APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. JASON REED, Defendant – Appellant.	FILED United States Court of Appeals Tenth Circuit July 7, 2022 Christopher M. Wolpert Clerk of Court No. 21-2073

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:18-CR-01576-KWR-1)

Todd B. Hotchkiss, Albuquerque, New Mexico, for Defendant-Appellant.

Emil J. Kiehne, Assistant United States Attorney (Fred J. Federici, United States Attorney, with him on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **BALDOCK**, and **ROSSMAN**, Circuit Judges.

BALDOCK, Circuit Judge.

Defendant Jason Reed pleaded guilty to being a felon in possession of a firearm. At sentencing, the district court concluded Defendant's previous convictions for drug distribution qualified him for enhanced

criminal penalties under the Armed Career Criminal Act (ACCA). That statute mandates a 15-year minimum sentence for unlawful firearm possession when the offender has three or more previous convictions for serious drug offenses "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The district court applied the ACCA enhancement and sentenced Defendant to 15 years' imprisonment—the mandatory minimum. Defendant makes three challenges on appeal. First, he claims his guilty plea was unknowing or involuntary because his counsel erroneously advised him that the ACCA was unlikely to apply. Second, he argues the district court lacked the power to decide whether his prior federal drug-trafficking convictions qualified as ACCA predicate felonies. Third, he alleges he was given insufficient notice that the ACCA might apply to him. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm.

I.

Defendant was previously convicted of several felonies. In 2004, he was convicted in federal court of four felonies: three counts of distributing a mixture containing cocaine base and one count of disposing a firearm to a convicted felon. Even though the four convictions were contained in a single judgment, each conviction was—according to the judgment—concluded on a different date. A year later, Defendant was convicted in state court of trafficking cocaine.

The present appeal arises out of Defendant's more recent criminal activity. In September 2017, Defendant knowingly brought a handgun and several rounds of ammunition to an apartment in Farmington, New

Mexico. A grand jury indicted Defendant for being a felon in possession of a firearm and ammunition. 18 U.S.C. § 922(g)(1). Initially, Defendant wanted to go to trial. But it soon became apparent that he was unlikely to obtain an acquittal: a laboratory found Defendant's DNA on the handgun and Defendant's initial trial counsel (referred to throughout as "trial counsel") was unable to locate any witness to support Defendant's version of events.

The Government offered Defendant a plea agreement. Among other things, the agreement stated that the maximum prison sentence Defendant could receive was 10 years, unless the district court determined he was an armed career criminal under the ACCA, in which case his minimum prison sentence would be 15 years and his maximum sentence would be life. The agreement also informed Defendant that "regardless of any of the parties' recommendations, the Defendant's final sentence is solely within the discretion of the Court." Trial counsel advised Defendant about whether he should accept the Government's plea agreement. Given Defendant's prior convictions, trial counsel worried Defendant might qualify for a sentencing enhancement under the ACCA, and he discussed that issue with Defendant. But trial counsel's advice was flawed. As discussed in further detail below, trial counsel mistakenly believed Defendant did not have the requisite number of felonies for an ACCA enhancement, and trial counsel advised Defendant based on this erroneous belief. Trial counsel, however, was careful not to promise Defendant that the ACCA would not apply. Defendant entered the plea agreement.

At his change-of-plea hearing, Defendant was once again reminded of the possibility of an ACCA enhancement and the consequences associated with pleading guilty. Echoing the plea agreement, the prosecutor reminded Defendant that he faced a maximum of 10 years' imprisonment unless the district court determined that he was an armed career criminal, in which case he would face a mandatory minimum term of 15 years' imprisonment and a maximum sentence of life imprisonment. Defendant acknowledged that he understood the charge and the maximum penalties that go along with it. He also acknowledged that, in the event he received a sentence he did not expect, he would be unable to withdraw his guilty plea. Additionally, Defendant agreed that the factual basis of his offense, as set forth in the plea agreement, was true and accurate, and that he was pleading guilty because he was in fact guilty. He also indicated that no one had made any promises (other than those in the plea agreement) to encourage him to plead guilty. Defendant then pleaded guilty.

The United States Probation Office issued Defendant's Presentence Investigation Report (PSR) on November 26, 2019. Based on Defendant's previous convictions—specifically, Defendant's three federal drug-trafficking convictions—the PSR concluded Defendant was subject to an enhanced sentence under the ACCA. *See* 18 U.S.C. § 924(e)(1) (imposing a 15-year mandatory minimum sentence when an 18 U.S.C. § 922(g) defendant has three previous convictions for serious drug offenses committed on "occasions different from one another"). Because the PSR's ACCA find-

ing directly contradicted trial counsel's advice, Defendant obtained new counsel and moved to withdraw his guilty plea. He argued that his guilty plea was unknowing or involuntary because trial counsel's erroneous advice constituted ineffective assistance of counsel.

The district court held an evidentiary hearing on the motion. Trial counsel testified at the hearing, explaining how he reached the conclusion that Defendant was unlikely to receive an ACCA enhancement. According to his testimony, trial counsel reviewed Defendant's prior federal and state judgments and estimated that, at most, Defendant had two ACCA predicate felonies: one for the state drug distribution conviction and one for the three federal drug distribution convictions contained in a single judgment. Trial counsel's error was rooted in the erroneous belief that convictions contained in a single judgment qualify as one predicate felony for ACCA purposes. *See United States v. Green*, 967 F.2d 459, 460–61 (10th Cir. 1992) (holding an ACCA enhancement is proper even if the three prior convictions were the result of a single judicial proceeding). Explaining how he reached this conclusion, trial counsel testified:

> After looking at [Defendant]'s discovery, the drug convictions alleged in it, and with what knowledge I had of Tenth Circuit case law at the time, I thought that this document, this judgment, would count as one conviction, even though it alleged more than one crime for a drug offense. And I was partly informed, in my reaching that decision, by State law, there's a State case called State v. Linam, which deals

> with habitual offender applications and enhancement of sentence. It's an old New Mexico Supreme Court case from the 1980s. And it provided that in order for somebody to be enhanced as an habitual offender, they needed to commit a crime and be convicted, commit a crime and be convicted, and commit a crime and then be convicted, in order for the habitual to be applied.

