No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MELVIN MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of the reduced reliability of virtual procedures employed during the pre-vaccine period of the COVID-19 pandemic, was the "reasonable probability of prejudice" showing required for plain error review of plea hearing defects met where petitioner, prior to being sentenced, informed the district court of the involuntariness of the plea, the inaccuracy of the factual basis, and petitioner's inability to consult effectively with counsel?

INTERESTED PARTIES

The caption contains the names of all of the parties interested in the proceedings.

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PETITION FOR WRIT OF CERTIORARI

Melvin Martinez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number No. 21-10261 on March 21, 2022.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, unpublished and available at 2022 WL 834796, is contained in the Appendix (App. 1).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the following constitutional and statutory provisions:

U.S. Const. amend. V (due process clause):

> No person shall be ... shall ... be deprived of life, liberty, or property, without due process of law.

Fed. R. Crim. P. 11(b)(1)

> (b) Considering and Accepting a Guilty or Nolo Contendere Plea.
>
> (1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel–and if necessary have the court appoint counsel–at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

Fed. R. Crim. P. 11(h)

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

STATEMENT OF THE CASE

On December 16, 2019, petitioner Melvin Martinez, who was just 20 years old, was charged with one count of carjacking in violation of 18 U.S.C. § 2119. The indictment referenced the aiding and abetting theory of liability under 18 U.S.C. § 2. Two months later, on March 13, 2020, the first of many administrative orders concerning COVID-19 was issued by the Chief Judge of the Southern District of Florida. Administrative Order 2020-18. The order limited in-court appearances and continued all jury matters. On the same day, the Federal Detention Center in Miami, where petitioner was detained pretrial, suspended all in-person legal visitation. The remainder of proceedings in petitioner's case would be held virtually, and he was unable to meet in person with his attorney from that point on. *See* FDC Miami Update, *available at* https://www.flsd.uscourts.gov/sites/flsd/files/WorkGroupCOVID-19UpdateFDC.pdf (last visited June 5, 2021).

On July 13, 2020, defense counsel signed, on petitioner's behalf, a plea agreement that petitioner had never seen. In the written plea agreement, petitioner agreed to plead guilty to the single count of the indictment. Defense counsel also signed a factual proffer on petitioner's behalf. Petitioner first saw the factual proffer and the plea agreement in late October 2020, three months

after the plea hearing.

The July 13, 2020 change of plea hearing was held virtually using Zoom. Petitioner consented to the virtual hearing solely in order to avoid a two-week isolation quarantine required for pretrial detainees who wished to appear in person. At the hearing, the prosecutor recited the factual proffer and petitioner said he agreed. The district court omitted several components of a plea colloquy under Fed. R. Crim. P. 11, including inquiries into voluntariness and coercion and advice regarding the maximum and minimum financial penalties, the aiding and abetting charge, and the constitutional trial rights petitioner was waiving. The district court did not advise petitioner of either mandatory or discretionary restitution penalties.

Petitioner requested an in-person sentencing hearing, and it was scheduled for December 2020. On the day of the hearing, it was learned that petitioner contracted COVID-19 and could not be brought to court. A month after contracting COVID-19, defendant was sentenced via Zoom on January 14, 2021. In the Zoom proceeding, defense counsel was not present with petitioner; any attempt by petitioner to seek immediate consultation with counsel would require asking the court to stop the proceeding to establish a separate telephone connection to permit attorney-client discussions.

At the sentencing hearing, petitioner spoke on his own behalf. Petitioner explained that he felt taken advantage of when he was approached by FBI agents to sign a search authorization without having counsel present. He felt betrayed by his attorney who waived off her absence at the meeting he had with the FBI "like it was no big deal." Sentencing trans. 32. Petitioner explained that

he thought the search of his phone had been done illegally on the basis of the warrant that he signed without his attorney present—a warrant that was supposed to be for DNA testing only. He also spoke at length about his dissatisfaction with his attorney, stating that if his counsel had gone through his case thoroughly with him, she would have seen that certain parts of the investigation were undertaken illegally. *Id*.

Importantly, petitioner explained to the district court that he never saw the plea agreement or the factual proffer until months after he had entered his plea. Petitioner explained that he was "pressured into a signing a bad plea" and that he was "fooled by [his] own attorney." *Id.* at 31. Petitioner concluded by stating:

> I felt that I needed to talk to a judge or someone I could trust to help me work out this situation. . . .
>
> Your Honor, I'm not stating this because I want to withdraw my plea. My lawyer told me if I was to withdraw my plea, it's only going to hurt me. I just feel that it's important for me to speak the truth of what really happened and have it on record. The truth is, Your Honor, I'm scared. I have been scared not only by the prosecutor and the FBI agent, but also by my public defender into taking a bad plea.

Id. at 32–33.

The district court then engaged petitioner in further discussion, during which petitioner explained that he did not participate in the alleged carjacking despite associating with the assailant and "tampering" with the vehicle. *Id*. at 38. The district court explained to petitioner that he had hurt his position for sentencing because petitioner had made statements inconsistent with acceptance of responsibility.

