No.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERICA UMBAY

Defendant - Appellant.

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

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether a Criminal Defendant Can Withdraw a Plea Under Federal Rule of Criminal Procedure 11(b)(3) if the Plea Lacked an Adequate Factual Basis?

II. Whether a Criminal Defendant Can Appeal a Plea if the District Court Advised Her She Could Appeal?

III. Whether a District Court Imposes an Unreasonable Sentence by Failing to Adequately Consider the Criminal Defendant's Drug Addiction as a Mitigating Factor?; Whether Trial Counsel Rendered Ineffective Assistance?

TOPICAL INDEX

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

STATE STATUTES

OTHER SOURCES

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

ERICA UMBAY petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Memorandum affirming her conviction. (Appendix)

OPINION BELOW

On October 8, 2021, the Ninth Circuit Court of Appeals entered a Memorandum affirming Umbay's conviction and sentence. (Appendix)

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Commerce Clause refers to Article 1, Section 8, Clause 3 of the U.S. Constitution; *Strickland v. Washington*, 466 U.S. 668 (1984)

STATEMENT OF THE CASE

The prosecution charged Erica Umbay a single count of felon in possession of a firearm. (18 U.S.C. § 922(g)(1).)

On October 3, 2019, Umbay entered a guilty plea and, on March 12, 2020, the Honorable Troy L. Nunley sentenced Erica Umbay to 70 months in federal prison and to supervised release for 36 months. (ER-10, 33, 50)

Umbay appealed to the Ninth Circuit Court of Appeals and, on October 8, 2021, the Ninth Circuit denied her appeal.

STATEMENT OF THE FACTS

The Plea Agreement

On October 11, 2017, law enforcement officers executed a federal search warrant at defendant ERICA UMBAY's residence in Woodland, California. Law enforcement officers seized a Taurus .357-caliber revolver bearing serial number SG748833 and a silver .40 caliber revolver with an obliterated serial number from UMBAY's bedroom. Law enforcement officers also seized UMBAY's Samsung Galaxy S8 Plus cell phone.

During a subsequent forensic examination of the cell phone, law enforcement officers found several photographs of UMBAY holding the Taurus revolver. Taurus firearms are manufactured outside the state of California, accordingly, the revolver seized from UMBAY had previously traveled in interstate or foreign commerce.

The defendant stipulates that she had previously been convicted of the felony offenses listed in the Superseding Information. The defendant stipulates that prior to possessing the firearms, she knew that she had been convicted of an offense punishable by imprisonment for a term exceeding one year. In fact, the defendant knew that her felony convictions made it unlawful for her to possess a firearm. (ER-59)

REASONS TO GRANT CERTIORARI

I. THE PLEA LACKED A FACTUAL BASIS BECAUSE POSSESSION OF ONE FIREARM MANUFACTURED IN A DIFFERENT STATE DOES NOT VIOLATE INTERSTATE COMMERCE

A. Introduction

Umbay pleaded guilty to one count of felon in possession of a firearm. 18 U.S.C. § 922(g)(1).Umbay's A plea without a sufficient factual basis is invalid under Fed. R. Crim. P. 11(b)(3).

Umbay's plea lacked a sufficient factual basis because 18 U.S.C. § 922 (g)(1) required that the gun have a link to interstate commerce. The prosecution relied solely on the purported fact that, at some unknown time and place, the firearm found in her bedroom had been manufactured outside the state of California.

Even if Umbay, in her plea agreement, waived her right to appeal her conviction and sentence, the waiver would not preclude the court's consideration of her Rule 11

claim. See *United States v. Brizan,* 709 F.3d 864, 866 (9th Cir. 2013) ("We decline to enforce an appeal waiver . . . if the district court failed to comply with Federal Rule of Criminal Procedure 11[.]").