In advising Defendant about the plea agreement, trial counsel anticipated Defendant was unlikely to receive an ACCA enhancement, but he never promised Defendant that he would be ineligible for such an enhancement. Defendant also testified at the evidentiary hearing. He testified that trial counsel informed him that he did not believe Defendant would be considered an armed career criminal. According to Defendant, trial counsel told him that the ACCA language contained in the plea agreement was form language that he did not need to worry about. Defendant testified that he relied on trial counsel's opinion in deciding to accept the plea agreement and claimed that he would have gone to trial but for counsel's erroneous advice that the ACCA would not apply.

The district court denied Defendant's motion to withdraw his guilty plea. Applying *Strickland v. Washington*'s two-part test for ineffective assistance of counsel, the district court held (1) trial counsel's performance was not constitutionally ineffective and (2) Defendant failed to demonstrate he suffered prejudice as a result of the allegedly ineffective assistance

of counsel. The district court, therefore, rejected Defendant's claim that trial counsel's performance rendered his guilty plea unknowing or involuntary.

After the resolution of Defendant's motion, Defendant filed objections to the PSR. He argued that the district court lacked authority to find his prior convictions were serious drug offenses "committed on occasions different from one another," 18 U.S.C. § 924(e)(1), because facts that increase the mandatory minimum sentence must be submitted to the jury and found beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 108 (2013). The district court overruled Defendant's objections and imposed ACCA's mandatory minimum sentence.

II.

Defendant's first claim on appeal is the district court reversibly erred by concluding his guilty plea was knowing and voluntary despite trial counsel's erroneous advice about the ACCA's application. Defendant argues his trial counsel's advice "was not within the range of competence demanded of attorneys in criminal cases," rendering his subsequent decision to plead guilty unknowing or involuntary. *United States v. Carr*, 80 F.3d 413, 416 (10th Cir. 1996) (citing *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

At the outset, it is not immediately apparent that Defendant's current argument is the same one he made before the district court. In his district court briefing, Defendant at times argued his guilty plea was unknowing or involuntary because of counsel's deficient performance, *see Hill*, 474 U.S. at 56, and at

other times argued counsel's deficient performance provided a "fair and just reason" for withdrawing his guilty plea, Fed. R. Crim. P. 11(d)(2)(B). We treat these as separate claims. *Compare Carr*, 80 F.3d at 417–19 (analyzing the voluntariness of defendant's guilty plea in light of counsel's allegedly deficient performance), *with id.* at 419–21 (considering counsel's allegedly deficient performance as a factor in reviewing the district court's denial of a motion to withdraw a guilty plea). After reviewing Defendant's opening brief, we agree with the Government that the only issue before us is whether trial counsel's allegedly defective performance invalidated Defendant's guilty plea. To the extent Defendant argued before the district court that there was a "fair and just reason" for withdrawing his plea, Fed. R. Crim. P. 11(d)(2)(B), he waived that argument on appeal by failing to raise it in his opening brief. *E.g., Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020). Thus, the discrete issue before us is whether trial counsel's allegedly defective performance rendered Defendant's guilty plea unknowing or involuntary—an issue we review de novo. *Carr*, 80 F.3d at 416.

Defendant is effectively raising an ineffective assistance of counsel claim on direct appeal—a practice we generally disfavor. *See, e.g., Massaro v. United States*, 538 U.S. 500, 504–05 (2003); *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc). Accordingly, we must first consider whether it is appropriate for us to address this issue. "[I]n most cases a motion brought under [28 U.S.C.] § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." *Massaro*, 538 U.S. at 504. But

there are exceptions to this rule. "We recognize a narrow exception for the 'rare claims which are fully developed in the record and allow such claims to be brought either on direct appeal or in collateral proceedings.'" *United States v. Trestyn*, 646 F.3d 732, 741 (10th Cir. 2011) (quoting *Galloway*, 56 F.3d at 1242) (cleaned up). Here, the district court held an evidentiary hearing on Defendant's motion to withdraw his guilty plea where trial counsel and Defendant testified about trial counsel's performance and issued an opinion holding trial counsel was not constitutionally ineffective. Given these circumstances, the factual record is sufficiently developed for us to entertain Defendant's ineffective-assistance claim on direct appeal. *See United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993); *Carr*, 80 F.3d at 416 n.3.

"We review a challenge to a guilty plea based on a claim of ineffective assistance of counsel using the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984)." *Gordon*, 4 F.3d at 1570 (citing *Hill*, 474 U.S. at 58). Under this test, Defendant must show (1) his counsel's performance "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and (2) counsel's deficient performance resulted in prejudice, *id.* at 692. Because we ultimately hold Defendant cannot establish prejudice, we decline to consider whether trial counsel's performance fell below an objective standard of reasonableness. *Id.* at 697 ("[T]here is no reason for a court . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

"To show prejudice in the guilty plea context, the defendant must establish that 'there is a reasonable

probability that, but for counsel's errors, he would not have pleaded guilty and insisted on going to trial.'" *Gordon*, 4 F.3d at 1570 (quoting *Hill*, 474 U.S. at 59). A defendant's mere allegation that, but for counsel's ineffective assistance regarding application of the ACCA to his sentencing calculation, he would have insisted on going to trial is ultimately insufficient to establish prejudice. *Id.* at 1571 (citing *United States v. Arvanitis*, 902 F.2d 489, 494 (7th Cir. 1990)). When conducting the prejudice inquiry, courts "will often review the strength of the prosecutor's case as the best evidence of whether defendant in fact would have changed his plea and insisted on going to trial." *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001) (citing *Hill*, 474 U.S. at 59). "It is not necessary for the defendant to show that he actually would have prevailed at trial, although the strength of the government's case against the defendant should be considered in evaluating whether the defendant really would have gone to trial if he had received adequate advice from his counsel." *Id.* at 1069. Defendant cannot establish prejudice for two reasons: (1) Defendant pleaded guilty after being repeatedly informed that he could receive an ACCA enhancement, and (2) the circumstances do not suggest Defendant would have gone to trial absent trial counsel's erroneous advice.

