Appendix

NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RALEIGH RANA FIGUERAS, Defendant-Appellant.	No. 21-15886 D.C. Nos. 2:19-cv-01267-MCE-EFB 2:16-cr-00045-MCE-EFB-2 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Submitted February 8, 2022**
San Francisco, California

Before: HURWITZ and VANDYKE, Circuit Judges, and ERICKSEN,*** District Judge.

Appellant Raleigh Figueras appeals from a district court order denying his 28 U.S.C. § 2255 motion. Alleging ineffective assistance of counsel, Figueras

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

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

*** The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota, sitting by designation.

challenges a sentence imposed after a guilty plea. We have jurisdiction under 28 U.S.C. §§ 1291 and 2255, and we affirm.

"We review de novo a district court's decision to deny a motion under 28 U.S.C. § 2255. A claim of ineffective assistance of counsel raises a mixed question of law and fact, which we review de novo." *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158 (9th Cir. 2000) (internal citation omitted).

To establish ineffective assistance of counsel, Figueras must prove (1) "that counsel's representation fell below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and (2) that any such deficiency was "prejudicial to the defense," *id.* at 692. We may consider either *Strickland* prong, and need not address both if a defendant makes an insufficient showing under one. *Id.* at 697; *see Schumway v. Washington*, 145 F.3d 1340, at *2 (9th Cir. 1998). Here, we need address only the prejudice prong.

To satisfy the prejudice requirement, Figueras must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Where, as here, ineffective assistance is alleged to have led a defendant to accept a plea deal, a different result means that "but for counsel's errors, [Figueras] would either have gone to trial or received a better plea bargain." *United States v. Howard*, 381 F.3d 873, 882 (9th Cir. 2004); *see Lee v. United States*, 137 S. Ct. 1958, 1965 (2017).

Figueras "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

Figueras, a legal permanent resident of the United States, pled guilty to possession of stolen U.S. mail in violation of 18 U.S.C. § 1708, for which he was sentenced to 12 months in prison. The conviction and resulting sentence of "at least one year," 8 U.S.C. § 1101(a)(43)(G), made him "deportable" pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). Figueras contends that, but for his counsel's ineffective assistance in not seeking a term of imprisonment of less than one year, he would have received a shorter prison sentence, thereby avoiding the immigration consequences he now faces.

The record does not support the conclusion that the sentencing judge would have given Figueras a shorter sentence had counsel sought one, nor that he would have proceeded to trial if his counsel acted differently. The same district judge presided over both sentencing and the § 2255 proceedings. In denying the § 2255 motion, that judge made clear that he "would not have imposed less than a twelve-month sentence … just so [Figueras] could avoid immigration consequences." The record also reflects that counsel "consistently" advised Figueras "that he would be deported … as a result of pleading guilty …, including [to] … possession of stolen mail." Figueras nevertheless chose to plead guilty, "understanding … that he would

be deported." Given Figueras's criminal history and the apparent strength of the government's case against him, this was a rational decision. *See Padilla*, 559 U.S. at 372.

AFFIRMED.

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RALEIGH RANA FIGUERAS, Defendant-Appellant.	No. 21-15886 D.C. Nos. 2:19-cv-01267-MCE-EFB 2:16-cr-00045-MCE-EFB-2 Eastern District of California, Sacramento ORDER

Before: HURWITZ and VANDYKE, Circuit Judges, and ERICKSEN,* District Judge.

The panel judges have voted to deny the petitioner's petition for panel rehearing. Judges Hurwitz and VanDyke have voted to deny rehearing en banc, and Judge Ericksen has recommended to deny the same. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Petitioner's petition for panel rehearing and rehearing en banc, filed February 23, 2022, is DENIED.

* The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota, sitting by designation.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. RALEIGH RANA FIGUERAS, Movant.	No. 2:16-cr-00045 MCE-EFB P **MEMORANDUM AND ORDER**

Movant Raleigh Rana Figureras ("Movant") pled guilty pursuant to a written plea agreement to: (1) Bank Fraud and Attempted Bank Fraud in violation of 18 U.S.C. § 1344(2) (Count 4); (2) Aggravated Identity Theft in violation of 18 U.S.C. § 1028A(a)(1) (Count 9); (3) Possession of Stolen U.S. Mail in violation of 18 U.S.C. § 1708 (Count 10); and (4) Unlawful Possession of Five or More Identification Documents in violation of 18 U.S.C. § 1028(a)(3). He was sentenced to concurrent twelve (12) month terms of imprisonment on Counts 4, 10, and 11, to be served consecutively to a twenty-four (24) month term of imprisonment on Count 9, for a total term of thirty-six (36) months, all of which he has now served.

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Presently before the Court is Movant's amended motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. ECF No. 118 ("Motion"). The matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

On November 3, 2020, the magistrate judge filed findings and recommendations, recommending to this Court that the Motion be granted and Figueras be resentenced. Findings and Recommendations ("F&R"), ECF No. 138. The United States ("the government") timely filed objections. ECF No. 153 ("Opp'n"). Because Movant's Motion is based on the theory that his plea and sentencing counsel, Jerome Price, provided constitutionally ineffective assistance of counsel ("IAC"), Mr. Price also timely objected to the F&R. ECF No. 152. Movant timely replied. ECF No. 157.

Having carefully reviewed the entire file, the Court respectfully ADOPTS in part, and REJECTS in part, the findings and recommendations of the magistrate judge.

BACKGROUND[1]

Movant was initially charged with: (1) seven counts of bank fraud and attempted bank fraud pursuant to 18 U.S.C. § 1344 (Counts 1-7); (2) one count of aggravated identity theft pursuant to 18 U.S.C. § 1028(a)(1) (Count 9); (3) one count of possession of stolen U.S. mail pursuant to 18 U.S.C. § 1708 (Count 10); and (4) one count of unlawful possession of five or more identification documents pursuant to 18 U.S.C. § 1028(a)(3) (Count 11). ECF No. 21. He accepted a plea agreement that dropped six of the bank fraud/attempted bank fraud charges, ECF No. 75. Movant was thereafter sentenced to twelve (12) months of imprisonment on Counts 4, 10, and 11, to be served concurrently to one another, and twenty-four (24) months of imprisonment on Count 9, to be served consecutively to the three previously-enumerated Counts, for a total term of thirty-six (36) months.

[1] Background information is adopted with slight alteration from the Findings and Recommendations. F&R, at 2-3.

Movant is not a United States citizen and was advised, both in the plea agreement and at sentencing, that his plea could result in his removal from the country. However, as relevant here, he alleges that he was not specifically advised that if he accepted the plea agreement as to Count 10 and received a sentence of 12 months or more, that conviction would constitute an "aggravated felony" for immigration purposes as a theft offense under 8 U.S.C. § 1101(a)(43)(G). Such a conviction and sentence, according to Movant, would prevent him from asserting a number of defenses to deportation.