B. Standard of Review

"Generally, 'where, . . . , the defendant failed to raise the Rule 11 violation before the trial court,'" the court "review[s] the alleged error under the plain-error standard." See *United States v. Myers*, 804 F.3d 1246, 1256 (9th Cir 2015); see also, e.g., *United States v. Pena*, 314 F.3d 1152, 1155 (9th Cir. 2003) (Because the defendant did not object below to the Rule 11 colloquy, the conviction may be reversed for Rule 11 error only if the district court committed plain error.).

C. Federal Rule of Criminal Procedure 11(b)(3)

Federal Rule of Criminal Procedure 11(b)(3) provides: "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." The

court satisfies this requirement by determining "that the conduct which the defendant admits constitutes the offense charged . . . to which the defendant has pleaded guilty." *United States v. Jones,* 472 F.3d 1136, 1140 (9th Cir. 2007) (quoting *McCarthy v. United States,* 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1960)).

"The rule prescribes no specific method of establishing the factual basis. . . . However, it must be established on the record that there is sufficient evidence to support the conclusion that defendant is guilty." *United States v. Rivera-Ramirez,* 715 F.2d 453, 457 (9th Cir. 1983) (citations omitted).

D. 18 U.S.C. § 922 (g)(1) Requires a Nexus to Interstate Commerce

Congress' power to regulate articles or goods in commerce does not "permit it to regulate an item for eternity simply because it has once passed state lines." *United States v. Pappadopoulos,* 64 F.3d 522, 527 (9th Cir. 1995) (citing *United States v Nukida*, 8 F.3d 665, 671 (9th Cir 1993)

(collecting cases regarding the loss of an item's interstate character)).

In a case dealing with a statute similar to 18 U.S.C. § 922(g)(1), *United States v. Lopez,* 514 U.S. 549, 559, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Supreme Court held that a version of § 922(q), the Gun-Free School Zones Act of 1990, violated the Commerce Clause because it did not limit the offense to situations substantially affecting interstate commerce. *Id.* at 561, 115 S. Ct. at 1630-31. In particular, *Lopez* emphasized that § 922(q) "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." *Id.* at 561, 115 S. Ct. at 1631.

In 2000, the Supreme Court struck down certain provisions of the Violence Against Women Act as unconstitutional for exceeding Congress's authority under the Commerce Clause. *United States v. Morrison*, 529 U.S. at 605, 613, 617, 120 S. Ct. at 1747, 1751-52, 1754 (2000).

Although *Morrison* involved a different statute, *Morrison* discussed the *Lopez* decision, its reasoning, and its labeling of the "link between gun possession and a substantial effect on interstate commerce" as attenuated. *Id.* at 609-14, 120 S. Ct. at 1749-52; see also *United States v. Pappadopoulos*, 64 F.3d at 527 (Court reversed the arson conviction because of insufficient federal jurisdictional grounds where the only interstate commerce was that the home received natural gas from a company that received some of its natural gas from an out-of-state source) *Id.* at 924; see *Bond v. United States*, 572 U.S. 844, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014) (Statute prohibiting the possession or use of "any chemical weapon" didn't apply to "an amateur attempt by a jilted wife to [use two chemicals to] injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water.") *Id.* at 848; *United States v. Polanco,* 93 F.3d 555, 563 (9th Cir. 1996) (holding that a jurisdictional element "requiring the government to prove

that the defendant shipped, transported, or possessed a firearm in interstate commerce, or received a firearm that had been shipped or transported in interstate commerce . . . insures, on a case-by-case basis, that a defendant's actions implicate interstate commerce to a constitutionally adequate degree.")

E. Cases Hold that Mere Possession of an Item Does Not Affect Interstate Commerce

Cases also hold that mere possession of an item fails to qualify as commercial or economic activity. See also *United States v. Stewart (Stewart II),* 451 F.3d 1071, 1073 (9th Cir. 2006) (stating that possession of machine guns is not an economic activity); *United States v. McCoy*, 323 F.3d 1114, 1131 (9th Cir. 2003) ("simple intrastate possession [of home-grown child pornography] is not, by itself, either commercial or economic in nature").