Petitioner reiterated that if he had been able to see his plea agreement in person, he probably would have wanted to withdraw his plea, but he understood that it was too late to do so at sentencing. When the district court asked petitioner about the statements he made under oath at the plea colloquy, petitioner explained that

> the guilty plea came before I was aware of all this illegal[] stuff that was done in my case and that Plea Agreement and proffer was went through over the phone with me, Your Honor. I didn't have enough time to sit back and really analyze it and see the stuff that was really put into there.

Id. at 37. The issues for petitioner included that he never got to read the plea agreement for himself before the change of plea hearing and was not able to meet with his attorney in person to go through his case comprehensively with her. Petitioner said that he expressed satisfaction with his lawyer at the change of plea hearing because, in July 2020, he did not have much information about his case. He explained that at the time of the plea colloquy, "I'm just going by what my defensive counsel told me. I'm locked down in a room all day. I don't know what's really going on with my case." *Id.* at 39. Between July 2020 and the sentencing hearing, petitioner explained that he had learned much more about the investigation in his case and he stated, "I would have thought my defensive counsel would have seen this way prior to me pleading guilty." *Id.* at 40. With regard to the factual proffer, petitioner stated that the only reason he had agreed to the factual proffer read at the plea hearing was

> because I was told that they were going to supersede an indictment and charge me with extra stuff out of a phone that was never—that was illegally searched. How can you charge me with something that's not even pertaining to this case? Like I stated in the letter, I was scared . . . and I was pressured into taking [the plea].

Id. at 39.

Despite petitioner's comments regarding being pressured into pleading guilty, the district court proceeded with sentencing without giving petitioner leave to obtain conflict-free counsel. The court imposed a sentence of 120 months imprisonment and imposed restitution in the amount of $10,581. Petitioner's counsel then moved to withdraw, in light of the allegations petitioner had made about her representation. The district court granted her motion and appointed him a new attorney for appeal.

Petitioner appealed his conviction to the Eleventh Circuit, contending that the district court's violation of his due process and Fed. R. Crim. P. 11 rights in the plea proceeding—including (1) failure to ascertain whether petitioner's plea was voluntary, (2) failure to advise petitioner of his right to persist in his plea of not guilty, his right to have counsel at trial, and his right to cross-examine witnesses at trial, (3) affirmatively misadvising petitioner regarding restitution, and (4) failure to explain the nature of the aiding and abetting charges—rendered the plea constitutionally defective. Petitioner also claimed that district court erred in failing to continue the Zoom sentencing hearing to assign a new, un-conflicted attorney to petitioner's case.

The Eleventh Circuit ruled that under *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), the plain error review standard applies to plea colloquy errors even if a defendant objects prior to sentencing that his plea was involuntary. App. 4. Applying the plain error standard established in *Dominguez Benitez*, the court of appeals concluded that the district court's adverse evaluation of defendant's claim of involuntariness foreclosed petitioner's claim of a "reasonable

probability" that the plea errors affected the plea decision. App. 6 (noting that at the plea hearing, despite the absence of inquiry by the district court as to whether petitioner was pleading voluntarily, petitioner "did not protest when the district court expressed its finding that" the plea was voluntary). The Eleventh Circuit concluded that the absence of a motion to withdraw the plea meant that petitioner—who blamed his unwillingness to make such a motion on his conflicted counsel's advice that it would result in greater prejudice at sentencing—could not complain about the district court's failure to inquire as to the defendant's need for new counsel or right to proceed pro se. App. 14.

REASONS FOR GRANTING THE PETITION

This Court should determine whether the *Dominguez Benitez* plain error standard, as applied to petitioner's assertion of his claim of an involuntary plea—made prior to imposition of sentence and in the context of the virtual process afforded to petitioner during the pre-vaccine period of the COVID-19 pandemic—required that the court of appeals find that confidence in the proceeding was undermined.

In *United States v. Vonn*, 535 U.S. 55, 59 (2002), the Court held that "a silent defendant has the burden to satisfy the plain-error rule." In *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.6 (2004), the Court explained that "[t]he omission of a single Rule 11 warning without more is not colorably structural." The Court concluded in *Dominguez Benitez* that it was "worth repeating, that the violation claimed was of Rule 11, not of due process." *Id.* at 83.

Petitioner was not silent in the district court. He contended his plea was involuntary and the result of coercive pressure by incompetent counsel whom he could not even meet with face-to-face

prior to plea or sentencing and who pressured him, including by unreasonably asserting that other inapplicable charges could be filed.

The plea errors, both constitutional and rule-based, in petitioner's case were multiple and substantial. In *Dominguez Benitez*, the Court "formulate[d] the standard for determining whether a defendant has shown, as the plain-error standard requires, an effect on his substantial rights." *Id.* at 80. The Court held that, in order to satisfy the third prong of plain error review (namely, whether the error in question affected the defendant's substantial rights), a defendant need only show a reasonable probability that, but for the error, the result of the proceeding would have been different. *See id.* at 83; *see also Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) ("[T]he defendant has the burden of establishing each of the four requirements for plain-error relief.").

"The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Id.* at 83 n.9 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). And "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *see also Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016) ("When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be

sufficient to show a reasonable probability of a different outcome absent the error.").