On November 2, 2018, while Movant was serving his prison sentence, he was contacted by immigration officials and told that he would be deported upon release because his conviction for possession of stolen mail was an aggravated felony that precluded any possible defense to removal. ECF No. 118 at 17. After being so advised, Movant prepared a section 2255 motion, purportedly with the assistance of another inmate. ECF No. 111-1 at 15 ¶ 6. Movant asserts that he signed the motion, dated it, and turned it over to that inmate for mailing. Id. The motion bears a date — November 5, 2018 — consistent with those allegations. See ECF No. 96 at 12. For reasons that are unclear, however, the Court did not receive that copy of the motion. It received only a second copy that Movant himself later placed in the prison mail system in June 2019. ECF No. 118 at 17-18. That Motion has since been amended, as well. ECF No. 118.[2]

STANDARD OF REVIEW[3]

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this Court conducts a de novo review of this case. A federal prisoner making a collateral

[2] Given these facts, there is some question regarding the timeliness of Movant's Motion. Because the Court denies the Motion on the merits, it assumes without deciding that the filing was timely.

[3] This section is adopted with minimal alteration from the Findings and Recommendations. F&R at 3.

attack against the validity of his or her conviction or sentence must do so by way of a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255, filed in the court which imposed sentence. United States v. Monreal, 301 F.3d 1127, 1130 (9th Cir. 2002). Under § 2255, the federal sentencing court may grant relief if it concludes that a prisoner in custody was sentenced in violation of the Constitution or laws of the United States. Davis v. United States, 417 U.S. 333, 344-45 (1974); United States v. Barron, 172 F.3d 1153, 1157 (9th Cir. 1999). To warrant relief, a Movant must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); see also United States v. Montalvo, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We hold now that Brecht's harmless error standard applies to habeas cases under section 2255 . . . ."). Relief is warranted only where a Movant has shown "a fundamental defect which inherently results in a complete miscarriage of justice." Davis, 417 U.S. at 346; see also United States v. Gianelli, 543 F.3d 1178, 1184 (9th Cir. 2008).

ANALYSIS

According to Movant, his "judgment and sentence are illegal and contravene his rights under the Fifth and Sixth Amendments to the United States Constitution." Motion at 2. Under the Sixth Amendment, Movant avers that counsel was ineffective because counsel failed to: (1) advise him of the specific immigration consequences of a guilty plea to Count 10; or (2) advocate for a sentence of less than one year on Count 10 in plea negotiations and at sentencing. Id. at 13-23. Under the Fifth Amendment, Movant asserts that his guilty plea was entered "unknowingly and involuntarily" in violation of his rights to due process because he was under the mistaken belief that he was not pleading to an offense that would constitute an aggravated felony under immigration law. Finally, Movant contends that he was denied a fair sentencing hearing because he was

deprived of the opportunity to argue for a sentence of less than one year on Count 10 to avoid conviction of an aggravated felony. Id. at 24-28.

As a threshold matter, the Government argues that Movant waived his right to collaterally attack his conviction when he entered his guilty plea pursuant to his plea agreement. Opp'n at 8-9. This is true to the extent that Movant's plea agreement was knowing and voluntary. However, such a waiver does not encompass claims of IAC that are associated with the negotiation of plea agreements. See F&R at 15; see, e.g., Washington v. Lampert, 422 F.3d 864, 870-71 (9th Cir. 2005); United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994). If Movant's counsel was ineffective in advising him with regards to his plea, the Court concludes that the appropriate remedy would be to allow Movant to withdraw from that agreement and either attempt to renegotiate or go to trial. Any potential sentencing errors at Movant's original sentencing would then become irrelevant. If, on the other hand, Movant knowingly and voluntarily entered his plea agreement, then the waivers to any challenge to his sentence included therein remain binding. It follows that, regardless of what happened at sentencing, the only relevant question is whether Plaintiff can show that his decision to plead guilty was the result of counsel's unreasonable advice and that, absent such advice, it was reasonably likely that he would have garnered a more favorable plea or exercised his right to be tried by a jury of his peers.[4]

More specifically, the Sixth Amendment guarantees the accused "the right . . . to have the Assistance of Counsel for [their] defence." "[T]he right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 685-86 (1984) (citation omitted). To establish IAC under Strickland, the defendant must prove (1) "that counsel's representation fell below an objective standard of reasonableness," id.

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[4] To conclude otherwise would allow Movant to have his cake and eat it too, countenancing an argument that even though plea negotiations were constitutionally flawed due to IAC, the agreement should nonetheless be treated as binding because it is still beneficial to him over the option of going to trial or trying to negotiate different terms.

at 687-88, and (2) that any such deficiency was "prejudicial to the defense." Id. at 692; see Garza v. Idaho, 139 S. Ct. 738, 744 (2019).

In assessing the performance of counsel, judicial scrutiny "must be highly deferential." Strickland, 466 U.S. at 689; see id. ("[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."). There exists a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. The Supreme Court has recognized that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Id. For pleas, the Movant also "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010). As for establishing prejudice, the Movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

This Court is not convinced that Mr. Price improperly advised Movant as to the immigration consequences of his guilty pleas. Having reviewed the record in its entirety, it appears that Movant knew deportation was potentially inevitable. See, e.g., ECF No. 152-2 at 21 (Mr. Price acknowledging that the plea agreement "reflected the best deal we could get from the United States government. It was certainly eyes open that deportation removal was a possibility. And that was expressed in the plea agreement."); ECF No. 152-1 at 4 (Mr. Price: "Mr. Figueras ultimately decided to accept the plea offer realizing that the likelihood of success at trial was low and trial likely would not have changed his predicament."). Given Movant's extensive criminal history, the Government declined to dismiss the substantive charges, the bulk of which ran the risk of qualifying as aggravated felonies, either because of loss amount or time in prison. See Opp'n 10-12 (explaining that the "risk of loss over $10,000 was pervasive for the fraud counts and thus, the risk of aggravated felony status as a result of conviction under the extant plea agreement was fully accepted").

It would not be surprising if Mr. Price chose not to advise Movant during plea negotiations in precise technical terms exactly how Count 10 might qualify as an aggravated felony, especially given how unlikely it was that this Court would actually impose a sentence that low. See ECF No. 152 at 4 (explaining that the Probation Officer recommended a sentence of 33-41 months on Count 10).[5] As Mr. Price points out, at the time the parties were negotiating the plea, the lack of mitigation facts made the potential for a downward departure of that magnitude essentially nil and Movant's deportation was basically a certainty. See id. at 3-5; ECF No. 89, at 1-3 (sentencing memorandum). For that reason, and because the risk of succeeding at trial was low, negotiations shifted from minimizing immigration consequences to minimizing time in custody. See Strickland, 466 U.S. at 689 (recognizing that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way"). Even Movant himself tacitly concedes that the plea negotiations were constitutionally proper because he does not ask to withdraw his guilty plea and seeks instead only to be resentenced on Count 10. If Movant truly believed the plea was infirm, he should be seeking to withdraw it entirely so that he might try to negotiate a different plea or take his chances at trial.

