him were three alleged violations of 18 U.S.C. § 924(c). It is undisputed that when he entered his plea (to one of the § 924(c) charges and three other charges) he had been advised (by his counsel) that if he were convicted on all three § 924(c) charges, the minimum sentence would be 60 years as a result of the "stacking" provisions of § 924(c). It is also undisputed that the mandatory minimum sentence would actually have been 27 years (because the amendments to the First Step Act became effective on the day he entered his plea).

The panel opinion states that Mr. Dominguez's misunderstanding of the punishment for violations of § 924(c) is not material because he fully understood the penalty he would face as a result of his guilty plea. That puzzles me. A defendant who pleads guilty is making a choice between alternatives: pleading guilty or going to trial. To make an intelligent choice the defendant must be adequately informed regarding each alternative. To assess the alternative of going to trial, the defendant needs to consider both the probability of being convicted and the consequences that would flow

from being convicted. A very important consequence is the minimum sentence that the judge could impose. I do not understand how a court can say that Mr. Dominguez's choice was adequately informed when he was provided grossly incorrect information about the minimum sentence he could receive if he were convicted at a trial. Perhaps this misinformation did not affect Mr. Dominguez's choice. Litigating that issue is quite proper. But for now, I would vote to hear the case en banc for the purpose of eliminating an analysis that strikes me as contrary to common sense.