The court of appeals assumed that the plain error standard of *Dominguez Benitez* applies to due process violations as well as mere Rule 11 violations and thus found no reversible error despite petitioner's claim prior to imposition of sentence that the plea was involuntary, that the virtual processes applied during the COVID-19 pandemic and counsel's failures of consultation impeded his understanding and evaluation of the plea agreement and factual basis that he never saw until months after the plea, and that his factual proffer misstated what he did and thus did not satisfy the aiding and abetting theory on which he was prosecuted.

Petitioner's extended statement prior to imposition of sentence, that the district court acknowledged was inconsistent with the virtually-conducted plea proceeding, created a reasonable probability sufficient to undermine confidence in the plea.

The plea scenario envisioned by the Court in *Dominguez Benitez* is far from what occurred in petitioner's case. First, petitioner did not merely claim a misapprehension of certain plea withdrawal rights as in *Dominguez Benitez*, but claimed a fundamentally flawed plea with an erroneous factual proffer, that petitioner had not seen until months after the plea, and petitioner claimed further that he who did not participate in the offense of conviction as an aider and abettor. Second, the premise underlying plain error review—that a party forfeited an objection—was called into question where defense counsel acknowledged a conflict of interest that required her to withdraw and placed her in an adversarial, rather than representative, status as to petitioner. Third,

all of the proceedings occurred not in a courtroom where the defendant could freely consult with counsel and where each participant could best see, hear, and evaluate the input and nuance of each other's participation, but rather in a virtual format—involving a form of facetime connecting four different locations in a manner that precluded global awareness by petitioner and made it most difficult for him, alone in a jail lockup, to be fully engaged in the process without counsel by his side or at ready telephone access.

The plea colloquy was rife with errors and omissions. The district court failed to address each of the three core concerns underlying Rule 11. First, the district court plainly erred in accepting the plea because it never inquired of petitioner whether his plea was voluntary, thus failing to address the core focus on whether the guilty plea was free from coercion. Another of the core concerns underlying Rule 11, that the defendant know and understand the consequences of his guilty plea, was affected by two additional errors: the district court affirmatively misadvised petitioner as to restitution when it accepted the government's representation that there was no restitution (whether mandatory or discretionary) and failed to advise petitioner of essential trial-process constitutional rights he was giving up by pleading guilty. Lastly, petitioner was never advised of the essential elements of the charge against him, where the record failed to show he had ever received or seen a copy of the indictment, and the record does not indicate that he was aware of the elements of carjacking or aiding and abetting carjacking. Thus, the third core concern underlying Rule 11, that the defendant understand the nature of the charges, was not addressed.

The district court's duty to conduct a thorough plea colloquy was heightened by the fact that the change of plea hearing was held virtually and the district court's ability to assess petitioner's demeanor was reduced. The numerous errors made during the plea colloquy affected substantial rights—a fact evidenced by petitioner's statements at sentencing where he contested the underlying facts of the carjacking charge and complained that defense counsel had coerced him into pleading guilty.

Although petitioner told the district court that he did not want to withdraw his plea, he stated that this decision was based on his belief that it was too late to do so. Under these circumstances, the district court's apparent belief that the sentencing statement by petitioner should be rejected in favor of statements made at the defective plea proceeding and decision not to sua sponte continue the sentencing hearing and assign new counsel to consult with petitioner about whether he wanted to move to withdraw his plea were plainly erroneous and prejudicial and cannot substitute for the evaluation of a reasonable probability of prejudice. "[I]t is not the appellate court's function to determine guilt or innocence." *Kotteakos*, 328 U.S. at 763.

In petitioner's case, the district judge never asked petitioner if his plea was voluntary, did not ask if it resulted from force or threats, and did not ask if anyone had made petitioner any promises beyond those in the plea agreement. The necessity of complying with Rule 11(b)(2) and ascertaining whether petitioner's plea was truly voluntary was heightened by the fact that petitioner was not in court but appearing via video from jail. The district court could not as clearly assess

petitioner's demeanor via video or know whether petitioner was alone in the video conference room.

There is a greater potential for miscommunication and misunderstanding when a hearing is held over Zoom as compared to the controlled environment of the courtroom. As when a defendant is pro se, a district court's plea colloquy must be particularly exacting when a defendant appears by video. Because the district court failed to ascertain whether petitioner's plea was voluntary during the plea colloquy, its conclusion that the guilty plea was freely and voluntarily entered had no basis.

The court of appeals agreed that the district court "did not mention [petitioner']s right to plead not guilty, to continue to be represented by counsel at trial, and to cross-examine adverse witnesses and compel the attendance of witnesses. *See* Fed. R. Crim. P. 11(b)(1)(B), (D), (E)." App. 6–7. Regarding the claim that "the district court failed to ensure that [petitioner']s plea was 'voluntary and did not result from force, threats, or promises' beyond those contained in his plea agreement [as required by] Fed. R. Crim. P. 11(b)(2)," the court of appeals ruled that petitioner's explanation that counsel forced him to plead guilty based on unfounded threats of additional prosecution were of no importance because petitioner's "statement shows only that his counsel provided advice and helped him understand the risks of choosing to plead not guilty." App. 5. The court of appeals also looked to the fait accompli position asserted by petitioner at sentencing—where his counsel told him plea *withdrawal* would present extraordinary penalties—should not have controlled the question of whether confidence in the defective plea was undermined. *See* App. 6.

