

APPENDIX A

United States Court of Appeals  
for the Fifth Circuit

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No. 21-40325  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**  
January 12, 2022

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

FREDDIE GALAN,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 7:20-CR-1266-1

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Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:\*

Freddie Galan challenges his guilty-plea conviction for conspiring with intent to distribute 500 grams or more of methamphetamine. He primarily contends that the factual basis was not sufficient under Federal Rule of Criminal Procedure 11(b)(3) to support his conviction.

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 21-40325

Because Galan raises his challenge for the first time on appeal, we review for plain error, “examining the entire record for facts supporting the guilty plea and drawing reasonable inferences from those facts to determine whether the conduct to which the defendant admits satisfies the elements of the offense charged.” *United States v. Escajeda*, 8 F.4th 423, 426 (5th Cir. 2021). We may consider, *inter alia*, the facts contained in the plea colloquy, the presentence report (PSR), and the sentencing hearing. *United States v. Barton*, 879 F.3d 595, 599 (5th Cir. 2018).

Contrary to Galan’s contentions, his plea colloquy and the PSR establish that the conspiracy at issue predated the cooperation of co-conspirator Jesus Mares with the Government. *See United States v. Asibor*, 109 F.3d 1023, 1032 (5th Cir. 1997) (observing that an individual who eventually cooperates with Government “may have been a part of the continuing conspiracy prior to becoming an informer”). The PSR likewise describes communications, contained on Galan’s cell phone, between Galan and an unidentified individual with a Mexico-based phone number discussing an apparent narcotics operation. *See Escajeda*, 8 F.4th at 427 (observing that defendant can be convicted of conspiring with individual whose name is unknown). Finally, the large quantity of drugs at issue—approximately 70 kilograms of methamphetamine—provides strong circumstantial evidence from which the existence of the conspiracy may be inferred. *See id.* Galan fails to show plain error. *See id.* at 426; *Barton*, 879 F.3d at 599.

Because Galan’s challenges to the voluntariness of his plea and the effectiveness of his trial counsel are both premised upon his meritless factual-basis contentions, those remaining claims likewise fail. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) (holding that counsel cannot render ineffective assistance by failing to raise meritless claim).

The judgment of the district court is AFFIRMED.

APPENDIX B

United States Court of Appeals  
for the Fifth Circuit

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No. 21-40325

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United States of America,

*Plaintiff—Appellee,*

*versus*

Freddie Galan,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 7:20-CR-1266-1

---

ON PETITION FOR REHEARING EN BANC

Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX C  
Case No. 21-40325

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

FREDDIE GALAN,

Defendant – Appellant

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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

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BRIEF FOR APPELLANT

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**CERTIFICATE OF INTERESTED PERSONS**

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

No. 21-40325

FREDDIE GALAN,  
Defendant-Appellant.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America.
2. Freddie Galan.

s/ Derly Joel Uribe

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REQUEST FOR ORAL ARGUMENT

Defendant-Appellant, FREDDIE GALAN, requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 34.2.

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**STATEMENT OF JURISDICTION**

**1. Subject Matter Jurisdiction in the District Court.** This case arose from the prosecution of alleged offenses against the laws of the United States. The district court exercised jurisdiction under 18 U.S.C. § 3231.

**2. Jurisdiction in the Court of Appeals.** This is a direct appeal from a final decision of the United States District Court for the Southern District of Texas, entering judgment of criminal conviction. This Court has jurisdiction of the appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Under Federal Rule of Appellate Procedure 4(b), a criminal defendant who wishes to appeal a district court judgment must file notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or a notice of appeal by the Government. Under Federal Rule of Appellate Procedure 4(b), a criminal defendant who wishes to appeal a district court judgment must file notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or a notice of appeal by the Government. The district court signed the judgment on May 14, 2021. Since Galan's notice of appeal was filed on April 21, 2021, after the sentence was imposed at the April 8, 2021 sentencing hearing, but before the district court signed said judgment, this appeal is therefore timely.

**STATEMENT OF THE ISSUES**

1. Is the undisputed factual basis sufficient as a matter of law to sustain Mr. Galan's guilty plea?
2. Did Mr. Galan plead guilty in violation of the Due Process Clause of the Fifth Amendment because his guilty plea was not made on a knowing and voluntary basis?
3. Did Mr. Galan plead guilty in violation of his Sixth Amendment right to receive effective assistance of counsel?