First, Defendant was repeatedly informed, prior to pleading guilty, that he was potentially subject to ACCA and a mandatory minimum 15 years' imprisonment. The plea agreement said: "The Defendant understands that the maximum penalty provided by law for this offense is imprisonment for a period of up to 10 years; unless defendant is determined to be an

armed career criminal, then imprisonment for not less than 15 years up to life." And while advising Defendant about the offered plea agreement, trial counsel "discussed whether [Defendant] might be determined to be an armed career criminal," but erroneously advised him that the ACCA would not apply. Furthermore, at the plea colloquy the Government again reminded Defendant that if he "is determined to be an armed-career criminal," "he faces . . . a mandatory term of 15 years' imprisonment up to life." Additionally, Defendant knew, from his plea agreement, that his "final sentence [was] solely within the discretion of the Court." After repeated warnings that he might be adjudicated an armed career criminal and the consequences of such a determination, Defendant indicated at the plea colloquy that he understood "the charge and the maximum penalties that go along with it." He also acknowledged that he would be unable to withdraw his plea if he received a sentence he did not expect.

Second, the other factual circumstances, including the strength of the prosecution's case and the benefits of pleading guilty, undercut any assertion by Defendant that he would have insisted on trial absent trial counsel's allegedly erroneous advice. *See Miller*, 262 F.3d at 1072. After Defendant told trial counsel that he wanted to go to trial, trial counsel sent an investigator to Farmington to locate witnesses who could support Defendant's version of events. But none were found. Shortly thereafter, a laboratory found Defendant's DNA on the handgun. In light of these developments, trial counsel advised Defendant about the plea agreement. Defendant's assertion that he would have

otherwise insisted on trial "suffers from an obvious credibility problem . . . in light of the circumstances the defendant would have faced at the time of his decision"—namely, his weakening defense. *Id.* at 1074 (quoting *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988)). Finally, Defendant benefitted from his guilty plea even as an armed career criminal because it lowered his guideline sentence from 188–235 months' imprisonment to 180 months' imprisonment. Appellee's Answer Br. 7.

Given these circumstances, defendant's assertion that absent trial counsel's erroneous advice he would have gone to trial is insufficient to establish prejudice. *Gordon*, 4 F.3d at 1571; *see also, e.g., United States v. Hamilton*, 510 F.3d 1209, 1216–17, 1216 n.3 (10th Cir. 2007); *United States v. Silva*, 430 F.3d 1096, 1099–1100 (10th Cir. 2005); *United States v. Cain*, 309 F. App'x 272, 273 (10th Cir. 2009) (unpublished). Because Defendant cannot establish prejudice from his trial counsel's allegedly defective representation, we conclude Defendant entered the guilty plea knowingly and voluntarily. *See Carr*, 80 F.3d at 419.

III.

Defendant's second claim on appeal is the district court lacked the power to decide whether his prior convictions were "committed on occasions different from one another," 18 U.S.C. § 924(e)(1), because a jury must find facts which increase a defendant's mandatory minimum sentence. *See Alleyne*, 570 U.S. at 111–12. The Government asks us to enforce Defendant's appellate waiver on this issue. In deciding whether an appellate waiver is enforceable, we first ask "whether the disputed appeal falls within the

scope of the waiver of appellate rights." *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam). To determine a waiver's scope, we apply general contract principles, strictly construe the appellate waiver, and read any ambiguities against the Government and in favor of Defendant's appellate rights. *See id.* at 1324–25.

We must, therefore, begin by examining the appellate waiver's language. Defendant agreed to waive the right to appeal:

> any sentence and fine within or below the applicable advisory guideline range as determined by the Court . . . . In other words, the Defendant waives . . . the right to appeal any sentence imposed in this case except to appeal the Defendant's sentence to the extent, if any, that the Court may depart or vary upward from the advisory sentencing guideline range as determined by the Court.

The Government argues that, because the ACCA enhancement increased Defendant's guideline sentence to 15 years and the district court did not depart or vary upward from that ACCA guideline sentence, Defendant's challenge to the district court's ACCA fact-finding authority falls squarely within the appellate waiver. Defendant rejects that view, asserting that "challenging the district court's power to make factual findings is not an attack on the sentence . . . and is outside the scope of the appellate waiver." Appellant's Opening Br. 35–36. Because each party's reading is equally plausible, we read this ambiguity against the Government and in favor of Defendant's appellate rights.

The issue before us, therefore, is whether the district court can find a Defendant's prior convictions were "committed on occasions different from one another," 18 U.S.C. § 924(e), or if that is a factual determination reserved for the jury.[1] We review this claim de novo. *United States v. Michel*, 446 F.3d 1122, 1132 (10th Cir. 2006). Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, Defendant argues the question of whether his previous convictions were committed on different occasions is an issue of fact which must be submitted to a jury and proved beyond a reasonable doubt, because they are facts that increase the mandatory minimum sentence. *Alleyne*, 570 U.S. at 108.

While Defendant's argument is not without some force, our precedent forecloses such an argument. In *Michel*, we rejected a defendant's claim that whether his prior convictions were committed on occasions different from one another was a factual question that must be decided by a jury. 446 F.3d at 1132–33; *see also United States v. Harris*, 447 F.3d 1300, 1303

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[1] To the extent Defendant is arguing a jury must find whether his previous convictions are "serious drug offense[s]," 18 U.S.C. § 924(e)(2)(A)(ii), he is mistaken. The issue of whether Defendant's prior convictions satisfy the ACCA's definition for serious drug offense "involves a question of law for a court to decide, and not a question of fact for a jury." *United States v. Moore*, 401 F.3d 1220, 1224 (10th Cir. 2005); *United States v. Easterling*, 137 F. App'x 143, 147 (10th Cir. 2005) (unpublished) ("[T]he determination of whether a prior felony constitutes a 'serious drug offense' under the ACCA is a question of law and not fact, and thus there is no requirement that the existence of such prior convictions be charged in the indictment or proven to a jury under a beyond a reasonable doubt standard.").