The district court also conveyed erroneously to petitioner that there would be no mandatory

or discretionary restitution penalty, violating the requirements that the district court inform the defendant of "the court's authority to order restitution," Fed. R. Crim. P. 11(b)(1)(K), and of any mandatory minimum penalty, Fed. R. Crim. P. 11(b)(1)(I). Clearly, the imposition of mandatory penalties of which petitioner was not warned constituted a due process violation.

The district court committed plain error when it failed to describe the nature of the charge, including aiding and abetting liability, to petitioner or to otherwise determine that petitioner had read the indictment and understood the charge to which he was pleading guilty. This core concern is reflected in Rule 11(b)(1)(G), which requires district courts to inform the defendant of "the nature of each charge to which the defendant is pleading." Fed. R. Crim. P. 11(b)(1)(G). In petitioner's case, the word indictment was not even mentioned at his plea hearing, much less was there confirmation that he had read or received a copy of the indictment.

The Court should amplify its decision in *Dominguez Benitez* to clarify that a defendant need not specifically move to withdraw a plea in order to obtain review of plea colloquy errors going to plea voluntariness. And the Court should hold that a reasonable probability of plea error prejudice under *Dominguez Benitez* may be satisfied by a defendant's objection prior to sentencing that the plea was false and involuntary, even if the defendant fails to withdraw the plea.

The circumstances of petitioner's case are ideal for providing assurance that defendants voluntarily waive fundamental rights by pleading guilty. In *McCarthy v. United States*, 394 U.S. 459, 466 (1969), this Court explained how Rule 11 is meant to assure that the plea, which

"simultaneously waives several constitutional rights ... must be 'an intentional relinquishment or abandonment of a known right or privilege.'" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). When a defendant enters a guilty plea, she waives a panoply of constitutional rights. *See Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969). In order for the waiver of rights to be valid and the plea effective, the record must reflect that the defendant entered the plea knowingly and voluntarily. *Boykin,* 395 U.S. at 242–43 & n.5. "'[I]f a defendant's guilty plea is not … voluntary and knowing, it has been obtained in violation of due process and is therefore void.'" *Id*. at 243 n.5 (quoting *McCarthy*, 394 U.S. at 466).

"The purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea." *Mitchell v. United States*, 526 U.S. 314, 322 (1999); *see id*. at 318, 323 (Rule 11(c)(3) directs the district court, before accepting a guilty plea, to ascertain the defendant understands he or she is giving up "the right to be tried by a jury and at that trial ... the right against compelled self-incrimination.").

The Court should grant certiorari to resolve whether the district court's violations of petitioner's due process and Fed. R. Crim. P. 11 rights, evaluated in light of the reduced confidence afforded by virtual proceedings, can meet the test for reversal even where the district court still believes petitioner is guilty.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

RICHARD C. KLUGH, ESQ.
Counsel for Petitioner

Miami, Florida
June 2022

APPENDIX

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-10261

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MELVIN MARTINEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cr-20826-FAM-1

Before JILL PRYOR, NEWSOM, and BRANCH, Circuit Judge.

PER CURIAM:

Melvin Martinez pleaded guilty to and was convicted of carjacking and aiding and abetting carjacking. On appeal, Martinez, for the first time, challenges the knowing and voluntary nature of his guilty plea, as well as the district court's failure to continue his sentencing hearing *sua sponte* to give him time to consult new counsel. He also asserts that his 120-month sentence is substantively unreasonable. We reject each of these arguments and affirm.

I

As detailed in his factual proffer, Martinez and another individual (K.C.) approached a Mercedes-Benz G550 at a gas station one night in October 2019. They "each pointed firearms at the driver," and "demanded that [she] exit the [v]ehicle, which [she] did in fear [for] her life." Martinez then snatched a rather expensive chain from the woman's neck, and his accomplice entered the Mercedes and drove away in the vehicle. A couple of hours later, police recovered the car unoccupied, and determined that two fingerprints on the Mercedes matched those of Martinez. The woman later identified Martinez "as one of the men who pointed a firearm at her at the gas station and took her necklace." Text messages from Martinez's phone also revealed that he was with K.C. when they "lost" the Mercedes, and Martinez explained "that's why we park em to see if [the] feds [are] already on it."

Martinez pleaded guilty to carjacking and aiding and abetting carjacking. After accounting for an acceptance-of-responsibility adjustment, the district court determined—and the parties did not dispute—that the advisory Guidelines range was 57 to 71 months' imprisonment. Before his sentence was imposed, however, Martinez provided a statement. Despite his earlier representations that he was pleased with counsel, Martinez complained that his counsel "pressured" him into signing a bad plea, and he averred that he "really didn't have nothing to do with this carjacking." Further, he claimed that he hadn't seen his written plea until three months after it was entered. Martinez clarified that he did not want to withdraw his plea, but he hoped that the sentencing judge would "take into consideration" the concerns he had raised.

The sentencing judge found that Martinez's statements were "inconsistent with acceptance of responsibility and a show of remorse." On top of that, the judge was troubled by Martinez's lack of appreciation for the seriousness of his offense, as well as a string of thefts in Martinez's past for which he hadn't "really been penalized." Relying most heavily on the need to protect the public, the sentencing judge decided to depart upward from the Guidelines' recommendation—to a sentence of 120 months. He also ordered Martinez to pay $10,581 in restitution for the items stolen during the carjacking, including the necklace.