**STATEMENT OF THE CASE<sup>1</sup>**

**A. Proceedings Below.**

On August 11, 2020, the Grand Jury filed an indictment against Mr. Galan and two others alleging two counts. ROA.23-24 Said indictment charges a conspiracy (Count One) and a possession of a controlled substance counts (Count Two) alleging that Mr. Galan knowingly conspired to possess with intent to distribute and possessed with intent to distribute 500 grams and more of a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 846, 841(a)(1), 841(b)(1)(A), and 18 U.S.C. §2. ROA.23-24.

Mr. Galan and the government entered into a written plea agreement on December 2, 2020. ROA.162-163. On January 5, 2021, Mr. Galan plead guilty to Count One of the indictment, the conspiracy count. ROA.98. On April 8, 2021, the district court sentenced Mr. Galan to: three hundred twenty-four months (324); a mandatory special assessment of \$100; and a five year term of supervised release with specified conditions. ROA.79-84 [judgment]; ROA.159-160 [transcript of oral pronouncement of sentence]. On April 21, 2021, Mr. Galan filed his timely notice of appeal. ROA.56. This appeal followed.

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<sup>1</sup> References to the Record on Appeal are made as "ROA. [page number]." The presentence report ("PSR") is referenced in the following manner: PSR, ¶ [paragraph number].

B. Statement of the Facts.

After Mr. Galan plead guilty, the Probation Office scored him at Level 43 and recommended a guideline sentencing range of 360 months to life. ROA.221, PSR ¶ 73. Other facts relevant to this appeal are set forth in the Argument section below.

SUMMARY OF THE ARGUMENT

An agreement between a defendant and a government informant is not a conspiracy offense as a matter of law. The factual basis Mr. Galan admitted to does not establish that he committed a conspiracy offense because it provides that the agreement that is the basis of the alleged conspiracy is between him and Jesus Mares, a government informant. Mr. Galan plead guilty not knowing that his admitted conduct does not establish that he committed a conspiracy offense. Mr. Galan argues on appeal that his guilty plea should be vacated because the district court erred in accepting an insufficient factual basis. Mr. Galan further argues on appeal that his guilty plea was void and unconstitutional because his guilty plea was made on an unintelligent and involuntary basis in violation of the Fifth Amendment's due process clause, and it was also made in violation of the Sixth Amendment because he received ineffective assistance of counsel.

## ARGUMENT

### **I. The undisputed factual basis is insufficient as a matter of law to sustain Mr. Galan's guilty plea.**

#### **A. The *de novo* standard of review should be held to apply.**

Mr. Galan stipulates that he is objecting to the factual basis for the first time on appeal. However, he maintains that he did not have an opportunity to object to the factual basis at his re-arrainment hearing because he did not know, and his trial counsel did not advise him that the factual basis the Government read into the record does not constitute the crime of conspiracy as a matter of law. Mr. Galan maintains on appeal that in light of this Court's holdings in *U.S. v. Grogan*, 977 F.3d 348, 352 (5<sup>th</sup> Cir. 2020) and *U.S. v. Diggles*, 957 F.3d 551, 560 (5<sup>th</sup> Cir. 2020), he should not be prejudiced on appeal due to his ignorance of the law with the more deferential plain error standard of review. Mr. Galan argues on appeal that the *de novo* standard of review should be held to apply since that standard applies to determining questions of law including whether the admitted factual basis constitutes the crime of conspiracy. *United States v. Pleitez*, 876 F.3d 150, 157 (5<sup>th</sup> Cir. 2017) (Questions of law are reviewed *de novo*); *see also United States v. Tilford*, 810 F.3d 370, 371 (5<sup>th</sup> Cir. 2016). (Conclusions of law are reviewed *de novo*).