Courts have not found that mere possession is, itself, an economic activity and mere possession has not been found to be consistent with activities the Supreme Court has found

to be commercial. See, e.g., *Perez v. United States*, 402 U.S. 146, 154, 157, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) (loansharking); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981) (industrial mining); *Lopez*, 514 U.S. at 561) ("'Section 922(q) is not an essential part of a larger regulation of economic activity. . . . It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.'")

In two cases arising under the 1968 Omnibus Crime Control and Safe Streets Act ("1968 Act"), the Supreme Court left open whether, upon appropriate findings and a different statute, Congress could regulate possession of firearms. *United States v. Bass*, 404 U.S. 336, 339, n.4, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971); *Scarborough v. United States,* 431 U.S. 563, 575, n.12, 52 L. Ed. 2d 582, 97 S. Ct.

1963 (1977). The statutory language at issue in those cases made it a criminal offense for a felon "to receive, possess, or transport in commerce or affecting commerce any firearm." 18 U.S.C. § 1202(a)(1) (superseded by Pub. L. 99-308, § 104(b), May 19, 1986, 100 Stat. 459).

Based on the ambiguous language, the *Bass* court held that, in pure possession cases involving firearms, the government had to prove a nexus to commerce. *Bass*, 404 U.S. at 348-49. In *Scarborough*, the Court held that the government could satisfy the nexus requirement by proving that a firearm had at some time traveled in interstate commerce 431 U.S. at 575. The Court also noted that the nexus requirement might not be required if the statute in question clearly indicated Congress' intent to dispense with the nexus requirement. *Id.*; Cf. *United States v. Hanna*, 55 F.3d 1456, 1462 (9th Cir. 1995) (Interstate Commerce connection found because 18 U.S.C. § 922 regulated interstate transportation of firearms; firearm stolen in

Nevada crossed state lines when found in California)

F. The Rule 11 Error Allows Umbay to Withdraw her Guilty Plea

Umbay entered an invalid guilty plea because the guilty plea lacked a sufficient factual basis. Fed. R. Crim. P. 11(b)(3). The prosecution failed to prove an essential element in the indictment, namely, that Umbay's possession of a firearm arose out of or was connected in any way with a commercial transaction. See, *Lopez*, 514 U.S. 549.

In Umbay's case, the factual basis consisted solely of one sentence in the plea agreement that, at some unknown time and place, the firearm had been manufactured outside the State of California. To meet the "interstate commerce" element of the charge under 18 U.S.C. § 922(g)(1), the prosecution inserted the following sentence into the plea:

> Taurus firearms are manufactured outside the state of California, accordingly, the revolver seized from UMBAY had previously traveled in interstate or foreign commerce. (ER-59)

The only information the prosecution had to support its

claim that the firearm had a connection with or affected interstate commerce was an inference that, when Umbay had the gun, "Taurus firearms are manufactured outside the state of California . . ." However, the stipulated facts fail to prove that, when the gun allegedly traveled to California, it had been manufactured outside California.

Even if the Ruger had been manufactured outside California when Umbay possessed the gun, the prosecution failed to prove that, when Umbay acquired the gun, the gun had been manufactured outside California. The single sentence in the plea failed to prove when Umbay's firearm had traveled in interstate commerce from out of some unknown state into California.

If possessing a firearm manufactured in another state affected interstate commerce, almost any ex-felon who possessed a gun would be subject to federal criminal charges. In contrast, an ex-felon who possessed the same gun in the state where the gun was manufactured would commit no

federal crime.

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Given federalism's central role in the Constitution, the Supreme Court has long directed lower courts to presume that they lack jurisdiction. *Turner v. Bank of North Am.*, 4 U.S. 8, 11, 1 L. Ed. 718, 4 Dall. 8, 11 (1799); see also *Pappadopoulos,* 64 F.3d at 528 , rev'd on other grounds by *Jones v. United States,* 529 U.S. 848, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000) ("[Federal courts] must jealously preserve the balance of power between the federal and state governments"); *Kokkonen v. Guardian Life*, 511 U.S. at 377 (burden of establishing that a cause lies within the limited jurisdiction of the federal courts is on the party asserting jurisdiction).