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[5] In a declaration provided in objection to the F&R, Mr. Price states that while he does not recall specific conversations on the matter, his standard practice was to research each contemplated charge in the plea offer. ECF No. 152 at 3. Such investigation includes reviewing each charge — which would have included Count 10 — and seeking information as to how that charge may interact with aggravated felony provisions. Mr. Price confidently states that such research would have unsurfaced Randhawa v. Ashcroft, 298 F.3d 1148 (9th Cir. 2002), which held that a § 1708 conviction categorically qualifies as a theft offense under 8 U.S.C. § 1101(a)(43)(G). Id. at 3; see id. at 4. According to Mr. Price, in consideration of the probation guidelines on sentencing for Count Ten (33-41 months), in addition to his interactions with this Court, he would have advised Figueras that he was facing a sentence of greater than 12 months, and his "normal practice would be to convey" his understanding that this would result in an aggravated felony. Id. at 4. Mr. Price avers that the immigration consequences "would have been on [his] radar" based on Movant's concerns. Id. In support, Mr. Price states that "the reason why I fought so hard was that Mr. Figueras and I both knew that the conviction did in fact matter, as Count 10 would be an aggravated felony if he received the guideline sentence we expected him to receive at that point." Id. at 5. He concludes: "When Mr. Figueras decided to plead guilty, I distinctly remember feeling that there was nothing more we could do in plea negotiations to help his immigration situation and that Mr. Figueras would be deported. I believe Mr. Figueras pleaded guilty well aware of the risk of deportation." Id. Thus, Movant's entire IAC claim is seriously undermined by the credible account of his own plea counsel.

Of course, by opting to do neither—and electing to remain bound by the agreement—Movant has also essentially conceded that he cannot show prejudice. Indeed, there is no question now that, as things stand today, Movant has been advised as to all immigration consequences flowing from his convictions, yet he still wishes to be bound by that bargain. It is clear, then, that Movant does not wish to proceed to trial. This conclusion is further bolstered by the fact that Movant admittedly knew at the time he entered the plea that some of his other counts of conviction could qualify as aggravated felonies if the loss amount was high enough, but that knowledge was not enough to deter him from pleading guilty.[6]

Nor has Movant established that he could have garnered a more favorable plea agreement. The Government was adamant that it would not dismiss any of the substantive charges, and even after Movant had established mitigation facts for sentencing, the Government was not willing to recommend a twelve-month sentence. See Opp'n at 10-12. There is simply nothing in the record to support the theory that Movant could have done any better than he actually did.[7] Further still, Mr. Price actually

[6] Since the "injury" Movant identifies is really the failure to procure a less than twelve-month sentence, ECF No. 155 at 4,5, Movant is hard pressed from a practical perspective to argue that he would have gone to trial originally, given the potential drawbacks of doing so. The evidence against Movant was apparently overwhelming, so his likelihood of avoiding immigration consequences by going that route was not good. See ECF No. 152-2 at 15. Moreover, at his original sentencing, Movant benefitted from guidelines reductions for acceptance of responsibility that likely would not have been applicable if Movant were convicted after a trial. See generally ECF No. 89 (sentencing memorandum). Movant is also likely aware that if he went to trial now in an understandably desperate attempt to stay in this country, he could instead end up in the even more untenable position where he is serving a longer prison sentence than originally imposed, which of course would still be followed by his inevitable deportation. Tellingly, although Movant indicates that "[i]n the event this Court disagrees with Mr. Figueras that resentencing is the appropriate remedy in this case, and instead concludes plea withdrawal is the only appropriate remedy, Mr. Figueras respectfully asserts his intention to continue his pursuit of relief pursuant to 28 U.S.C. § 2255," Movant still does not indicate that he would elect to proceed to trial. ECF No. 155 at 6.

[7] For this reason, this case is distinguishable from Lee v. United States, where the plea agreement entailed certain deportation while the risk of removal via trial was almost certain. 137 S. Ct. 1958, 1968-69 (2017). Here, as established supra, deportation was not a certainty with the plea because the sentence on Count 10 was still unknown. Unlike in Lee, the "consequences of taking a chance at trial" here were "markedly harsher than pleading." Cf. id. at 1969. This is precisely because whether Movant's conviction qualified as an aggravated felony depended wholly on the sentence imposed, not on the fact of the conviction itself, and, as indicated, going to trial was likely to result in a longer guideline sentence for a variety of reasons. Movant's best chance of obtaining a short sentence was to accept responsibility and plead guilty. Finally, there is no assertion here that Movant's attorney wrongly informed him that there would be no deportation risk with a plea. Cf. id. at 1962-63.

did attempt to advocate for a sentence of less than one year for count 10, including full dismissal. See Opp'n at 11-12; ECF No. 152 at 4 ("I . . . made numerous efforts on Mr. Figueras's behalf to negotiate a plea that did not require him to plead to Count 10.").

Finally, this Court can confidently say that it would not have imposed less than a twelve-month sentence on Count 10 just so Movant could avoid immigration consequences. To claim otherwise is inconsistent with this Court's solemn recognition of its tremendous responsibility in depriving liberty from the convicted. Indeed, Movant's IAC claim is entirely reliant on the flawed assumption that this Court would grant him preferential treatment on resentencing based on his immigration status — something it declines to do. The Court already determined that a twelve-month sentence was sufficient but not greater than necessary having considered all of Movant's circumstances. To then depart downward because Movant is a non-citizen would mean that this Court was treating Movant more favorably than a similarly situated United States citizen based solely on his status. This Court does not fashion its sentences to favor individuals based on their immigration or citizenship class. Stated another way, Movant got the best sentence he could have hoped for based, in large part, on the extraordinary work Mr. Price did representing him before this Court. Given all of the foregoing, the Court simply cannot say that "a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 559 U.S. at 372.

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In sum, as difficult as it is for Movant to face deportation now that he has turned his life around, and as sympathetic as the Court is to Movant's position, his deportation is not Mr. Price's fault. To the contrary, it is an unfortunate collateral consequence of years of Movant's poor choices catching up with him.[8]

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed November 3, 2020 (ECF No. 138) are ADOPTED in part and REJECTED in part, consistent with the foregoing.

2. The Motion to Vacate, Set Aside, or Correct Sentence, ECF No. 118, is DENIED.

3. The Clerk of Court is directed to CLOSE the companion civil case, 2:19-cv-01267-MCE-EFB.

IT IS SO ORDERED.

Dated: May 14, 2021

MORRISON C. ENGLAND, JR
SENIOR UNITED STATES DISTRICT JUDGE

[8] Movant's Fifth Amendment claim fails with his IAC claim. "Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). This Court has already determined supra that Mr. Price was acting within the range of competence expected of criminal defense attorneys, and in fact minimized incarceration exposure despite a concededly formidable government case. As to Movant's understanding of consequences, it cannot be said that his guilty plea was given without knowledge of the high risk (but not certainty) of deportation, depending on this Court's sentencing. Mr. Price informed Figueras of the serious risk, and he attests that he would have informed the client of the specific deportation dangers associated with Count 10. See ECF No. 152 at 4-5. The plea agreement informed him that there were uncertain immigration consequences that could range up to "automatic removal from the United States." ECF No. 75 at 9-10. Even this Court advised Figueras of potential immigration consequences under a Rule 11 colloquy, to which he agreed. Because Movant provided his plea voluntarily and intelligently, he was not deprived of his Fifth Amendment due process rights in doing so.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RALEIGH RANA FIGUERAS, Defendant.	No. 2:16-CR-00045-MCE **ORDER**

Defendant Raleigh Rana Figueras ("Defendant"), proceeding through counsel, has filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. On November 3, 2020, the magistrate judge recommended that Defendant's § 2255 motion be granted and ordered that any objections were to be filed within fourteen days. ECF No. 138.