Mr. Galan argues, in the alternative, that the plain error standard of review

applies since his trial counsel failed to recognize and object that the undisputed factual basis is insufficient as a matter of law to sustain his guilty plea to a conspiracy offense. *United States v. Johnson*, 194 F.3d 657, 660 (5<sup>th</sup> Cir. 1999). The plain error standard of review requires (1) an error (2) that is plain and (3) affects the defendant's substantial rights. *Puckett v. United States*, 129 S.Ct. 1423, 1429 (2009). If these three requirements are met, then the Court of Appeals may, in its discretion, correct the error if failure to do so would seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

**B. The factual basis is insufficient to establish a conspiracy offense because a government informant cannot be a party to a conspiracy.**

A trial court cannot enter judgment on a guilty plea unless it determines a factual basis for the plea exists. Fed. R. Crim. P. 11(b)(3). The purpose of this requirement "is to protect a defendant who may plead with an understanding of the nature of the charge, but 'without realizing that his conduct does not actually fall within the definition of the crime charged.'" *United States v. Oberski*, 734 F.2d 1030, 1031 (5<sup>th</sup> Cir. 1984) (quoting *United States v. Johnson*, 546 F.2d 1225, 1226-27 (5<sup>th</sup> Cir. 1977)). In addition, the "factual basis must appear in the record and must be sufficiently specific to allow the court to determine that the defendant's conduct was 'within the ambit of that defined as criminal.'" *United States v. Johnson*, 194 F.3d at

660 (quoting *United States v. Oberski*, 734 F.2d at 1031).

This requirement “is designed to ‘protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.’” *McCarthy v. United States*, 394 U.S. at 467; *United States v. Castro-Treviño*, 464 F.3d 536, 540 (5<sup>th</sup> Cir. 2006). In carrying out this requirement, “[t]he district court must compare ‘(1) the conduct to which the defendant admits with (2) the elements of the offense charged in the indictment....’” *United States v. Hildebrand*, 527 F.3d at 474-75 (quoting *United States v. Marek*, 238 F.3d 310, 315 (5<sup>th</sup> Cir. 2001)(en banc).

Mr. Galan was charged with conspiring with Jesus Mares and Frankie Miguel-Galan, III in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(A) as follows:

[Mr. Galan] did knowingly and intentionally conspire and agree together and with other persons known and unknown to the Grand Jurors, to possess with intent to distribute a controlled substance. The controlled substance involved was 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance

ROA.23, 98, 162-163. The elements of a conspiracy to distribute narcotics are the following for the Government to establish: “(1) the existence of an agreement between two or more persons to violate narcotics laws; (2) the defendant’s knowledge

of the conspiracy, and (3) the defendant's voluntary participation in the conspiracy.”

*United States v. Jones*, 969 F.3d 192, 196 (5<sup>th</sup> Cir. 2020).

The factual basis the Government read into the record and the colloquy among the district court and Mr. Galan is as follows:

The Defendant Freddie Galan entered into an agreement with Jesus Mares and others to possess with intent to distribute narcotics. On July 21, 2020, Jesus Mares was apprehended by law enforcement in possession of approximately 70 kilograms of methamphetamine. After he was apprehended Jesus Mares agreed to make phone calls to other co-conspirators. He called Freddie Galan and told him that he had eluded law enforcement and that he still had the narcotics.

In the recorded phone call Freddie Galan advised Mares to take the narcotics to the shop located near the town of Los Carreras (phonetic) and Highway 83 and to conceal the narcotics in a bush located on the rear of the property and that he would send Junior to pick up Mares and pay him. Frankie Galan later showed up at the location to pick up the narcotics. Mr. Galan knew what he was doing was wrong, but, nonetheless, persisted in doing it.

THE COURT: Mr. Galan, do you agree with what the Government stated?

DEFENDANT GALAN: Um, yes.

THE COURT: Okay. I see some hesitation, so do you think that there is something that is not correct, Mr. Galan?

DEFENDANT GALAN: I have to speak to my lawyer.

ROA.98-99. Since the district court observed Mr. Galan to be hesitant in agreeing to the factual basis the Government read into the record, the district court allowed Mr.

Galan to privately confer with his attorney. ROA.99-100. After Mr. Galan privately conferred with his attorney, the district court asked Mr. Galan specific questions in light of the hesitancy the district court observed Mr. Galan had demonstrated agreeing to the factual basis and the following colloquy between them took place:

**THE COURT:** So you, I assume, did not know that Mr. Mares was cooperating with law enforcement. But you got a call from Mr. Mares and in that call he indicates to you that he got away from law enforcement and that he still has the drugs with him. Is that correct?