"Under our federal system, the States possess primary authority for defining and enforcing the criminal law. When Congress criminalizes conduct already denounced as

criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561.

Cal. Penal Code § 29800 criminalizes the possession of a firearm by an ex-felon as follows:

> (a) (1) Any person who has been convicted of a felony, . . . and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.

The basic punishment for a felony violation of Cal. Penal Code § 29800 consists of 16 months, or two or three years in the state prison. Cal. Penal Code § 18.

Under Rule 11(b)(3), Umbay's plea should be vacated because her plea lacked a factual basis and her appellate waiver provision cannot be enforced. Umbay's conviction should be vacated because she did not enter into a knowing and voluntary plea; the prosecution never proved a factual basis for the plea.

II. UMBAY PROPERLY APPEALS HER CASE BECAUSE THE DISTRICT COURT ADVISED HER THAT SHE COULD APPEAL

A. Introduction

Umbay pleaded guilty to one count of ex-felon in possession of a firearm. Her plea agreement included a waiver of her appeal rights. (ER-56)But, her waiver cannot be enforced because the district court advised her that she could appeal. Her appeal is properly before this Court.

B. The District Court Must Correctly Advise a Defendant of the Right to Appeal

Where a district court advises a defendant of her right to appeal, and the government does not object, the government loses its right to enforce an appellate waiver, as the defendant "could have no reason but to believe that the court's advice on the right to appeal was correct." *United States v. Buchanan,* 59 F.3d 914, 917-18 (9th Cir. 1995).

This exception applies when the district court advises a defendant that he has a right to appeal "unequivocally, clearly, and without qualification," and the government does

not object. *United States v. Arias-Espinosa*, 704 F.3d 616, 619-20 (9th Cir. 2012).

C. The District Court Told Umbay that She Could Appeal Her Conviction and Sentence

After Umbay entered her plea, the district court advised her that she had appellate rights. The district court told Umbay:

> THE COURT: Ms. Umbay, *you do have a right to appeal from your conviction if you believe that your guilty plea was somehow unlawful, or involuntary, or if there's some other defect in the proceedings that was not waived by your plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law.*
>
> A defendant may waive those rights as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable. *But if you believe a waiver is unenforceable, you can present that argument to the appellate court.* With few exceptions, any notice of appeal must be filed within 14 days of judgment being entered in your case. If you cannot afford the costs of an appeal, you will be permitted to proceed without the payment of costs. If you cannot afford counsel, one will be appointed to represent you. If you request it, the clerk of the court will prepare and file the notice of appeal on your behalf. (ER-30)

(Italics added.)

The district court told Umbay that she could appeal her conviction and sentence if she believed she entered a defective plea. (ER-30) Umbay appealed because, based on the district court's representation, Umbay believed she could appeal. (ER-67) Umbay believed she entered an invalid plea because the plea lacked a factual basis and because the district court did not adequately consider her drug addiction as a mitigating factor. (See Arguments I, III) Her appeal is properly before this Court.

III. THE DISTRICT COURT FAILED TO ADEQUATELY CONSIDER UMBAY'S DRUG ADDICTION AS A MITIGATING FACTOR; TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE

A. Introduction

On October 3, 2019, Umbay entered a guilty plea to the single charged offense of ex-felon in possession of a firearm. (ER-10, 33, 50) On March 12, 2020, the district court sentenced Umbay to 70 months in federal prison. (ER-3, 30) The district court relied mostly on Umbay's prior lengthy criminal history most of which involved drug offenses.