Although the objection period has passed, Assistant Federal Defender Jerome Price now moves to intervene as an interested party or witness in Defendant's § 2255 action pursuant to Federal Rule of Civil Procedure 24(b) and moves to enlarge the time to file objections. ECF No. 140. Counsel for the government also moves for an extension of time to file objections. ECF No. 144. Defendant opposes both motions. ECF Nos. 142, 145.

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Both matters were referred to a United States Magistrate Judge pursuant to Local Rule 302. On November 30 and December 2, 2020, the magistrate judge filed two separate Findings and Recommendations herein which were served on all parties and which contained notice to all parties that any objections to the Findings and Recommendations were to be filed within seven days. ECF Nos. 146, 147. No objections have been filed.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this Court has conducted a de novo review of these matters. Having carefully reviewed the pleadings, the Court respectfully rejects the magistrate judge's Findings and Recommendations and grants both Mr. Price and the Government's motions. Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed November 30, 2020 (ECF No. 146), are respectfully REJECTED;

2. The Findings and Recommendations filed December 2, 2020 (ECF No. 147), are respectfully REJECTED;

3. Mr. Price's motion to intervene and motion for extension of time to file objections (ECF No. 140) is GRANTED;

4. The Government's motion for extension of time to file objections (ECF No. 144) is GRANTED;

5. Any objections to the Findings and Recommendations filed November 3, 2020 (ECF No. 138) shall be filed no later than January 11, 2021; and

6. In light of Defendant's immigration status, the Court further orders that Defendant remain at the Sacramento County Jail pending the conclusion of his 28 U.S.C. § 2255 action.

IT IS SO ORDERED.

Dated: December 10, 2020

MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. RALEIGH RANA FIGUERAS, Movant.	No. 2:16-cr-0045-MCE-EFB P ORDER AND FINDINGS AND RECOMMENDATIONS

Introduction

Pending before the court is Raleigh Rana Figueras's (hereinafter "movant") amended motion to vacate, set aside, or correct his sentence pursuant to section 2255 (ECF No. 118), which the government has opposed (ECF No. 126). The court held an evidentiary hearing on the motion on September 29 and 30, 2020. Movant was represented by Attorney Erin Radekin. The government was represented by Assistant U.S. Attorney Michelle Rodriguez. After considering the pleadings, the testimony of the witnesses and exhibits presented at the hearing, and the arguments advanced by counsel at the hearing, the court concludes that movant's motion should be granted.

Also pending is the government's motion to strike a declaration submitted by Frederick Williams on behalf of the movant. ECF No. 135. For the reasons described below, that motion is denied.

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Movant's Section 2255 Motion

A. Background

Movant was charged with: (1) seven counts of bank fraud and attempted bank fraud pursuant to 18 U.S.C. § 1344; (2) one count of aggravated identity theft pursuant to 18 U.S.C. § 1028(a)(1); (3) one count of unlawful possession of five or more identification documents pursuant to 18 U.S.C. § 1028(a)(3); and (4) one count of possession of stolen U.S. mail pursuant to 18 U.S.C. § 1708. ECF No. 21. He accepted a plea agreement that dismissed all but one of the bank fraud counts. ECF Nos. 75 & 91. The plea agreement required him to plead guilty to four counts: (1) one count of bank fraud and attempted bank fraud; (2) one count of aggravated identity theft; (3) one count of possession of stolen mail; and (4) one count of unlawful possession of five or more identification documents. He was sentenced to three concurrent twelve-month sentences for the counts of bank fraud, possession of stolen mail, and possession of identification documents. ECF No. 90. He was sentenced to a consecutive twenty-four month sentence for the count of aggravated identity theft. *Id.* This motion centers on the plea of guilty to a single Count (Count 10) of possession of stolen mail in violation of 18 U.S.C. § 1708, and, in particular, the immigration consequences of receiving a sentence of 12 months as to the Count.

Movant is not a United States citizen and was advised, both in the plea agreement and at sentencing, that his plea could result in his removal from the country. But, significantly, he was not advised that if he accepted the plea agreement as to count 10 and received a sentence of 12 months or more, it would constitute an aggravated felony and render him without a defense to his deportation.

On November 2, 2018, and while movant was serving his prison sentence, he was contacted by immigration officials and told that he would be deported because his conviction for possession of stolen mail was an aggravated felony that precluded any possible defense to removal. ECF No. 118 at 17. After being so apprised, movant prepared a section 2255 motion with the assistance of another inmate — Frederick Williams. ECF No. 111-1 at 15 ¶ 6. He asserts that he signed the motion, dated it, and turned it over to Williams for mailing. *Id.* The motion does bear a date — November 5, 2018 — consistent with those allegations. *See* ECF No.

96 at 12. For reasons that are unclear, the court did not receive that copy of the motion. It received only a second copy that movant himself placed in the prison mail system in June of 2019. ECF No. 118 at 17-18. As discussed below, the government contests the timeliness of movant's section 2255 motion and therefore the court's jurisdiction to address it.

Movant now argues that: (1) his motion is timely and should be considered; and (2) that his defense counsel rendered ineffective assistance by failing to advise him that a sentence of one year or more on the count for possession of stolen mail would result in an aggravated felony conviction.

B. Legal Standards

A federal prisoner making a collateral attack against the validity of his or her conviction or sentence must do so by way of a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255, filed in the court which imposed sentence. *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002). Under § 2255, the federal sentencing court may grant relief if it concludes that a prisoner in custody was sentenced in violation of the Constitution or laws of the United States. *Davis v. United States*, 417 U.S. 333, 344-45 (1974); *United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999). To warrant relief, a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We hold now that Brecht's harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254."). Relief is warranted only where a petitioner has shown "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346. *See also United States v. Gianelli*, 543 F.3d 1178, 1184 (9th Cir. 2008).

C. Timeliness of Figueras's Motion

A section 2255 motion must be filed at the "latest of": (1) one year of the movant's judgment becoming final, § 2255(f)(1); (2) one year of when the Supreme Court initially recognized a new right made retroactively applicable to cases on retroactive review, §2255(f)(3); (3) one year of his discovery of the facts supporting the movant's claims, § 2255(f)(4); or (4) the

date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. Section 2255(f)(1)-(4). Here, the parties appear to agree that the judgment against movant was final on November 21, 2017 — 14 days after judgment was entered in this case and at the expiration of time for filing of a notice of direct appeal. *See* ECF No. 118 at 10; ECF No. 126 at 2. As noted *supra*, the court did not receive movant's initial pro se section 2255 motion until July 8, 2019 — well over a year after his judgment became final. *See* ECF No. 96. The question, then, is whether: (1) some later start date is applicable or (2) the prison mail box rule renders his late filing timely.