(10th Cir. 2006). Relying on *Apprendi*'s prior conviction exception—which excludes the "fact of a prior conviction" as a matter for jury deliberation, 530 U.S. at 490—we held that "whether prior convictions happened on different occasions from one another is not a fact required to be determined by a jury but is instead a matter for the sentencing court." *Michel*, 446 F.3d at 1133; *see also Harris*, 447 F.3d at 1303. We reasoned that certain issues of fact "inherent in the convictions themselves" or "sufficiently interwoven with the facts of the prior crimes" do not need to be submitted to a jury and found beyond a reasonable doubt because *Apprendi* left to the judge "the task of finding not only the mere fact of previous convictions but other related issues as well." *Michel*, 446 F.3d at 1133 (quoting *United States v. Thompson*, 421 F.3d 278, 286 (4th Cir. 2005); *United States v. Santiago*, 268 F.3d 151, 156–57 (2d Cir. 2001)).

Absent en banc reconsideration or a superseding contrary decision by the Supreme Court, we are bound by the precedent of prior panels. *E.g., In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam). Defendant seems to suggest that the Supreme Court's decision in *United States v. Haymond*, 139 S. Ct. 2369 (2019) (plurality), contradicts our holding in *Michel*. We disagree. We need not deeply analyze the *Haymond* decision in this case to decide whether it contradicts *Michel*, because Justice Gorsuch's plurality opinion—the opinion relied upon by Defendant—explicitly states the prior-conviction exception is not implicated in its decision. *Id.* at 2377 n.3. And recently, when given the opportunity to decide "whether the Sixth Amendment requires that a jury, rather than a

judge, resolve whether prior crimes occurred on a single occasion"—the same issue presented here and in *Michel*—the Supreme Court declined to reach the issue. *Wooden v. United States*, 142 S. Ct. 1063, 1068 n.3 (2022). We do not read *Haymond* to contradict our holding in *Michel*, especially in light of the Supreme Court's refusal to reach the issue in *Wooden*. The Supreme Court may disagree with our prior precedent and reach a different result in the future, but until then *Michel* remains the law of this Circuit. Thus, the district court had the authority to decide whether Defendant's prior convictions were "committed on occasions different from one another."[2] 18 U.S.C. § 924(e)(1); *see Michel*, 446 F.3d at 1132–33.

IV.

Defendant's final argument on appeal is that he had insufficient notice that the ACCA might apply to him before he pleaded guilty. According to Defendant, he was denied procedural due process because the ACCA was not mentioned in the arraignment, the indictment, or the information; the plea agreement did not specifically state that he had three prior drug-trafficking convictions in federal court; and the plea colloquy did not specifically identify the prior convictions that could be used to enhance his sentence under the ACCA.[3] We review this issue de novo. *See*

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[2] We need not decide whether the district court properly held Defendant's prior convictions were committed on occasions different from one another because Defendant does not challenge that factual finding—he only challenges the district court's authority to make such a finding.

[3] In making this argument, Defendant might be trying to make additional arguments under the Equal Protection Clause and

United States v. Hardy, 52 F.3d 147, 150 (7th Cir. 1995).

To satisfy procedural due process, "a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge even if due process does not require that notice be given prior to the trial on the substantive offense." *Oyler v. Boles*, 368 U.S. 448, 452 (1962); *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990); *Hardy*, 52 F.3d at 150. Defendant received due process because he had actual notice of the possibility of an ACCA enhancement in a reasonable time as well as the opportunity to be heard concerning that status. *Hardy*, 52 F.3d at 150; *United States v. Gibson*, 64 F.3d 617, 625–26 (11th Cir. 1995); *United States v. Garcia*, 188 F. App'x 706, 709 (10th Cir. 2006) (unpublished); *United States v. Triplett*, 160 F. App'x 753, 763 (10th Cir. 2005) (unpublished); *United States v. Martinez*, 30 F. App'x 900, 907–08 (10th Cir. 2002) (unpublished).

The plea agreement notified Defendant that he faced a 15-year mandatory minimum sentence if the district court determined he was an armed career criminal. *See Triplett*, 160 F. App'x at 763. Before Defendant pleaded guilty, trial counsel obtained the previous federal court judgment listing Defendant's three previous drug-distribution convictions and discussed the possibility of an ACCA sentence with Defendant. *See United States v. Mauldin*, 109 F.3d 1159, 1163 (6th Cir. 1997); *Gibson*, 64 F.3d at 626. At the

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the Sixth Amendment. But his briefing is insufficiently developed for us to address any such arguments. *See United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004).

plea colloquy, the Government informed Defendant that an ACCA sentence would be imposed if he were found to be an armed career criminal. *See United States v. Cobia*, 41 F.3d 1473, 1476 (11th Cir. 1995) (per curiam); *Garcia*, 188 F. App'x at 709; *Triplett*, 160 F. App'x at 763. Finally, the PSR recommended an ACCA sentence be imposed and identified the specific federal drug-trafficking convictions that supported the enhancement. *See United States v. O'Neal*, 180 F.3d 115, 126 (4th Cir. 1999); *Hardy*, 52 F.3d at 150. Defendant also had a sufficient opportunity to be heard concerning the ACCA enhancement. He took advantage of this opportunity by filing written objections to the PSR and reraising those objections at his sentencing hearing. *See O'Neal*, 180 F.3d at 126. Defendant received due process.

Defendant's arguments to the contrary are unpersuasive. There is no statutory or constitutional requirement that the Government mention the ACCA or list the anticipated predicate felonies in his indictment or information, or at his arraignment. *See id.* at 125; *Craveiro*, 907 F.2d at 264; *Moore*, 401 F.3d at 1226. And the Government was not required to explicitly identify which convictions may serve as ACCA predicate felonies in the plea agreement or at the plea colloquy—at least where, like here, the PSR listed the defendant's ACCA predicate felonies. *See O'Neal*, 180 F.3d at 125–26.

* * *

For the reasons stated herein, the district court's judgment and sentence are **AFFIRMED**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

Plaintiff,

vs.

JASON REED,

Defendant.

Case No. 1:18-cr-01576 KWR

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant's Motion to Withdraw Guilty Plea (**Doc. 60**). The Court held an evidentiary hearing on October 20, 2020. Having reviewed the pleadings, evidence, and testimony at the hearing, the Court finds that Defendant's motion is not well taken and, therefore, is **DENIED**.

BACKGROUND

Defendant was charged with one count of felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Defendant was alleged to have been in an apartment that was owned by someone else, and in one of the bedrooms of the apartment were two bags. Defendant is the alleged owner of the bags, and firearms were found in the bags.