**DEFENDANT GALAN:** Yes ma'am.

**THE COURT:** And you then gave him instructions to go to this particular place and there that he would put the drugs someplace to be later picked up by somebody identified as Junior. Is that also correct?

**DEFENDANT GALAN:** Yes ma'am.

**THE COURT:** And you understood that he was calling you about these drugs that he had that some way or other you were involved with. Is that also correct?

**DEFENDANT GALAN:** Yes ma'am.

**THE COURT:** And you understood that he would be taking those drugs to this shop that you, you know, directed him to, to be picked up by somebody else. Is that also correct?

**DEFENDANT GALAN:** Yes ma'am.

**THE COURT:** And this is something that you were doing by agreement with Mr. Mares and/or others. Is that also correct?

**DEFENDANT GALAN:** Yes ma'am.

ROA.101-102

The factual basis the Government read into the record and responses to the specific questions the district court posed to Mr. Galan make it abundantly clear that the only parties to the alleged conspiracy are Mr. Galan and Mares, a government informant. The factual basis is insufficient as a matter of law because “there can be no conspiracy between one defendant [Mr. Galan] and a government informant [Mr. Mares].” *United States v. Manotas-Mejia*, 824 F.2d 360, 365 (5<sup>th</sup> Cir. 1987). The last question the district court posed attempting to establish a conspiracy between Mr. Galan and Mares “and/or others” reinforces the point—since an affirmative answer to the question makes the “conspiracy” exclusively between Mr. Galan and Mares a true statement. There is also an absence of evidence that anyone other than Mr. Galan and Mr. Mares had knowledge of or voluntarily participated in the purported conspiracy including Frankie Galan, the person sent to retrieve and pay for the narcotics.

In the light most favorable to the Government, the only connection to the alleged conspiracy Frankie Galan had was to retrieve and pay for the narcotics—which does not in any way lead to a reasonable inference that he had knowledge of any alleged conspiracy to distribute the narcotics or voluntarily participated in said alleged conspiracy. Frankie Galan’s mere presence or association with either Mr. Galan or Mares is insufficient as a matter of law to make him a co-conspirator. *See*

*United States v. Ross*, 58 F.3d 154, 159 (5<sup>th</sup> Cir. 1995). Moreover, this Court will not readily infer Frankie Galan's or anyone else's knowledge and decision to join a conspiracy. *Id.* In addition, a buyer-seller relationship, without more, also does not establish a conspiracy. *United States v. Maseratti*, 1 F.3d 330, 336 (5<sup>th</sup> Cir. 1993). For these reasons, this Court should reject any attempt by the Government to reconstruct the legally non-existent conspiracy between Mr. Galan and Mares with someone other than Mares, a government informant, such as Frankie Galan, whose only involvement was as an errand runner or "gofer." The evidence simply does not and cannot support Frankie Galan (or anyone else) as a co-conspirator as a matter of law. Accordingly, the factual basis is insufficient as a matter of law to support the conspiracy conviction against Mr. Galan.

In the event the Court determines the plain error standard of review applies, the conspiracy conviction should still be reversed on appeal. Under a plain error analysis, the first inquiry to determine is whether the district court committed a Rule 11 error that is clear and obvious. *Puckett v. United States*, 129 S.Ct. at 1429 (2009). This Court determines whether an error is plain or obvious "by reference to existing law at the time of appeal." *United States v. Bishop*, 603 F.3d 279, 280 (5<sup>th</sup> Cir. 2010). The law is well established and clear that a conspiracy offense does not exist between a defendant and a government informant. *United States v. Manotas-Mejia*, 824 F.2d at

365. Therefore, the district court undoubtedly committed a clear and obvious error in accepting a factual basis that does not actually establish a conspiracy offense. ROA. 98-102.

The next inquiry to determine is whether the plain error affected Mr. Galan's substantial rights such that there is "a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004). Had Mr. Galan actually understood that reaching an agreement with Mares, a government informant, does not constitute a conspiracy offense, he would not have plead guilty to a crime he did not actually commit and subjected himself to any length of time in prison, much less a twenty-seven year prison sentence, which is the sentence he received. Therefore, it is irrefutable that the district court's error in accepting the legally defective factual basis significantly prejudiced Mr. Galan's substantial rights. *See United States v. Garcia-Paulin*, 627 F.3d 127, 134 (5<sup>th</sup> Cir. 2010). ("We are satisfied that Garcia-Paulin would not have pled guilty to a statutory offense that subjected him to a prison sentence if he had realized that the factual basis relied on by the court and the government to support the conviction on that count failed to show that his conduct violated the statute.")