The district court imposed an unreasonable sentence by failing to adequately consider Umbay's addiction to drugs. Trial counsel rendered ineffective assistance by failing to raise the issue at sentencing. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

B. Standard of Review

Appellate courts review sentencing decisions for an abuse of discretion, "[r]egardless of whether the sentence

imposed is inside or outside the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). An appellate court must "ensure that the district court committed no significant procedural error, such as . . . selecting a sentence based on clearly erroneous facts." *Id.*

C. The Law Requires District Courts to Impose a Reasonable Sentence 18 U.S. C. § 3553(a)

"A substantively reasonable sentence is one that is 'sufficient, but not greater than necessary' to accomplish § 3553(a)(2)'s sentencing goals."[1] *United States v. Crowe,* 563

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[1]In part, 18 U.S. C. § 3553(a) provides: (a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--¶ (1) the nature and circumstances of the offense and the history and characteristics of the defendant;¶ (2) the need for the sentence imposed-- ¶(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;¶ (B) to afford adequate deterrence to criminal conduct;¶ C) to protect the public from further crimes of the defendant; and ¶ (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most

F.3d 969, 977 n.16 (9th Cir. 2009)

"The touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553 (a)." *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (quoting *United States v. Grier*, 475 F.3d 556, 571 (3d Cir. 2007) (en banc)); see also *United States v. Ellis,* 641 F.3d 411, 423 (9th Cir. 2011),

Even though the Sentencing Guidelines are only advisory, district courts must use the Guidelines as the "starting point" for determining a sentence. See, e.g., *Gall v. United States,* 552 U.S. at 49. While the district court may impose a sentence outside the Guidelines range, "it may not manipulate the calculations under the Sentencing Guidelines in order to produce a Guidelines range that will allow it to impose the sentence it prefers." *United States v. Lee,* 725 F.3d 1159, 1164 (9th Cir. 2013).

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effective manner[.] 3553(a)).

D. Drug Addiction Requires Treatment Not Incarceration

The Career Offender guideline as applied to low-level, non-violent drug addicts fails to recognize that drug treatment works to rehabilitate offenders and thus reduce recidivism. See, e.g., Nat'l Institute on Drug Abuse, Nat'l Institutes of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations* (2006) ("[T]reatment offers the best alternative for interrupting the drug abuse/criminal justice cycle for offenders with drug abuse problems. . . . Drug abuse treatment is cost effective in reducing drug use and bringing about associated healthcare, crime, and incarceration cost savings" because every dollar spent toward effective treatment programs yields a four to seven dollar return in reduced drug-related crime, criminal costs and theft.).

"[S]tatistics suggest that the rate of recidivism is less for drug offenders who receive treatment while in prison or jail, and still less for those treated outside of a prison

setting." *United States v. Perella,* 273 F. Supp. 2d 162, 164 (D. Mass. 2003) (citing Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217, 1220 (2002)); see Elizabeth K. Drake, Steve Aos, & Marna G. Miller, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, tbl.1 (2009) (finding that treatment-oriented intensive supervision reduced recidivism by 17.9%; drug treatment in prison reduced recidivism by 6.4%; drug treatment in the community reduced recidivism by 8.3%); see also *United States v. Matheny*, 450 F.3d 633, 641 (6th Cir. 2006) (tacitly approving the sentencing court's statement "that it considered, pursuant to § 3553(a)(1), the fact that Matheny had his drug addiction since childhood"); *United States v. Maier*, 975 F.2d 944, 945 (2d Cir.1992) (affirming departure where defendant's "efforts toward rehabilitation followed an uneven course, not a surprising result for someone with a fourteen year history of addiction")

E. A District Court Should Consider the Personal Characteristics of the Offender

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996). Courts impose the punishment that "fit[s] the offender and not merely the crime." *Pepper v. United States*, 562 U.S. 476, 487-88, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011) (quoting *Williams v. New York,* 337 U.S. 241, 247, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949)). The court must sentence the individual who appears before it on that day. *Pepper*, 562 U.S. at 492 (quoting *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000)). Therefore, "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life

and characteristics." *Pepper*, 562 U.S. at 488 (quoting *Williams,* 337 U.S. at 247).