Defendant was represented by counsel who has since retired ("former defense counsel"). Prior to Defendant entering into a plea agreement, former de-

fense counsel received discovery from the Government. Former defense counsel sent out an investigator to locate witnesses, but the investigator was unable to find the woman who leased (or owned) the apartment in which the firearms were found or find any witnesses. The Government also produced DNA discovery. Defendant's DNA was found on the gun.

Former defense counsel talked with Defendant about his criminal history and what was in his discovery. Former defense counsel explained the Armed Career Criminal Act and the penalties if ACCA applied. He recalls there were two judgments for drug conviction, one in state court and one in federal court. Former defense counsel believed that multiple federal convictions in the same judgment counted as a single conviction on the theory they were all part of the same occasion or transaction.

Former defense counsel discussed with defendant whether he was eligible for ACCA, and he estimated that it did not apply. This was an estimate and not a promise that he was not eligible for an ACCA enhancement. Defense counsel stated that Defendant understood that there was a possibility he could be sentenced under ACCA.

On September 17, 2019, Defendant entered into a plea agreement and pled guilty. **Doc. 41**. The Court conducted a plea hearing on September 18, 2019, conducted a plea colloquy, and accepted Defendant's guilty plea. **Doc. 59**.

At the plea hearing, an AUSA advised that Defendant would face a term of imprisonment of up to ten years, "unless the Defendant is determined to be

an armed-career criminal in which case he faces up to 15 years – a mandatory of 15 years' imprisonment up to life." **Doc. 60-1 at 9**. The Court asked whether Defendant understood the maximum penalties, and Defendant said yes. **Doc. 59 at 11**. Defendant indicated he understood that in the event he got a sentence he did not expect, he would not be able to withdraw his guilty plea. ***Id.***

At the plea hearing the Court asked whether "anyone made any promises to get you to plead guilty to that that are not contained in the plea agreement or any addendum to the plea agreement?" **Doc. 59 at 15**. Defendant said no.

Moreover, the written plea agreement provided that the maximum penalty was ten years, "unless defendant is determined to be an armed career criminal, then imprisonment for not less than 15 years up to life." **Doc. 41 at 2**. Former defense counsel testified that he did not advise Defendant that this provision would not apply to him. In the plea agreement, Defendant acknowledged prior convictions in the plea agreement: a 2005 conviction in San Juan County, and federal convictions in 2005 under two separate case numbers (03-cr-1317 and 03-cr-2283). **Doc. 41 at 8-9**.

The PSR was disclosed on November 25, 2019. **Doc. 45**. Defendant was assessed as an armed career criminal.

Defendant was previously convicted in federal court. An amended judgment was entered on April 20, 2004 in Case No. 03-cr-2283 and Case No. 03-cr-1317, adjudicating defendant guilty on the following counts:

- 21 U.S.C. § 841b(1)(c), distribution of less than 5 grams of a mixture and substance containing Cocaine base (03cr1317). Date of offense: July 17, 2002.
- 21 U.S.C. § 841(b)(1)(C), distribution of less than 5 grams of a mixture and substance containing cocaine base (03cr1317). Date of offense: July 18, 2002.
- 21 U.S.C. § 841(b)(1)(C), distribution of less than 5 grams of a mixture and substance containing cocaine base (03cr1317) Date of offense: October 14, 2002.
- 18 U.S.C. §§ 922(d)(1), 924(a)(2), disposing of a firearm to a convicted felon (03cr2283). Date of offense: January 29, 2003.

DISCUSSION

Defendant seeks to withdraw his guilty plea because he asserts it was not knowingly and voluntarily entered. He argues that he received ineffective assistance of counsel because former defense counsel erroneously estimated that he would not be sentenced under the Armed Career Criminal Act. The Court finds, based on the testimony and evidence admitted at the hearing, that Defendant was well aware he may be sentenced under ACCA with a fifteen year to life sentence, and counsel was not ineffective.

After a court has accepted the plea but before sentencing, a defendant who wishes to withdraw his plea must "show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). A defendant proceeding under Rule 11(d)(2)(B) does not have

an absolute right to withdraw a guilty plea. *See United States v. Rhodes*, 913 F.2d 839, 845 (10th Cir. 1990) ("There is no absolute right to withdraw a guilty plea."). The decision whether to permit withdrawal of a plea "always and ultimately lies within the sound discretion of the district court to determine on a case by case basis . . . ." *United States v. Soto*, 660 F.3d 1264, 1267 (10th Cir. 2011) (quotations omitted).

The Court analyzes seven factors when considering a motion to withdraw a plea:

(1) whether the defendant asserted his innocence,
(2) whether the plea was knowing and voluntary,
(3) whether defendant was assisted by counsel,
(4) whether the defendant delayed filing his motion and, if so, why,
(5) whether withdrawal would prejudice the government,
(6) whether withdrawal would substantially inconvenience the court, and
(7) whether withdrawal would waste judicial resources.

United States v. Hamilton, 510 F.3d 1209, 1214 (10th Cir. 2007). Among these factors, the most important to consider are whether the defendant asserted his innocence, the validity of his plea, and the effectiveness of his counsel. *Id.* at 1217. If the defendant cannot meet his burden to prove these factors, then the Court need not address the remaining factors. *Id.* The remaining factors, which focus on the potential burden on the Government and the Court, cannot by themselves "establish a fair and just reason for withdrawal." *Id.*; *see also United States v. Byrum*, 567 F.3d

1255, 1265 (10th Cir. 2009) ("[A] court need not address the prejudice to the government, the timing of the defendant's motion, the inconvenience to the court, or the waste of judicial resources factors, unless the defendant establishes a fair and just reason for withdrawing his guilty plea in the first instance.").

Considering the evidence and the law, the Court finds that Defendant did not meet his burden to show that withdrawing his plea would be fair and just.

I. Factor 1: no assertion of innocence.

Defendant did not assert actual innocence in either the briefing or at the evidentiary hearing. To satisfy the assertion of innocence factor, "the defendant must present a credible claim of legal innocence." *United States v. Hamilton*, 510 F.3d 1209, 1214–15 (10th Cir. 2007). "In other words, the defendant must make a factual argument that supports a legally cognizable defense." *Id.*, *citing United States v. Barker*, 514 F.2d 208, 220 (D.C.Cir.1975) (en banc) ("If the movant's factual contentions, when accepted as true, make out no legally cognizable defense to the charges, he has not effectively denied his culpability...."). Defendant made no claim of legal innocence or asserted a factual argument supporting a legally cognizable defense.