1. Later Applicable Start Date

Movant argues that he is entitled to a later start date for the one-year limitations period insofar as he did not know that his aggravated felony conviction had deprived him of removal defenses until November 2, 2018 — the day immigration officials informed him that he had been convicted of an aggravated felony and would be removed. ECF No. 118 at 12. Movant has submitted a declaration from Jerome Price, the counsel who represented him at the time he negotiated and accepted the plea at issue. Price states that:

> I recall having conversations with Mr. Figueras during which I advised him that because the total loss on any count involving fraud was less than $10,000, conviction of those counts would not be aggravated felonies per 8 U.S.C. § 1101(a)(43)(M)(i). I knew that a conviction of an aggravated felony could result in adverse immigration consequences for a noncitizen such as Mr. Figueras. I did not advise Mr. Figueras, however, that Count 10 was technically a "theft offense" under 8 U.S.C. § 1101(a)(43)(G) – meaning a conviction on Count 10 would constitute an aggravated felony only if the sentence was one year or more – and that the loss amount was irrelevant for purposes of classifying the conviction as an aggravated felony under immigration law.

ECF No. 111-1 at 3, ¶ 4 (Ex. A, Declaration of Jerome Price). Under movant's theory, he is entitled to a later start date in November 2018 because that is when he discovered that his conviction on Count 10 was an aggravated felony for the purposes of immigration law.

The government argues this later start date does not apply because the discovery movant made in November of 2018 was legal rather than factual. ECF No. 126 at 4-5. In *Ford v. Gonzalez*, the U.S. Court of Appeals for the Ninth Circuit held that "[t]he 'due diligence' clock

starts ticking when a person knows or through diligence could discover the vital facts, regardless of when their legal significance is actually discovered." 683 F.3d 1230, 1235 (9th Cir. 2012). Under the government's theory, the "vital fact" was the existence of the conviction on Count 10 itself, which was known to the movant at the time judgment was entered. It was the legal significance of that conviction — that it was an aggravated felony because the corresponding sentence was twelve months — that he discovered at a later date. The standard is an objective rather than a subjective one. The Seventh Circuit has explained:

> Time begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance. If § 2244(d)(1) used a subjective rather than an objective standard, then there would be no effective time limit . . . .

Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000).

At the evidentiary hearing, movant's counsel argued that the discovery at issue was both legal and factual – the factual element being the discovery that Price had misadvised movant as to the nature and potential risks associated with Count 10. This argument presents a close question insofar as it is difficult to separate the "fact" of Price's misadvisement from the legal discovery associated therewith. However, the court need not decide the question because, as explained below, movant's motion was timely under the prison mail box rule.

2. Prison Mailbox Rule and Frederick Williams's Declaration

Movant argues that, under the prison mailbox rule, his motion was timely filed on November 5, 2018 — the date he signed his motion and gave it to Williams — the inmate who was assisting him. ECF No. 118 at 10-11. Movant testified at the hearing and described William as acting as a jail-house lawyer with whom he would consult at the prison library. When movant learned that he was to be deported he went to see Williams who advised him to file a section 2255 motion. Movant testified that Williams helped draft the motion and upon completion assured movant that he (Williams) would deposit the motion in the outgoing prison mail. *Id.*, ECF No. 111-1 at 15-16, ¶ 6 (Ex. C, Declaration of Figueras). Under the prison mail box rule, a prisoner's legal filing "is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of the court." *Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003).

And, as movant correctly notes, the fact that the delivery to prison officials was performed by another inmate does not alter the mailbox rule analysis.[1] *See Hernandez v. Spearman*, 764 F.3d 1071, 1074 (9th Cir. 2014) ("Application of the rule has never turned on the identity of the prisoner who physically delivers the petition to prison authorities. After examining the precedential underpinnings of the mailbox rules, we conclude that there is no reason it should.").

After the hearing in this matter was concluded, the court invited movant to submit a declaration from Williams who, prior to these proceedings, had been deported to Belize. ECF No. 131. On October 20, 2020, movant submitted the declaration. ECF No. 134-1. Williams's declaration corroborated movant's testimony as to the mailing of his initial section 2255 motion. *Id.* Then, the government moved to strike Williams's declaration, arguing that: (1) the declaration bore no indicia of reliability or credibility — there was no certification or notary indicating that it was actually authored by Frederick Williams; and (2) even if it was authored by Williams, the court should afford it no weight because he was convicted of fraud and false statements. ECF No. 135 at 1-2. In conjunction with its motion, the government submitted a lengthy appendix of documents which purport to show that Williams previously attempted to deceive a federal court as to the timeliness of his own section 2255 motion. ECF No. 136.

As to the reliability of the declaration, the court notes that Williams signed under penalty of perjury. ECF No. 134-1 at 3. Thus, it complies with the requirements of 28 U.S.C. § 1746[2]

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[1] The government argues that movant is not entitled to the mailbox rule insofar as he delivered his motion to another inmate rather than prison authorities. ECF No. 126 at 6. But so long as the other inmate delivered the motion into the hands of prison authorities, that is sufficient.

[2] Section 1746 states, in pertinent part:

> Wherever, under any law of the United States or under any rule . . . order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same . . . such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

and is deemed admissible on that basis. The remainder of the government's arguments regarding Williams's propensity for fraud go to the credibility of the declaration rather than its admissibility. Thus, the motion to strike the declaration is denied.

Movant credibly described in his testimony seeking advice from Williams upon learning of the impending deportation proceeding and the extent to which Williams assisted him. He described meeting with Williams at an office at the library and that Williams advised him on how to pursue a section 2255 motion. He described Williams helping him draft the motion and, upon signing it, leaving a copy with Williams to mail. He also described William's advice to wait when movant became concerned that he had not heard anything in response from the court. Additionally, no witness or documentary evidence was presented by the government to refute movant's testimony regarding his interactions with Williams or the mailing of the motion in November of 2018.

And movant's testimony is bolstered by Williams's declaration. As noted above, the declaration corroborates what movant testified to at the motion hearing. So too does the United States Department of Homeland Security "Notice to Appear" — dated November 2, 2018 — which movant attached to his reply to the motion to strike. ECF No. 137-1 (Ex. A). By all accounts, movant was, at all times, desperate to avoid removal. Thus, it is credible that, immediately after receiving this immigration notice, he looked to the most readily available legal resource — a well known "jailhouse lawyer." Less persuasive is the notion that an individual who feared removal would, upon receiving a notice that the government intended to remove him, delay filing a section 2255 motion for months.