"Retribution is a legitimate reason to punish . . . [b]ut 'the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'" *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (quoting *Tison v. Arizona,* 481 U.S. 137, 149, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)). "While '[t]he initial decision to take drugs is mostly voluntary . . . when drug abuse takes over, a person's ability to exert self control can become seriously impaired.' . . . Stated plainly, addiction biologically robs drug abusers of their judgment, causing them to act impulsively and ignore the future consequences of their actions." *United States v. Hendrickson*, 25 F. Supp. 3d 1166, 1172-73 (N.D. Iowa 2014) (quoting Nora D. Volkow, Preface to National Institute on Drug Abuse, *Drugs, Brains, and Behavior: The Science of Addiction 1* (2010),

http://www.drugabuse.gov/sites/default/files/sciofaddiction.pdf).

F. The District Court Failed to Adequately Consider Umbay's Drug Addiction As a Mitigating Factor

The district court failed to afford weight to mitigating factors, particularly Umbay's drug abuse that he considered to be a mitigating factor. Umbay suffered from drug addiction nearly all her life. At 13 years old, Umbay started using drugs. Throughout her life, she used drugs including PCP, ecstasy, cocaine, and methamphetamine. (PSR-SM-29 ¶72) Methamphetamine has "always been a problem for her." (PSR-SM-29 ¶72) She tried several drug programs while in prison, but they evidently did not work for her. (PSR-SM-29 ¶72)

Most of Umbay's criminal history involved drug offenses. In 1996, at age 21, she suffered a felony conviction for illegally possessing a drug for sale and served three years in prison. (PSR-SM-21 ¶36) In 1997, she possessed an illegal

drug that resulted in a 16 month prison term. (PSR-SM-21 ¶37) In 2006, at age 30, she illegally possessed methamphetamine and served eight months in prison. (PSR-SM-22 ¶39) At age 33 she was found with methamphetamine in her body cavity. (PSR-SM-22 ¶41) She committed drug related offenses through 2013. (PSR-SM-23-24¶¶42-45)

In the Information, the prosecution alleged that Umbay suffered four prior drug convictions for which Umbay served prison time: "¶2. Possession of a controlled substance for sale in violation of California Health and Safety Code Section 11378, on or about May 31, 2006, in Yolo County, California;¶ 3. Transportation of a controlled substance in violation of California Health and Safety Code Section 11379, on or about May 31, 2006, in Yolo County, California; ¶ 4. Possession of a controlled substance for sale in violation of California Health and Safety Code Section 11378, on or about April 3, 2012, in Yolo County, California; and ¶5.

Possession of a controlled substance for sale in violation of California Health and Safety Code Section 11378, on or about June 5, 2013, in Yolo County, California." (ER-60-61)

At sentencing, the district court acknowledged that Umbay suffered from addiction to drugs but focused on her resulting criminal record. At sentencing, the district court stated:

> THE COURT: Defendant admits that she has long suffered from drug addiction and that she began drug use at age 13. (ER-19)
>
> * * *
>
> THE COURT: Defendant has never married and has five children. Defendant states that she has participated in some drug treatment in 2001, 2004 and 2008, and she would like to participate in the Bureau of Prisons 500-hour RDAP program. (ER-20)
>
> * * *
>
> THE COURT: Defendant has a lengthy criminal history, as I indicated that includes multiple felony convictions and violations for controlled substances, including violations of parole which actually result in her serving increased prison sentences.
>
> The Court is also concerned about, as I

> indicated, about her post-arrest conduct while in the Sacramento county jail. And I just want to note several of those things. The defendant was observed while in Sacramento county jail on several occasions – at least eight occasions actually -- manipulating her toilet to utilize the jail sewer system to pass contraband and communicate with other inmates.
>
> In May of 2018, she was actually found with a black tar-like substance that was found to be heroin. In April 2019, she punched and choked another female inmate. In May of 2019, she was found in possession of anti-psychotic medication.
>
> And so it's also clear to the Court, and I think I made it very clear, that the defendant's conduct is just on a continuum. And it appears that, you know, she's failed to, you know, learn anything about being incarcerated. And it's just a continuous pattern of crimes as well as violations.
>
> However, to defendant's credit she has admitted that she has a substance abuse problem, and she has requested help via the RDAP program. (ER-27-28)

Umbay's crimes stem from her years of suffering from drug addiction. She needed treatment, not punishment. She might get into the RDAP program and may get 500 hours (62 days) of drug treatment in prison. But based on her past performance in prison drug treatment facilities, she needed more than 500 hours of in-house residential treatment. Her

five year sentence could not cure her addiction to drugs because she needed to learn and commit to strategies to control her addiction and be a productive member of society.