Rather, as explained further below, the record reflects that Defendant entered into a plea because of the discovery he received and the results of defense investigations. The Government produced discovery showing that Defendant's DNA was found on one of the firearms. Moreover, the defense investigator was unable to find witnesses, including the purported

renter or owner of the apartment where Defendant was staying when he was arrested or found with the firearms.

II. Factors 2 and 3: Defendant's plea was entered knowingly and voluntarily and was not the product of ineffective assistance of counsel.

Defendant argues that he received ineffective assistance of counsel, because former defense counsel allegedly erroneously estimated that two federal court convictions were one conviction for the purpose of 18 U.S.C. § 924(e), and he did not qualify as an armed career criminal because he did not have the required convictions.

When a defendant's challenge to a guilty plea is based on ineffective assistance of counsel, the Court applies the two-part test established in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). *See Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985). To prevail under this test, Defendant "must show both (1) that counsel's performance was deficient and (2) that this deficiency prejudiced [his] defense." *Carr*, 80 F.3d at 417 (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. 2052).

A. No ineffective assistance under first *Strickland* prong.

As to the first Strickland prong, an alleged erroneous sentencing estimate does not render former defense counsel's performance constitutionally ineffective. Generally, "[a] miscalculation or erroneous sen-

tence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel." *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir.1993); *United States v. McDowell*, 525 F. App'x 841, 845 (10th Cir. 2013). Former defense counsel credibly testified that he talked with Defendant about ACCA and estimated that Defendant would not be subject to ACCA, but that Defendant understood the possibility that ACCA would apply. Defendant testified that he understood former defense counsel did not promise that ACCA would not apply to him. Former defense counsel also testified that he did not promise Defendant that ACCA would not apply. Moreover, as explained below, the plea agreement and plea colloquy both provided that Defendant could be subject to ACCA and receive a minimum 15-year to life sentence. This type of alleged erroneous sentence estimation is not the type of constitutionally deficient performance rising to the level of ineffective assistance of counsel.

Defendant argues that this rule cited in Gordon should not apply because his counsel's estimate was off by a great degree. However, an erroneous sentence estimation is not necessarily constitutionally deficient performance even where counsel erroneously states the applicable sentence range or minimum sentence or incorrectly advises a defendant he would not be subject to career offender provisions. This is especially true when the Defendant has otherwise been made aware of the applicable sentence range. The record reflects, based on his discussion with former defense counsel, the plea agreement, and plea colloquy, that Defendant clearly knew ACCA might apply and

that he faced a potential sentence of fifteen years to life. *See United States v. Garcia*, 630 F. App'x 755, 758 (10th Cir. 2015) (no constitutionally defective performance where counsel erroneously advised him range was five to forty years instead of ten years to life, given plea colloquy and plea agreement); *United States v. Jordan*, 516 Fed. Appx. 681, 682 (10th Cir. 2013) (applying Gordon and holding erroneous sentencing estimate of 135 month maximum sentence was not ineffective assistance when sentence range in fact was ten years to life); *United States v. Silva*, 430 F.3d 1096, 1099 (10th Cir. 2005) (rejecting ineffective assistance claim based on counsel's failure to apprise defendant of sentencing consequences of extensive criminal history and potential career offender status; defendant acknowledged in his plea agreement and during plea colloquy that he understood sentencing would be discretionary); *see also United States v. Hamilton*, 510 F.3d 1209, 1216 (10th Cir. 2007) ("Mr. Hamilton's allegation that he would have gone to trial but for his attorney's failure to advise him of the career-offender provision is insufficient to establish prejudice."); *United States v. Norwood*, 487 F. App'x 431, 435 (10th Cir. 2012) (defendant who faced life sentence not given ineffective assistance where he was erroneously told by counsel he faced maximum of ten years and guideline sentence of 70 to 87 months in light of plea agreement and plea colloquy setting out correct maximum sentence); *United States v. Triplett*, 402 F. App'x 344, 348 (10th Cir. 2010) (defense counsel's erroneous statement that defendant faced a maximum 15 years when he in fact faced maximum penalty of life was neither constitutionally deficient

nor prejudicial where Defendant was aware of maximum penalty through plea colloquy); *United States v. Cain*, 309 F. App'x 272, 273 (10th Cir. 2009) (Defendant's belief he was subject to ten year maximum instead of 15 year minimum under ACCA was not ineffective assistance or prejudicial in light of plea colloquy); *United States v. Kutilek*, 260 F. App'x 139, 146–47 (10th Cir. 2008) (attorney's incorrect explanation of mandatory minimum, resulting in higher mandatory minimum than defendant thought, did not render his assistance ineffective); *see also United States v. Mannie*, 2012 WL 13059260, at *5 (W.D. Okla. Apr. 2, 2012) (erroneous advice from counsel that he would not be determined an armed career criminal and government would not use his criminal convictions to enhance his sentence vitiated by plea agreement and colloquy).

B. No Prejudice under Second *Strickland* Prong.

As to the second *Strickland* prong, to demonstrate he suffered prejudice as a result of the alleged deficiency Defendant "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." *Hill*, 474 U.S. at 59, 106 S. Ct. 366. Defendant has not shown prejudice, *i.e.*, that he would not have pled guilty absent the alleged erroneous sentence estimate. Former defense counsel testified that he talked about a potential plea agreement after the (1) defense investigator was unable to find witnesses to challenge the discovery and (2) discovery indicated that Defendant's DNA was found on the gun. Defendant reiterated this in his testimony.

Moreover, the record is clear that Defendant knew that ACCA could apply, precluding any finding of prejudice.