The government argues that movant's account of the initial mailing is questionable — going so far as to suggest, at the evidentiary hearing, that movant may have forged the November 2018 date on his pro se motion. Counsel for the government emphasized that movant had not

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> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

presented any log establishing that the document was mailed in November 2018, nor had he testified that there was any other observable "paper-trail" — such as the exchanging of postage or money. But absent evidence to the contrary — and not mere speculation on the part of the government — the court presumes the filing was delivered to prison authorities on the date it was signed. *See Butler v. Long*, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014) ("Butler signed the first petition on October 5, 2008, and it was stamped filed on October 15, 2008. We assume that Butler turned his petition over to prison authorities on the same day he signed it and apply the mailbox rule."). The court notes that avenues for challenging this presumption were available to the government. It could, for instance, have sought and presented documentary evidence which showed that no mailings in movant's (or Williams's) name were submitted during the time period in question. Better still, it might have called a prison official to testify as to how the prison mail system worked at Taft Correctional Institution and how, if at all, movant's testimony was inconsistent with that functioning. It failed to present such evidence, however. Instead, it challenges movant's testimony and Williams's declaration by arguing that both men have a history of perpetrating fraud. That history has some obvious bearing on credibility, but it is not the final word. Most convicted criminals have sordid deeds in their past which, in the eyes of most, render them less credible. The court declines to dismiss their testimony out of hand, however, particularly with respect to alleged violations of their constitutional rights. Instead, it finds, based on the entirety of the record, that movant's testimony regarding the timing of his initial motion is credible. *See* 28 U.S.C. § 2255(b) (" Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and *make findings of fact and conclusions of law with respect thereto*.") (emphasis added).

Finally, the court turns to the question of diligence. The Ninth Circuit has held that "[a] prisoner who delivers a document to prison authorities gets the benefit of the prison mailbox rule, so long as he diligently follows up once he has failed to receive a disposition from the court after a reasonable period of time." *See Huizar v. Carey*, 273 F.3d 1220, 1223 (9th Cir. 2001). The

government argues that petitioner failed to act diligently insofar as he did not send a letter to the court or otherwise investigate the status of the motion he initially sent. The court disagrees.

As noted *supra*, the initial motion was purportedly mailed in November of 2018 and never reached the court. Movant testified that he became concerned after two or three months had passed and he received no response from the court. Williams, however, advised him that it takes time to receive a response to such a motion and that he should wait. It was not until June of 2019 – nearly six months later – that movant sent another copy of his motion to the court. ECF No. 111-1 at 16, ¶¶ 7-8. But the passage of approximately six months between the mailing of the initial motion and movant's follow-up does not render him non-compliant with the diligence requirement. In *Huizar*, the Ninth Circuit held that a prisoner waiting twenty-one months for a court's decision on his filing (which was, like the case at bar, missing in transit) was acceptably diligent. 273 F.3d at 1224.

Based on the foregoing, the court concludes that the prison mailbox rule applies and the motion is timely filed.

D. Ineffective Assistance of Counsel

Turning to the merits, the question is whether movant's defense counsel, Jerome Price, rendered ineffective assistance of counsel when he failed to recognize (and relate to movant) that a conviction on Count 10 (possession of stolen mail) would be an aggravated felony if it resulted in a sentence of a year or more. The issue is material to movant's current circumstances in which he faces an order for his removal from the United States. Upon being sentenced to twelve months on Count 10, movant was left without any viable defense to immigration removal. Price's lack of awareness prevented him from negotiating with the government a recommended sentence of just under 12 months or requesting such a sentence from Judge England during the sentencing hearing. Movant claims that Price's error: (1) violated his right to effective assistance of counsel under the Sixth Amendment based on the misadvisement and the failure to negotiate/request a better plea/sentence; (2) violated his right to due process under the Fifth Amendment because his plea was not knowing and voluntary; and (3) violated his right a fair sentencing process under the Fifth Amendment. ECF No. 127 at 1-2.

As discussed below, the court finds that Price's misadvisement and subsequent failure either during negotiations or at the sentencing hearing to seek a sentence of one day less than the 12 months to which movant was sentenced as to Count 10, violated movant's Sixth Amendment right to effective assistance of counsel.

Ineffective assistance of counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). To sustain an ineffective assistance of counsel claim, a movant must prove that counsel's representation was deficient, falling below an objective standard of reasonableness. Meeting this requirement demands that the movant overcome the strong presumption that counsel's conduct fell within "the wide range of professionally competent assistance." *Id.* at 690. Second, defendant must show that counsel's deficient performance prejudiced the defense. *Id.* To prove prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Relevant here, the Supreme Court held in *Padilla v. Kentucky*, 559 U.S. 356 (2010) that effective assistance requires a defense attorney to inform a client of "clear" deportation consequences which arise wherever immigration law is "succinct, clear, and explicit." *Id.* at 368-69. *See also United States v. Rodriguez-Vega*, 797 F.3d 781, 786-791 (9th Cir. 2015) ("Counsel's statement at Rodriguez-Vega's sentencing hearing that 'there is a high likelihood that she'll still be deported. It's still probably considered an aggravated felony for purposes of immigration law'. . . , is similarly deficient because it likewise fails to state accurately the plain and clear status of the law.").

Attorney Price testified and candidly explained that he simply missed a critical issue as to Count 10 and its immigration consequences to movant. Price's testimony was detailed and forthcoming and the court finds it credible. Price explained that like the other Counts included in the plea agreement, his focus as to Count 10 was not on whether the sentence might exceed 12 months, but whether the amount of loss would reach $10,000. Price mistakenly believed that a plea of guilty to Count 10 (like the other Counts to which movant would plead guilty) would not

result in a conviction for an aggravated felony so long as the amount of loss was less than $10,000. Price overlooked, however, that Count 10 was a theft offense for immigration law purposes and, therefore, an imposition of a sentence of 12 months or more would result in a conviction for an aggravated felony regardless of loss amount. As a consequence of Price's oversight, movant's deportation became a certainty when Judge England sentence him to 12 months. Price admitted that he failed recognize this and did not properly advise movant of the legal implications surrounding Count 10. ECF No. 111-1 at 2-3.

To be sure, Price did advise movant that there were possible adverse immigration consequences and that, in pleading guilty, he would be "deportable." *Id.* at 2. But both Price and movant confirmed that Price did not advise movant that, if he were sentenced to 12 months or more on Count 10, he would be pleading to an aggravated felony and effectively guarantee his deportation. It is well established in this circuit that effective assistance requires that a defendant be so informed during the plea negotiations. *See United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011) ("A criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty."). Thus, without knowing that he would need to seek a sentence on Count 10 that was merely one day less than was imposed, movant did not have the opportunity at sentencing to explain these circumstances and the equity of a slightly shorter sentence. Such a reduction was not at all implausible. As movant argues, he could still have been sentenced to the identical overall amount of time simply by removing one day from the sentence on Count 10 and adding one day to the sentence on any of the other counts. Had such a request at the sentencing hearing been presented and granted by the sentencing judge it would have maintained the overall sentence length and preserved any available defenses to deportation. But, because Price and movant did not understand the consequences of that single day and mistakenly believed that a conviction on Count 10 would not result in an aggravated felony, movant accepted the plea. He did so knowing that he *could* be deported after consideration of his immigration defenses in a removal proceeding, but not knowing that, with a sentence of 12 months on Count 10, he *would* be deported without any such consideration. In short, there is a fundamental difference in

knowing a removal is possible as opposed to knowing it is a virtual certainty. That distinction has, as noted by the case law cited *supra*, been clearly drawn in this circuit. Knowledge of that risk might well have motivated movant to alter his plea negotiation strategy or to request a sentence just under one year at sentencing; or, at the extreme end, to reject a plea entirely and proceed to trial. In any event, under the law in this circuit Price's performance in advising movant was constitutionally ineffective. *United States v. Bonilla*, 637 F.3d at 984.