Martinez's appeal raises three issues. First, he argues that the district court failed to comply with Rule 11. Second, he insists that the district court should have *sua sponte* continued his

sentencing hearing after he complained about his counsel's representation. And third, he contests the substantive reasonableness of his sentence.

II

We turn first to his Rule 11 arguments. Martinez asserts that the district court's plea colloquy was deficient insofar as the court: (1) did not determine that his plea was free from coercion, (2) failed to apprise Martinez that he was waiving certain rights, (3) neglected to advise him that he could be held liable for restitution, and (4) failed to determine whether Martinez understood the nature of the charge against him. Because he "did not assert these Rule 11 violations in the district court, our review is only for plain error." *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1285 (11th Cir. 2015); *see* Fed. R. Crim. P. 52(b). To show plain error, Martinez has the heavy burden of identifying an (1) error, (2) that was obvious or clear, (3) that affected his substantial rights. *Greer v. United States*, 141 S. Ct. 2090, 2096–97 (2021). Only "if the above three prongs are satisfied" do we then have "the discretion to remedy the error—discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (alteration in original) (emphasis omitted) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)). Applying this standard, we conclude that none of Martinez's purported errors entitles him to relief.

A

As to the first, Martinez urges that the district court failed to ensure that his plea was "voluntary and did not result from force, threats, or promises" beyond those contained in his plea agreement. Fed. R. Crim. P. 11(b)(2). Martinez is right that the district court did not ask whether his plea was the product of coercion. But to demonstrate that this error affected his substantial rights, Martinez "must show 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). He has not done so here.

Martinez relies primarily on his contention at the sentencing hearing that he felt "pressured into signing a bad plea" because his attorney advised him that he could face additional charges if he didn't plead guilty. But this overlooks the fact that "[a]ll pleas of guilty are the result of some pressures or influences on the mind of the defendant." *United States v. Buckles*, 843 F.2d 469, 472 (11th Cir. 1988) (quotation omitted). "A defendant cannot complain of coercion where his attorney, employing [her] best professional judgment, recommends that the defendant plead guilty." *Id.*; *see United States v. Castro*, 736 F.3d 1308, 1315 (11th Cir. 2013) (per curiam). After all, plea decisions are inherently "suffused with uncertainty." *Premo v. Moore*, 562 U.S. 115, 124 (2011). In this case, Martinez's statement shows only that his counsel provided advice and helped him understand the risks of choosing to plead not guilty. He has thus failed to demonstrate that if the district court

asked him whether his plea was the product of coercion, there is a reasonable probability that he would've changed his plea.

To the contrary, Martinez thrice represented under oath his desire to plead guilty at the initial colloquy. And he did not protest when the district court expressed its finding that Martinez's "guilty plea [was] freely and voluntarily entered." Moreover, even after later alleging that his counsel pressured him to enter the guilty plea at the sentencing hearing, Martinez repeatedly insisted that he did not want to withdraw his plea. *See* Doc. 58 at 33 ("Your Honor, I'm not stating this because I want to withdraw my plea."); *id.* at 34–35 ("[N]ow that it's too late and I'm already here at sentencing, I would like to move forward so I can get back out there to my family."); *id.* at 44 ("I never said that I wanted to move backwards or withdraw my plea, Your Honor."). As Martinez assured the district court, he raised his concerns simply because he believed that it would help him at sentencing. In light of these facts, Martinez "ha[s] not carried the burden of showing that" any error by the district court "affected [his] substantial rights." *Greer*, 141 S. Ct. at 2097.

B

For similar reasons, Martinez fares no better on his contention that the district court neglected to inform him that he was waiving certain rights by pleading guilty. The district court advised Martinez of all the rights and matters specified in Rule 11, except it did not mention his right to plead not guilty, to continue to be represented by counsel at trial, and to cross-examine adverse witnesses

and compel the attendance of witnesses. *See* Fed. R. Crim. P. 11(b)(1)(B), (D), (E). As the government concedes, that was error.

Nevertheless, Martinez "offers no reason why he would not have pled guilty if he had received more thorough instructions under Rule 11." *United States v. Moriarty*, 429 F.3d 1012, 1020 n.5 (11th Cir. 2005); *see also United States v. Monroe*, 353 F.3d 1346, 1357 (11th Cir. 2003). As explained above, Martinez repeatedly expressed his desire to persist in a guilty plea—both at the plea colloquy and at the sentencing hearing. At the same time, we see "nothing in the record [that] indicates that, but for the district judge's error, [Martinez] would not have entered his guilty plea." *Moriarty*, 429 F.3d at 1020.[1]

[1] Martinez identifies one instance where he equivocally said at the sentencing hearing, "If I would have seen [the plea] in person or went over it in person, then I would be able to probably withdraw my plea." But Martinez admitted that his attorney "went through" the plea agreement over the phone with him. And the referenced statement was in no way tied to the district court's Rule 11 errors here, which concern the waiver of rights not listed in the plea agreement. Instead, Martinez expressed his concerns as to (1) the appellate waiver contained in the plea and (2) his involvement in the carjacking. With respect to the former, the district court went over the appellate waiver at the initial plea hearing, and Martinez affirmed that he still wanted to plead guilty even knowing of his limited ability to appeal. Further, because the court varied upwards—and thereby rendered the waiver inapplicable—any potential error is harmless. *See* Fed. R. Crim. P. 11(h). With respect to Martinez's involvement in the carjacking, the district court relied on Martinez's previous sworn admission that the facts contained in the proffer (and read at his plea hearing) were true. As we explain below, that was permissible.