The final prong of the plain error review is also satisfied. The legal proceedings in this case sanctioned a finding of guilt and the imposition of a significant prison

sentence as a result of erroneous legal conclusion that Mr. Galan committed and engaged in a narcotics conspiracy. If this Court elects not to correct the plain Rule 11 error that clearly and greatly prejudiced Mr. Galan, the federal government would in effect be allowing the continued and wrongful imprisonment of a man who in essence committed no crime. Therefore, the integrity, fairness, and public reputation of both the government and the courts can justifiably be criticized and called into question if such a miscarriage of justice is allowed to stand. Accordingly, the plain-error standard of review has been and should be determined by this Court to be satisfied.

**II. Mr. Galan's guilty plea was not made voluntarily and knowingly.**

**A. The Court's review is *de novo*.**

Voluntariness of a guilty plea is a question of law reviewed *de novo*. *United States v. Reyna*, 120 F.3d 104, 111 (5<sup>th</sup> Cir. 1997). The validity of a guilty plea is reviewed *de novo*. *United States v. Scott*, 857 F.3d 241, 245 (5<sup>th</sup> Cir. 2017); *United States v. Washington*, 480 F.3d 309, 315 (5<sup>th</sup> Cir. 2007) (citing *United States v. Reasor*, 418 F.3d 466, 478 (5<sup>th</sup> Cir. 2005)). Constitutional challenges are also reviewed *de novo*. *United States v. Pleitez*, 876 F.3d at 157.

**B. Mr. Galan's guilty plea was not made knowingly.**

Mr. Galan plead guilty without knowing that his conduct contained in the undisputed factual basis does not establish a conspiracy offense, the crime he was

charged with committing. ROA.98-102. Mr. Galan asserts that his guilty plea should be vacated because had he known that the undisputed factual basis did not establish that he committed a conspiracy offense, he would not have plead guilty. For a guilty plea to be constitutional it must be knowing, intelligent, voluntary, and done with sufficient awareness of the relevant circumstances and likely consequences. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005); *see also United States v. Washington*, 480 F.3d 309, 315 (5<sup>th</sup> Cir. 2007).

An involuntary and unintelligent guilty plea is a violation of due process and is void. *Matthew v. Johnson*, 201 F.3d 353, 364 (5<sup>th</sup> Cir. 2000) citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Since even the district court erred in determining that the factual basis sufficiently establishes a conspiracy offense, it is grossly unfair to expect Mr. Galan to have known better or more than the district court. Accordingly, Mr. Galan's guilty plea should be vacated on the basis that his unknowing, unconstitutional, and void guilty plea was made in violation of the due process clause.

### **III. Mr. Galan received ineffective assistance of counsel.**

#### **A. The Court's review is *de novo*.**

Ineffective assistance of counsel is a basis for invalidating a conviction under the Sixth Amendment, which is a constitutional challenge. *United States v. Urias-*

*Marrufo*, 744 F.3d 361, 365 (5<sup>th</sup> Cir. 2014). Constitutional challenges are reviewed *de novo*. *United States v. Pleitez*, 876 F.3d at 157 (5<sup>th</sup> Cir. 2017).

**B. Mr. Galan received ineffective assistance of counsel.**

Mr. Galan contends on appeal that his guilty plea should be invalidated because his trial counsel should have objected to the factual basis on the basis that an agreement between him and Mares, a government informant, does not constitute a conspiracy offense. Mr. Galan's trial counsel's failure to so object constitutes ineffective assistance of counsel, and his trial counsel's failure to so object also caused him to make an unintelligent and involuntary guilty plea. A guilty plea generally waives all nonjurisdictional defects in the proceedings against a defendant, and a claim of ineffective assistance of counsel is considered a nonjurisdictional defect. *United States v. Glinsey*, 209 F.3d 386, 392 (5<sup>th</sup> Cir. 2000). However, an exception exists with respect to ineffective assistance of counsel claims alleged to have rendered a guilty plea involuntary. *Id.* Mr. Galan satisfies the exception because he is asserting on appeal that his guilty plea was rendered involuntary because he did not know and his trial counsel did not advise him that he was pleading guilty based on facts that do not establish he engaged in a conspiracy as a matter of law.