The government argues that it was enough, under *Padilla*, for Price to advise movant that he could be deported. ECF No. 126 at 10 ("[T]he Supreme Court in *Padilla* requires that a criminal defense attorney, such as Price, 'need do no more' than advise a noncitizen, such as Figueras, that pending criminal charges 'may carry a risk' of adverse immigration consequences.") (internal citations omitted). But *Padilla* states that mere advisement of risk is appropriate where "the law is not succinct and straightforward." 559 U.S. at 369; *see also Rodriguez-Vega*, 797 F.3d at 786. The piece of immigration law at issue here may have been technical, but careful examination of the statute would have rendered its possible implications straightforward and relatable to movant.[3] *See Padilla*, 559 U.S. at 368 ("Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute"). Moreover, there were resources available to Price that he could have availed himself. Christopher Todd, movant's current immigration attorney, testified that he has contracted with defense attorneys and conflict panels, including the Federal Defender's Office for the Eastern District of California, to advise them on issues of immigration law. And as Todd testified, had movant simply been sentenced to 364 days as to Count 10 (and a longer period as to any other Count), he would not have become an aggravated felon for purposes of subsequent removal proceedings.

Nor is the court persuaded by the government's arguments that movant should have understood the aggravated felony risk regardless of his counsel's advice, either because of the

[3] At the evidentiary hearing, counsel for the government emphasized that Price was not an immigration attorney. That fact is undisputed, but careful examination of the statute — performable by any attorney — would have illuminated the issue at bar.

language included in the plea bargain or because he had participated in previous immigration proceedings. The language of the plea bargain is irrelevant to the question of whether counsel was effective. *Rodriguez-Vega*, 797 F.3d at 787 ("The government's performance in including provisions in the plea agreement, and the court's performance at the plea colloquy, are simply irrelevant to the question whether counsel's performance fell below an objective standard of reasonableness."). And the court will not impute an understanding of immigration law to movant based solely on his participation in other immigration proceedings. There is no precedent for the proposition that a defendant's participation in other, similar proceedings should deprive him of the right to constitutionally effective counsel.

The government also argues that Price's performance was not deficient because he technically advocated for a sentence of less than a year by "request[ing] the United States dismiss all counts, including § 1708, with a plea to only § 1028A (carrying a 2-year minimum mandatory sentence). The offer was rejected."[4] ECF No. 126 at 11-12. And, prior to sentencing, the government notes that:

> [I]mmediately prior to the sentencing hearing, Price requested the United States and defendant enter a joint sentencing recommendation for time served plus 24 months consecutive. This offer was rejected. The United States then informed Price of its intent to recommend Figueras receive credit for his time under supervision as a further offset from the PSR low end. Thus, Price tried to obtain a less than 12-month sentence through the United States and abandoned the position before the sentencing court when Price requested 12 months plus 24 months.

Id. at 12. But these contentions do not address the possibility that, having been made aware of the aggravated felony concern as to Count 10, movant might, as he indicated he would in his testimony, decline to take the plea. Nor does it address Price's failure to explain at the sentencing hearing the removal consequences as to Count 10 and request of Judge England a sentence of 364 days rather than 365 days.[5]

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[4] Figueras argues that government counsel's assertions should not be considered insofar as she did not submit them in the form of a declaration but, instead and inappropriately, as a witness in the case. ECF No. 127 at 11.

[5] As the government conceded in argument at the hearing, the goal of the prosecution was to secure an overall prison sentence that was just, not to secure the movant's deportation. That

Next, the government argues that movant cannot show prejudice based on Price's misunderstanding because movant cannot "establish he would rationally reject the extant plea agreement entirely because he would hold out for a § 1708 sentence guarantee of less than 12 months." ECF No. 126 at 11. The government emphasizes that all of movant's counts carried the risk of aggravated felony status and that "risk of loss over $10,000 was pervasive for the fraud counts and thus, the risk of aggravated felony status as a result of conviction under the extant plea agreement was fully accepted."[6] *Id.* These arguments are not persuasive. As the Ninth Circuit stated in *Rodriguez-Vega*, "[i]t is often reasonable for a non-citizen facing nearly automatic removal to turn down a plea and go to trial risking a longer prison term, rather than to plead guilty to an offense rendering her removal virtually certain." 797 F.3d at 789. Indeed, movant testified at the hearing that, had Price correctly advised him and he was unable to reach a plea bargain that ensured a sentence of less than a year on Count 10, he would have refused to plead guilty. And with respect to the risk of loss of over $10,000 dollars on any fraud count, Price has already offered his declaration that he told movant "because the total loss count on any count involving fraud was less than $10,000, conviction of those counts would not be aggravated felonies per 8 U.S.C. § 1101(a)(43)(M)(i)." ECF No. 111-1 at 3. Thus, it cannot be said that movant "accepted" the risk of an aggravated felony status by taking the plea agreement.

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goal was readily available even if Count 10 had been reduced by one day. To the extent that one day was material to achieving a just sentence, it could easily have been added to the sentence on another count.

[6] In its evidentiary hearing brief, the government also argues that there is no guarantee that Judge England would have agreed to a sentence of less than one year on Count 10. ECF No. 128 at 3-4. That may be, but movant was entitled to correct advice so that: (1) he could make an informed decision as to whether to take the plea at all; and (2) in the event he still elected to accept the plea, his counsel could request the sentence of less than a year and give him a chance to avoid an aggravated felony. Moreover, there was, at the very least, a "reasonable probability" that Judge England would have agreed to a sentence of eleven months and twenty-nine days given the profound immigration consequences a twelve-month sentence would carry. *See Strickland*, 466 U.S. at 694 (holding that a movant may demonstrate prejudice by establishing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Finally, the government argues that, pursuant to the language of the plea agreement, movant has waived his right to collaterally attack his conviction. ECF No. 126 at 8; ECF No. 75 at 8-9, ¶ 21. But claims of ineffective assistance of counsel that challenge the voluntary and intelligent nature of the plea agreement are not encompassed by such waivers. *See Washington v. Lampert*, 422 F.3d 864, 871 (9th Cir. 2005); *see also United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) ("We doubt that a plea agreement could waive a claim of ineffective assistance of counsel based on counsel's erroneously unprofessional inducement of the defendant to plead guilty or accept a particular plea bargain."); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993) (declining to hold that a waiver forecloses a claim of ineffective assistance or involuntariness of the waiver).

E. Remedy

At the hearing, movant's counsel stated that movant's only requested remedy was resentencing. The Ninth Circuit has held that a successful section 2255 "confers upon the district court broad and flexible power in its actions . . . ." *United States v. Handa*, 122 F.3d 690, 691 (9th Cir. 1997); *see also United States v. Jones*, 114 F.3d 897 (9th Cir. 1997) ("[T]he statute gives district judges wide berth in choosing the proper scope of post-2255 proceedings."). And this circuit has found resentencing to be an appropriate remedy after a successful section 2255 motion. *See United States v. Hock*, 172 F.3d 676, 680-81 (9th Cir. 1999).