To be sure, we have in the past permitted a defendant to withdraw a guilty plea based on a district court's failure to mention some of the rights listed in Rule 11. *See United States v. Hernandez-Fraire*, 208 F.3d 945, 951 (11th Cir. 2000). But "the defendant in *Hernandez-Fraire* expressed confusion during the plea colloquy as to the nature of his rights." *Moriarty*, 429 F.3d at 1020 n.5; *see Hernandez-Faire*, 208 F.3d at 951 ("I really don't know about this plea, *because I don't know what my rights are*."). "No such confusion appeared in [Martinez]'s plea colloquy." *Moriarty*, 429 F.3d at 1020 n.5. And it bears repeating that the presence of plain error alone is not sufficient to warrant vacatur. Because Martinez has failed to demonstrate a reasonable probability that he wouldn't have pleaded guilty absent the Rule 11 errors, he is not entitled to relief. *See Dominguez Benitez*, 542 U.S. at 83.

C

Martinez also complains that the district court failed to advise him of its "authority to order restitution." Fed. R. Crim. P. 11(b)(1)(K). The court explained the maximum punishments that it could impose, including "a quarter of a million dollar fine." Then, after Martinez confirmed his understanding, the court asked whether there was any "expected restitution," to which the government responded "[n]ot at this time."

Even assuming it was error for the court not to clarify that restitution could still be ordered at sentencing, Martinez's claim lacks merit. As we've held in the past, even a wholesale failure to warn of the possibility of restitution does not affect "a defendant's

substantial rights where he was warned of a potential fine larger than the actual amount of restitution ordered." *United States v. Morris*, 286 F.3d 1291, 1294 (11th Cir. 2002). As in *Morris*, the restitution order of $10,581 here "was considerably less than the fine [Martinez] was warned of at the time of his guilty plea." *Id.* Hence, he cannot make the third showing necessary for plain-error relief.

D

Martinez's final alleged Rule 11 error is that the district court didn't adequately explain the "nature of [the] charge" to which he pleaded guilty. Fed. R. Crim. P. 11(b)(1)(G). He maintains that the court never set forth the elements of carjacking or explained the aiding-and-abetting theory of liability. We again find no reversible error.

"There is no rigid formula or mechanical rule for determining whether the district court adequately informed the defendant of the nature of the charges." *United States v. Presendieu*, 880 F.3d 1228, 1238 (11th Cir. 2018) (quotation marks omitted). Nor does anything in Rule 11's text "specify that a district court must list the elements of an offense." *Id.* "Rather, what constitutes an adequate plea colloquy varies from case to case depending on the complexity of the charges and the defendant's intelligence and sophistication." *Id.*

Here, the district court was not faced with a "complex case[]," such as one involving "esoteric terms or concepts unfamiliar to the lay mind." *Id.* at 1239 (quotation omitted). We think that

carjacking "is ordinarily a relatively simple charge easily understood by a person" of Martinez's intelligence. *See United States v. DePace*, 120 F.3d 233, 237 (11th Cir. 1997); *United States v. Diaz*, 248 F.3d 1065, 1096 (11th Cir. 2001) (listing the elements of the offense). At the very least, even though it would have been preferable for the district court to list the elements of the offense, it was not plain error for it to instead rely on the factual proffer. *See Presendieu*, 880 F.3d at 1240. The district judge first confirmed that Martinez "want[ed] to plead guilty to Count 1 which is carjacking and aiding and abetting carjacking." The judge went on to say that the prosecutor would explain "what [Martinez was] charged with, [and] what [he was] pleading guilty to." And the prosecutor recited the proffer in full. That proffer stated that Martinez and K.C. approached the Mercedes and "each pointed firearms at the driver . . . with the intent to cause death or serious bodily harm and demanded that [she] exit the vehicle." After the driver exited the car "in fear [for] her life," K.C. "entered the driver's seat and drove away in the vehicle." The proffer then went on to explain that the Mercedes "was manufactured outside the state of Florida and previously had been transported, shipped or received in interstate or foreign commerce." Accordingly, the factual proffer explicitly touched on—often verbatim—all the elements necessary to sustain the charge against Martinez. *See Diaz*, 248 F.3d at 1096. And Martinez confirmed that he "agree[d] with everything the prosecutor ha[d] stated about what [he] did in this case." We cannot say that this colloquy resulted in plain error—that is, a "total or abject

failure" to ensure that Martinez "underst[ood] the nature of the charge[] against him." *Presendieu*, 880 F.3d at 1239.