In the plea colloquy, the AUSA stated "Defendant faces up to ten years' imprisonment, unless the defendant is determined to be an armed-career criminal in which case he faces up to 15 years, a mandatory term of 15 years' imprisonment up to life." **Doc. 59 at 9**. The Court asked Defendant "do you understand the charge and the maximum penalties that go along with it?" ***Id.* at 10.** Defendant said yes. ***Id.*** The Court asked if Defendant understood that the district judge is not mandated to impose the recommended sentence, and that Defendant could receive a sentence higher than the guidelines recommend. ***Id.*** Defendant said yes. At the plea colloquy, the magistrate judge asked "in the event you got a sentence that you did not expect, do you understand that you'd not be able to withdraw your guilty plea in that event." **Doc. 59 at 11**. Defendant said "yes." ***Id.***

In the plea agreement, Defendant acknowledged that "there have been no promises from anyone as to what sentence the Court will impose." **Doc. 41 at 11**. He also acknowledged that, regardless of the parties' recommendations, "the Defendant's final sentence is solely within the discretion of the Court." **Doc. 41 at 6**. At the plea colloquy, Defendant acknowledged that no one made any promises to him not contained in the plea agreement. **Doc. 59 at 15**. Defendant stated that he had the opportunity to discuss the plea agreement with his counsel and opportunity to fully discuss every section of the plea agreement. **Doc. 59 at 11**. The plea agreement and plea colloquy were also clear

that the court had final discretion in imposing a sentence, which could be higher than what he expected.

The evidence at the hearing did not contradict these facts. Former defense counsel testified that he and defendant discussed that ACCA could apply, but he estimated that Defendant did not qualify for armed-career offender status. However, he testified that no promises were made, and that Defendant understood that he could be deemed an armed career criminal under ACCA with a fifteen year to life sentence range. Former defense counsel testified that when he reviewed the plea agreement with Defendant, he did not tell Defendant that the fifteen year to life sentence range would not apply. He also testified that he explained the penalties if Defendant were deemed eligible for ACCA enhancement. Both Defense counsel and defendant acknowledged that no promises were made that ACCA would not apply.

Given this record, Defendant's testimony that he would have gone to trial absent former defense counsel's alleged erroneous sentencing estimate is not persuasive and does not establish prejudice. *See Gordon*, 4 F.3d at 1571 ("Given the fact that Defendant pleaded guilty even after being ... informed by the court [that it determined the final calculation of his sentence], his mere allegation that, but for original counsel's failure to inform him about the use of relevant conduct in sentencing, he would have insisted on going to trial, is insufficient to establish prejudice."); *United States v. Hamilton*, 510 F.3d 1209, 1216–17 (10th Cir. 2007) (analyzing similar facts and finding not prejudice in failure to advise on career offender status). Rather, defendant was well aware, based on

his conversations with defense counsel, his reading of the plea agreement, and the plea colloquy that he was potentially subject to ACCA with a minimum fifteen-year sentence to life.

C. Plea was entered into knowingly and voluntarily.

For the same reason as above, the Court also finds that Defendant's plea was entered into knowingly and voluntarily. He was well aware that ACCA could apply, through (1) former defense counsel's statements, (2) his plea agreement, and the (3) plea colloquy. He also knew that any sentence estimate given by his defense counsel would not bind the court, and there was no promise by defense counsel regarding what his sentence would be.

Based on this record, the Court finds that Defendant's plea was knowing and voluntary because he knew he possibly faced sentencing under ACCA with a minimum 15-year sentence to life.

III. Defendant may not withdraw guilty plea under Fed. R. Crim. P. 11(d)(1).

Defendant argues in a reply brief that he can withdraw his plea for any reason under Fed. R. Crim. P. 11(d)(1). That provision provides that "[a] defendant may withdraw a plea of guilty or nolo contendere: (1) before the court accepts the plea, for any reason or no reason." Fed. R. Crim. P. 11(d)(1). Defendant argues that the magistrate judge did not accept his plea of guilty. The Court disagrees. The magistrate judge accepted his guilty plea, but deferred acceptance of the plea agreement to the district judge. **Doc. 59 at 16** ("I therefore accept your plea and now adjudge you

guilty. I'll defer acceptance of the plea agreement to the district judge."). The Tenth Circuit appears to have rejected a similar argument, concluding that a plea of guilty was accepted for purpose of Rule 11(d)(1) where the magistrate judge accepted the guilty plea but deferred acceptance of the plea agreement. *See United States v. Byrum*, 567 F.3d 1255, 1261 (10th Cir. 2009).

Moreover, Defendant waived his right to withdraw his plea of guilty under Fed. R. Crim. P. 11(d)(1) in the plea agreement, as follows: "[b]y signing this plea agreement, the defendant waives the right to withdraw the defendant's plea of guilty pursuant to Federal Rule of Criminal Procedure 11(d) unless (1) the court rejects the plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(5) or (2) the defendant can show a fair and just reason as those terms are used in Rule 11(d)(2)(B) for requesting the withdrawal." **Doc. 41 at 7**. Defendant has not shown any reason why this waiver should not apply.

IT IS THEREFORE ORDERED that the Defendant's Motion Withdraw Guilty Plea (**Doc. 60**) is hereby **DENIED**.

/s/ Kea W. Riggs
KEA W. RIGGS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. JASON REED, Defendant – Appellant. ---------- THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICTS OF COLORADO AND WYOMING, et al., Amici Curiae.	FILED United States Court of Appeals Tenth Circuit September 1, 2022 Christopher M. Wolpert Clerk of Court No. 21-2073 (D.C. No. 1:18-CR-01576-KWR-1) (D. N.M.)

ORDER

Before **TYMKOVICH**, Chief Judge, **BALDOCK**, and **ROSSMAN**, Circuit Judges.

This matter is before the court on Appellant Jason Reed's *Petition for Rehearing En Banc*. Having carefully considered the petition and the filings in this appeal, we direct as follows.

To the extent the appellants seek rehearing by the panel, the petition is denied pursuant to Fed. R. App. P. 40.

The petition for rehearing *en banc* was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition seeking rehearing *en banc* is denied pursuant to Fed. R. App. P. 35(f).

The court grants the Federal Defenders of New Mexico, Colorado/Wyoming, Kansas, Western District of Oklahoma, Northern/Eastern District of Oklahoma and Utah's *Motion for Leave to File Amicus Brief in Support of Appellant*. The amicus brief will be filed as of August 25, 2022.