The district court did not give enough consideration to Umbay's lifelong struggle with drugs. Incarceration, as the district court realized, did nothing to help cure her addiction to drugs. Sentencing should provide the defendant with "needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D).

G. Trial Counsel Rendered Ineffective Assistance

Because the district improperly relied on unproven statements in the PSR at sentencing, trial counsel should have objected because, when a defendant raises objections to the PSR, the district court must resolve the factual dispute, and the government bears the burden of proof. The court may not simply rely on the factual statements in the PSR. *United States v. Ameline,* 409 F.3d 1073, 1085-86 (9th Cir.

2005) (en banc); see also Fed. R. Crim. P. 32 (i)(3)(B) (requiring court to rule on disputed matters at sentencing).

To prove trial counsel rendered ineffective assistance, Umbay must prove counsel's performance was: (i) objectively deficient and (ii) prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 687. The *Strickland* test applies to challenges to guilty pleas and plea agreements based on ineffective assistance of counsel claims. *United States v. Jeronimo*, 398 F.3d 1149, 1155 (9th Cir. 2005)

Trial counsel failed to stress Umbay's lifelong dependence on drugs. Prejudice resulted because, as a result of trial counsel's failure to emphasize Umbay's addiction to drugs as a mitigating factor, the district court erroneously imposed a seventy month sentence. *Strickland v. Washington,* 466 U.S. at 691.

CONCLUSION

Umbay respectfully that this Court grant Certiorari.

DATED: January 4, 2022

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

_____

Fay Arfa, Attorney for Appellant

APPENDIX

NOT FOR PUBLICATION

FILED

OCT 8 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERICA UMBAY, Defendant-Appellant.	No. 20-10124 D.C. Nos. 2:17-cr-00219-TLN-1 2:17-cr-00219-TLN MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted October 6, 2021**
San Francisco, California

Before: THOMAS, Chief Judge, and HAWKINS and FRIEDLAND, Circuit Judges.

Defendant Erica Umbay appeals her conviction for being a felon in possession of a firearm following her guilty plea to the charge. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

APPENDIX

Umbay's appeal is barred by the express terms of her plea agreement, where she agreed "to give up the right to appeal any aspect of the guilty plea, the conviction, and the sentence imposed in this case." At the plea colloquy, the court confirmed with Umbay that she was waiving her "right to collaterally attack or appeal all or any part of this plea, conviction, and/or sentencing" and Umbay indicated she understood. The district court found that her appellate waiver was knowingly and voluntarily made, consistent with Rule 11(b) of the Federal Rules of Criminal Procedure. *See United States v. Portillo-Cano*, 192 F.3d 1246, 1250 (9th Cir. 1999). The appeal waiver must therefore be enforced. *See United States v. Nunez*, 223 F.3d 956, 958–59 (9th Cir. 2000).

Nor did the court's later advisement at sentencing undermine the clarity of her waiver. The court correctly informed Umbay that there is a general right to appeal a guilty plea conviction if it were unlawful or involuntary or if some other defect in the proceedings existed, but reiterated that a defendant can waive those rights, and reminded Umbay that she had "entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable." *See United States v. Aguilar-Muniz*, 156 F.3d 974, 977 (9th Cir. 1988) (approving similar advisement).[1]

[1] In any event, Umbay's plea agreement had a sufficient factual basis. Fed. R. Crim. P. 11(b)(3); *United States v. Younger*, 398 F.3d 1179, 1193 (9th Cir. 2005)

AFFIRMED.

(finding sufficient connection to interstate commerce where defendant's gun was manufactured in Massachusetts and found in defendant's possession in California).

APPENDIX