Similarly, "[w]hile a brief explanation of the aiding and abetting theory would have been preferable, we cannot find that its omission undermined [Martinez]'s understanding to a degree that would invalidate the district court's acceptance of the guilty plea." *DePace*, 120 F.3d at 238. As in *DePace*, "[t]he degree of complexity added by the aiding and abetting theory is minimal" under these facts. *Id.* at 237. Martinez admitted at the plea colloquy that he pointed a gun at the victim to help force her out of the car so that his accomplice could drive away in the stolen vehicle. A lay person of Martinez's intelligence "would likely understand his liability for" brandishing a firearm in those circumstances. *Id.* It certainly wasn't plain error to so find—particularly not where Martinez "was represented by counsel and had ample opportunity to express any confusion [he] might have had." *United States v. Camacho*, 233 F.3d 1308, 1317 (11th Cir. 2000). Indeed, Martinez confirmed that he "went over everything" with his lawyer and represented that there wasn't anything that he didn't understand.

Even so, Martinez protests that some of the statements that he made at the sentencing hearing indicate that he didn't understand the concept of aiding and abetting. Yet in that same conversation, Martinez also claimed that there was "no gun involved in my case." He does not dispute that if there were a gun, he didn't understand how brandishing it would amount to aiding and abetting the carjacking. In essence, then, Martinez's argument

amounts to a simple disagreement with the district court's finding that he pointed a gun at the driver to help steal the Mercedes. There is, however, a "strong presumption" that his admissions to those very facts during the plea colloquy were true. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). And Martinez fell far short of rebutting that presumption; the district court was entitled to accept Martinez's sworn admissions over his later, self-serving repudiation of his involvement in the carjacking. *See United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) (per curiam). That being the case, the district court did not plainly err in its attempt to ensure that Martinez understood the nature of the charges against him.

Accordingly, we see no reversible Rule 11 error.

III

Next, Martinez insists that, after he lodged complaints about his attorney, the district court should have continued the sentencing hearing to permit him to consult new counsel. Normally, we'd review the denial of a motion to continue sentencing for abuse of discretion. *United States v. Edouard*, 485 F.3d 1324, 1350 (11th Cir. 2007). But, as Martinez acknowledges, he never moved for a continuance. "[B]ecause [he] did not raise this issue below, the plain error standard applies." *United States v. Cingari*, 952 F.3d 1301, 1305 (11th Cir. 2020); *see also, e.g.*, *United States v. Scott*, 877 F.3d 42, 51 (1st Cir. 2017); *United States v. Rivas-Macias*, 537 F.3d 1271, 1281 (10th Cir. 2008); *United States v. Carrera*, 259 F.3d 818, 824

(7th Cir. 2001); *United States v. Kizzee*, 150 F.3d 497, 501 (5th Cir. 1998).[2]

"As we have repeatedly recognized, an error cannot meet the 'plain' requirement of the plain error rule if it is not clear under current law." *United States v. Chau*, 426 F.3d 1318, 1322 (11th Cir. 2005) (per curiam) (quotation marks omitted). Martinez does not identify any case similar to this one, where we or the Supreme Court have found that a district court abused its discretion in refusing to continue a proceeding so that the defendant could obtain new counsel. Nor could we find any. That is fatal to Martinez's claim. *See United States v. Leon*, 841 F.3d 1187, 1196 (11th Cir. 2016) ("In this circuit, a district court's error is not plain or obvious if there is no precedent directly resolving the issue." (cleaned up)).

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[2] Seeking to escape plain-error review, Martinez cites to our decision in *United States v. Wingo*, 789 F.3d 1226, 1236 (11th Cir. 2015). But that case applied an abuse-of-discretion standard to "a district court's failure to *sua sponte* order a hearing on the defendant's competency under [18 U.S.C. § 4241]." *Id.* Our application of the abuse-of-discretion standard turned on the unique circumstance of an allegedly incompetent defendant and the language of § 4241, which imposes a specific "duty on the district court to inquire *sua sponte* into a defendant's mental competency." *Id.* at 1236 n.10; *see also id.* at 1235–38. Here, Martinez does not identify any similar reason why his claim isn't subject to the ordinary mandate that "unpreserved errors must be analyzed for plain error under Rule 52(b)." *Greer*, 141 S. Ct. at 2099; *see Puckett*, 556 U.S. at 135–36. Simply put, then, the issue wasn't "properly preserved for appeal in order to warrant abuse-of-discretion review." *United States v. Akwuba*, 7 F.4th 1299, 1316–17 (11th Cir. 2021).

In any event, we see no abuse of discretion. The matters Martinez complained of for the first time at sentencing—irregularities with the plea agreement, counsel's alleged deficiencies, and his insistence that he wasn't directly involved in the carjacking—were all known to him well before sentencing. Thus, Martinez was not "diligen[t] in his efforts" to bring his complaints to the court's attention, and a "continuance would have inconvenienced the court and the opposing party." *DeJesus v. Lewis*, 14 F.4th 1182, 1202 (11th Cir. 2021). In addition, Martinez expressed the opposite sentiments at his plea hearing, confirming under oath that he committed the acts described in the factual proffer and was pleased with his counsel, who concededly "went over everything" together with him. Even at sentencing, when the district judge asked Martinez "what should I do with" the complaints he raised, Martinez never asked for new counsel or sought a continuance. He simply asked the judge to "please sentence me and take into consideration what I stated," which the judge did. Given the foregoing circumstances, we cannot say that the district court erred in proceeding with the sentencing hearing—let alone plainly.[3]

[3] Martinez's trial counsel withdrew after the sentencing hearing because of the complaints that Martinez raised with respect to her performance. To the extent Martinez bases his claim on his counsel's alleged deficient performance, we decline to consider such a theory at this juncture. "The preferred means for deciding a claim of ineffective assistance of counsel is through a 28 U.S.C. § 2255 motion." *United States v. Patterson*, 595 F.3d 1324, 1328 (11th Cir. 2010). Martinez may pursue that potential avenue for relief in the future if he so chooses.