Entered for the Court
CHRISTOPHER M. WOLPERT, Clerk

/s/ Candice Manyak

By: Candice Manyak
Counsel to the Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA Plaintiff, vs. JASON REED and JOE REED, JR., Defendants.	No. CRB-1317 MCA Counts 1, 2, 3 and 4: 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) – Distribution of Less than 5 Grams of a Mixture and Substance Containing Cocaine Base; Count 5: 21 U.S.C. § 846: Conspiracy; Count 6: 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) – Distribution of 5 Grams and More of a Mixture and Substance Containing Cocaine Base; and 18 U.S.C. § 2, Aiding and Abetting.

I N D I C T M E N T

The Grand Jury charges:

Count 1

On or about July 17, 2002, in San Juan County, in the State and District of New Mexico, the Defendant, JASON REED, did unlawfully, knowingly and

intentionally distribute less than 5 grams of a mixture and substance containing Cocaine Base, a Schedule II controlled substance.

In violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).

Count 2

On or about July 18, 2002, in San Juan County, in the State and District of New Mexico, the Defendant, JASON REED, did unlawfully, knowingly and intentionally distribute less than 5 grams of a mixture and substance containing Cocaine Base, a Schedule II controlled substance.

In violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).

Count 3

On or about September 26, 2002, in San Juan County, in the State and District of New Mexico, the Defendant JOE REED, JR., did unlawfully, knowingly and intentionally distribute less than 5 grams of a mixture and substance containing Cocaine Base, a Schedule II controlled substance.

In violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).

Count 4

On or about September 26, 2002, in San Juan County, in the State and District of New Mexico, subsequent to the offense charged in Count 3, the Defendant JOE REED, JR., did unlawfully, knowingly and intentionally distribute less than 5 grams

of a mixture and substance containing Cocaine Base, a Schedule II controlled substance.

In violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).

Count 5

On or about October 14, 2002, in San Juan County, in the State and District of New Mexico, the defendants, JASON REED and JOE REED, JR., did unlawfully, knowingly and intentionally combine, conspire, confederate and agree with each other and with other persons whose names are known and unknown to the grand jury to distribute 5 grams and more of a mixture and substance containing Cocaine Base, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B).

In violation of 21 U.S.C. § 846.

Count 6

On or about October 14, 2002, in San Juan County, in the State and District of New Mexico, the Defendants, JASON REED and JOE REED, JR., did unlawfully, knowingly and intentionally distribute 5 grams and more of a mixture and substance containing Cocaine Base, a Schedule II controlled substance.

In violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), and 18 U.S.C. § 2.

A TRUE BILL:

/s/
FOREPERSON OF THE GRAND JURY

/s/
DAVID C. IGLESIAS
United States Attorney
__ 07/11/03 4:43pm

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA Plaintiff, vs. JASON REED, Defendant.	CRIMINAL NO. 03-1317 MCA 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 21(b)(1)(C): Distribution of Less than 5 Grams of a Mixture and Substance Containing a Detectable Amount of Cocaine Base.

I N F O R M A T I O N

The United States Attorney charges:

On or about October 14, 2002, in San Juan County, in the State and District of New Mexico, the defendant, JASON REED, did unlawfully, knowingly and intentionally distribute less than 5 grams of a mixture and substance containing a detectable amount of Cocaine Base, a Schedule II controlled substance.

In violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C).

DAVID C. IGLESIAS
United States Attorney

/s/
ELAINE Y. RAMIREZ

Special Assistant United
States Attorney
P.O. BOX 607
Albuquerque, NM 87102
(505) 346-7274

APPENDIX F

EXCERPT OF SENTENCING TRANSCRIPT

* * * *

[17]

THE COURT: All right. Thank you.

Mr. Hotchkiss, it appears that there is some fluidity or possible fluidity in the law, We don't know what's going to happen in the future. As you said, the only thing we can count on is that things are going to change. However, this is a Court that is duty-bound by precedent, and we certainly do not legislate from the bench.

That being said, as you have indicated, there is no case law to support your positions at this time, and I'm going to address your objections one by one.

In United States District Court, District of New Mexico, 2003-CR-1317, the defendant admitted to committing distribution of less than five grams of a mixture and substance containing a cocaine base in three different counts, that occurred on three different dates, July 17, 2002; July 18, 2002; and October 14, 2002. Certainly case law does not indicate that the predicate felonies are required to be prosecuted separately or even sentenced separately. The government does have the burden of proving the separateness of the offenses to the Court by a preponderance of the evidence.

I did follow the Shepard rules in looking at the documents for support of the three separate offenses **[18]** in this matter. The Tenth Circuit has adopted

a common sense approach on what the word "11 occasion" means when deciding whether these offenses occurred simultaneously or separately. The fact that you argue that they were an ongoing conspiracy or an ongoing flow of events is not something that is supported by case law in considering them as one or three arguments. The case law that the Court relies on indicates that they are three separate offenses that he is being convicted for.

As Ms. Mease indicated, on behalf of the United States, not only were they on different dates, but based on the Presentence Report previously filed, they occurred in three separate locations -- in a local restaurant parking lot; the parking lot of a local park; in a local convenience store. The defendant, according to the case law, had the choice to cease his criminal conduct at any time between the first and the second, or the second and the third.

The Court is going to find that each of the counts admitted in United States District Court, District of New Mexico, Case Number 03-CR-1317 were separate-occasion events and were proper in considering each separately as a predicate offense for application of the Armed Career Criminal Act, as shown per the Indictment and the undisputed portions of the **[19]** Presentence Report that we have talked about, and were properly counted for purposes of determining the application of the Armed Career Criminal Act.

I am going to find that as to this objection, the United States met their burden of proof by a preponderance of the evidence, and your objection is overruled.

Therefore, I'm going to find that the appropriate starting level offense under 924(e), pursuant to United States Sentencing Guideline 4B1.4, is at level 33. That's where we start.

Now, before I go on from there, I'm going to rule on your other objections. I am going to find that the defendant did receive sufficient notice regarding the Armed Career Criminal Act. Although he did have pre-plea notice, during the plea, there was no notice in the charging document. There is no legal support provided for a claim of required pre-guilt notification. As the United States appropriately indicated, he was notified of the possibility at his initial appearance, at his arraignment, and also as part of the Plea Agreement during the plea.

* * * *

APPENDIX G

RELEVANT STATUTORY PROVISION

18 U.S.C. § 924(e).

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.