The elements of an ineffective assistance of counsel claim are: (1) counsel's performance was deficient in that it fell below an objective standard of

reasonableness; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 689-94 (1984); *United States v. Glinsey*, 209 F.3d at 392. With respect to guilty pleas, prejudice is established if the conduct that constitutes ineffective assistance of counsel affected the outcome of the plea process. *United States v. Glinsey*, 209 F.3d at 392 (*citing Hill v. Lockhart* 474 U.S. 52, 59 (1985)). In this connection, appellant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.*

It is well settled conspiracy law that an agreement between a defendant and a government informant does not constitute a conspiracy as a matter of law. *United States v. Manotas-Mejia*, 824 F.2d at 365. It therefore is not unreasonable for a defendant in the position of Mr. Galan to expect a reasonably prudent attorney to know well-settled conspiracy law and advise him whether the factual basis in support of his guilty plea actually constitutes the crime he is pleading guilty to committing. Because a reasonably prudent attorney should have known and be able to advise his client that an agreement with a government informant cannot constitute a conspiracy offense, and a defendant should be able to rely on his trial counsel to advise him whether the specific conduct at issue actually constitutes the crime he is pleading guilty to, Mr. Galan’s trial counsel’s deficient performance in failing to advise him

in this regard, clearly falls below an objective standard of reasonableness. Therefore, Mr. Galan has satisfied the first element.

With respect to the second element, had Mr. Galan been properly advised of the legally defective factual basis, he would not have plead guilty to a crime that his admitted conduct does not establish he actually committed, and he would have insisted on going to trial. The whole point of having legal counsel is to advise and guide a lay person whether his conduct at issue violates the law. It is irrefutable that Mr. Galan's guilty plea was clearly affected by his trial counsel's ineffectiveness. Moreover, Mr. Galan's guilty plea was thus made unintelligently—essentially as if he had no legal counsel to advise him. Therefore, Mr. Galan has also satisfied the second element of his ineffective assistance of counsel ground.

Mr. Galan recognizes that this Court ordinarily reviews ineffective assistance of counsel claims on direct appeal "only in rare cases where the record allowed [the Court] to evaluate fairly the merits of the claim." *United States v. Glinsey*, 209 F.3d at 392, quoting *United States v. Higdon*, 832 F2d 312, 314 (5<sup>th</sup> Cir. 1987). Mr. Galan asserts that the case at bar is such a rare case because the record is sufficiently developed for this Court to make a judgment on direct appeal with respect to Mr. Galan's ineffective of counsel claim. The record establishes the following irrefutable points: Mr. Galan's admitted conduct contained in the factual basis supports an

agreement only between Mr. Galan and Mares, a government informant—which, as a matter of law, is not a conspiracy offense; Mr. Galan plead guilty to conspiracy based on a factual basis that clearly establishes he is not guilty of a conspiracy offense. A Court based on this sufficiently developed record can and should (for purposes of judicial economy) make a judgment that Mr. Galan’s trial counsel’s failure to advise him not to plead guilty to a crime his admitted conduct shows he did not actually commit constitutes ineffective assistance of counsel.

**CONCLUSION**

FOR THESE REASONS, the Court should reverse the district court’s judgment and remand with directions that a judgment of acquittal be entered. In the alternative, the Court should reverse the district court’s judgment and remand for a re-trial and for any and all other relief the Court deems appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing document was served on the U.S. Attorney's Office via ECM electronic mail on July 27, 2021 to those attorneys receiving service via ECM automatically. I further hereby certify that a copy of the above and foregoing document was served to the below named defendant at the below stated address via certified mail, return receipt requested:

Freddie Galan Register #17949-579  
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Three Rivers, TX 78071

s/Derly Joel Uribe  
Derly Joel Uribe

**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,123 number of words or less, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect Office X5 in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

s/Derly Joel Uribe  
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Dated: July 27, 2021