IV

Last up is Martinez's challenge to his sentence. We review the substantive reasonableness of a defendant's sentence under a "deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). When, as here, the sentence imposed is above that recommended by the Guidelines, we "may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors" justify the upward departure. *Id.* at 51. "Although there is no proportionality principle in sentencing, a major variance does require a more significant justification than a minor one—the requirement is that the justification be 'sufficiently compelling to support the degree of the variance.'" *United States v. Irey*, 612 F.3d 1160, 1196 (11th Cir. 2010) (en banc) (quoting *Gall*, 552 U.S. at 50). At the same time, we may not substitute our own judgment for that of the district court. *United States v. Rosales-Bruno*, 789 F.3d 1249, 1257 (11th Cir. 2015). The challenger can prevail only if he shows that the district court's sentence was entirely outside "the ballpark of permissible outcomes." *Id.* (quotation omitted).

That's not the case here. The district court emphasized the "very serious" nature of Martinez's offense, which included pointing a gun at someone—and thereby threatening her life—in order to steal her car. *See* 18 U.S.C. § 3553(a)(1), (a)(2)(A). In addition, the court stressed that Martinez hadn't "really been penalized for what [he had] done in the past." "District courts have broad leeway in deciding how much weight to give to prior crimes the defendant

has committed." *Rosales-Bruno*, 789 F.3d at 1261. And in this case, Martinez had a history that included grand theft, burglary, and larceny, among other crimes. *See* 18 U.S.C. § 3553(a)(1). This pattern of criminal behavior, the district court explained, helped to show that Martinez did not appreciate the severity of his misconduct. And one case in particular troubled the sentencing judge. There, Martinez's girlfriend instructed someone to park his car in a dimly lit area so that she could perform sexual acts on him. When the man complied, Martinez entered the car and attacked him from behind. As Martinez pistol-whipped the victim, his girlfriend used the diversion to steal the man's phone and money. After the victim escaped to confront Martinez's girlfriend, Martinez took the opportunity to drive his car to the other end of the parking lot so that he could rummage through it. When the victim returned, Martinez "again attacked" him. Martinez was sentenced only to probation and was ordered to pay deferred restitution. Because of the similarities between that crime and the instant offense—as well as Martinez's lack of appreciable punishment for the former—the district court thought that a stiff sentence was needed to "protect the public." *See id.* § 3553(a)(2)(C); *United States v. Shaw*, 560 F.3d 1230, 1239–40 (11th Cir. 2009). That determination was reasonable.

What's more, the court observed that Martinez wasn't remorseful and hadn't "fully accept[ed]" responsibility for his actions, as he contested his role in the carjacking and his possession of the firearm at the sentencing hearing. This was despite him previously admitting to the veracity of the factual proffer under oath. Those

factors, too, support the district court's upward variance. *See United States v. Kapordelis*, 569 F.3d 1291, 1318 (11th Cir. 2009). Finally, we note that "an additional sign of the upward variance's reasonableness" is the fact that Martinez's sentence was a full 5 years below the statutory maximum. *United States v. Riley*, 995 F.3d 1272, 1280 (11th Cir. 2021); *see* 18 U.S.C. § 2119(1).

In the end, "[w]e are not left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at [this] sentence." *United States v. Gibson*, 708 F.3d 1256, 1283 (11th Cir. 2013) (quotation marks omitted). It was within "the range of reasonable sentences dictated by the facts of the case." *Id.* (quotation omitted). Accordingly, Martinez's sentence is due to be affirmed.

* * *

We **AFFIRM** both Martinez's conviction and his sentence.

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
MELVIN MARTINEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: **19-20826-CR-MORENO**
USM Number: **20777-104**

Counsel For Defendant: **Celeste Higgins**
Counsel For The United States: **Stephanie Hauser**
Court Reporter: **Gilda Pastor-Hernandez**

The defendant pleaded guilty to Count ONE of the Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 2119(1)	Carjacking	10/20/2019	ONE

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **1/14/2021**

Federico A. Moreno
United States Senior District Judge

Date: January 14, 2021

DEFENDANT: **MELVIN MARTINEZ**
CASE NUMBER: **19-20826-CR-MORENO**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **120 MONTHS**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **MELVIN MARTINEZ**
CASE NUMBER: **19-20826-CR-MORENO**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **MELVIN MARTINEZ**
CASE NUMBER: **19-20826-CR-MORENO**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$10,581.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of $10,581.00. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **MELVIN MARTINEZ**
CASE NUMBER: **19-20826-CR-MORENO**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.