Conclusion

Accordingly, it is ORDERED that the government's motion to strike (ECF No. 135) is DENIED.

Further, it is RECOMMENDED that movant's motion to vacate, correct, or set aside his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 118) be GRANTED and he be resentenced as the district judge deems appropriate after consideration of a properly informed sentencing request/memorandum by movant.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written

objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 3, 2020.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. RALEIGH RANA FIGUERAS, Movant.	No. 2:16-cr-0045-MCE-EFB P FINDINGS AND RECOMMENDATIONS

On November 3, 2020, the court recommended that Mr. Figueras's (hereinafter "movant") section 2255 motion be granted. ECF No. 138. In so doing, it found that Mr. Jerome Price — movant's counsel during plea negotiations and at sentencing — rendered ineffective assistance in failing to recognize that movant's conviction of possession of stolen mail would be an aggravated felony if it resulted in a sentence of one year or more. *Id*. at 10. The objections deadline — fourteen days — passed without any party submitting any. Then, one week after the deadline expired, counsel for the government requested an extension of time to file objections. ECF No. 144. Therein, counsel stated that, during the deadline for lodging objections, she suffered an illness and, additionally, was on leave for one week. *Id*. at 2. The government asks for an extension of time to file objections until January 11, 2021 — thirty days from when it estimates transcripts of the evidentiary hearing will be available. *Id*. at 1. The court recommends that the motion for extension of time be denied.

Under the Federal Rules of Civil Procedure, a court may, for good cause, extend time based on a motion made after time has expired "if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1). To determine whether a party's neglect is excusable, the court consider four factors — "(1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010). Additionally, the court is cognizant of the local rules which provide that "[r]equests for Court-approved extensions brought on the required filing date for the pleading or other document are looked upon with disfavor." E.D. Cal. L. R. 144(d). It logically follows that requests for a court-approved extension brought *after* the required filing date should be looked upon with equal or, indeed, greater disfavor.

As to the four factors, the first, danger of prejudice to the opposing party, weighs against the requested extension of time. As the court previously noted, movant remains in the Sacramento County Jail awaiting the conclusion of these proceedings. ECF No. 146 at 3. And any relief from the pending final order of removal is contingent on the resolution of these proceedings. *Id.; see also* ECF No. 142 at 1-2. The second factor, the length of the delay, also cuts against granting an extension. The government is requesting a delay of more than a month to allow time to review the evidentiary hearing transcript.[1] The substantial delay compounds the prejudice to movant who will remain in the Sacramento County Jail until the objections are filed and the district judge adopts or rejects the pending recommendations.

The third factor, the government's reason for the delay, is dismaying. Counsel's declaration says nothing about what efforts were made by that counsel to meet the existing deadlines. Further, scheduling leave during the two-week period during which objections were to have been filed suggests that a timely request for an extension of time could have been filed if counsel had been diligent. Here, counsel filed nothing until after apparently being served with attorney Price's requests to intervene and extend time. As for the separate reason articulated in

[1] Counsel is aware of what arguments and evidence were presented at the evidentiary hearing. A lengthy delay to review transcripts of the hearing is unjustified.

the declaration, the court understands that illness respects no schedule, but the government's counsel is an experienced litigator in the United States Attorney's Office. As movant points out in his opposition, staff or other attorneys in the office could have assisted counsel in preparing a timely request for extension of time or, better yet, timely objections.[2]

Finally, the court presumes the final factor (the question of good faith) weighs in the government's favor. The court accepts counsel's representation as to an illness. The court also presumes that her failure to factor the two-week deadline into her week-long leave is a consequence of negligence rather than a bad faith attempt to delay these proceedings. However, that the government's motion is being brought in good faith does not counterbalance the other three factors. As all counsel are aware, this court granted movant's request to shorten time for adjudication of this section 2255 motion based on a finding of good cause. Indeed, the court heard oral argument on the matter (ECF No. 120) and was informed by the government that it could not agree to delay any deportation pending the resolution of this proceeding. In light of that the court set the matter for hearing on an expedited basis over the objection of the government. ECF No. 121. That urgency has not changed.

Accordingly, it is RECOMMENDED that the government's motion for extension of time to file objections (ECF No. 144) be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within seven days after being served with these findings and recommendations, Mr. Price (and either party if they so desire) may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to

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[2] The request that was finally submitted was not complicated. It consists of two sentences and a single page declaration. ECF No. 144. It could not have taken an inordinate amount of time or effort to submit it.

appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: December 2, 2020.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. RALEIGH RANA FIGUERAS, Movant.	No. 2:16-cr-0045-MCE-EFB P FINDINGS AND RECOMMENDATIONS

On November 3, 2020, this court recommended that Mr. Figueras's (hereinafter "movant") section 2255 motion be granted. ECF No. 138. In so doing, it found that Mr. Jerome Price — movant's counsel during plea negotiations and at sentencing — rendered ineffective assistance in failing to recognize that movant's conviction of possession of stolen mail would be an aggravated felony if it resulted in a sentence of one year or more. *Id.* at 10. Any objections to that recommendation were due on or before November 17, 2020. ECF No. 138 at 15. That deadline passed without any party submitting any objections.[1] After the deadline passed, Price filed a motion to intervene in which he requested intervention and an extension of time to file objections. ECF No. 140. Therein, he states that intervention is warranted because a finding that

[1] Though, in a motion submitted well after the deadline for objections passed, the government has requested an extension of time to submit objections. ECF No. 144. The court will be issuing separate findings and recommendations on that motion.

he misadvised movant "relates to how he discharged his professional responsibilities." *Id.* at 2. Movant filed an opposition to Price's motion (ECF No. 142) and Price filed a reply (ECF No. 143). For the reasons stated hereafter, it is recommended that Price's motion be denied.

Where a party has no intervention as of right, but seeks permission to intervene, a court may grant a timely motion to intervene if it is brought by one who is (1) given a conditional right to intervene by a federal statute, or (2) has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b). Price does not identify any conditional right to intervene granted by federal statute. Instead, he argues that he has a claim that shares a common question of law or fact insofar as the findings, if adopted, bear on how he conducted himself professionally. ECF No. 140 at 2. It is undoubtedly true that his performance as an attorney has been and remains at issue in this case. But that fact, standing alone, is not a claim. The U.S. Court of Appeals for the Ninth Circuit has stated that a claim is "[t]he aggregate of operative facts giving rise to a right enforceable by a court . . . [t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . [a] demand for money, property, or a legal remedy to which one asserts a right." *United States v. Kim*, 806 F.3d 1161, 1171 (9th Cir. 2015) (quoting *Black's Law Dictionary* 281-82 (9th ed. 2009)). Under even the most liberal reading of the foregoing definition, Mr. Price has not identified a specific claim that he would, if allowed to intervene, have the court adjudicate at this time. In fact, he acknowledges that, if his motion to intervene is granted, he may not file any objections at all. ECF No. 140 at 2 ("[U]pon receiving the magistrate judge's findings, the undersigned wishes to have time to review the transcripts *and consider whether objections should be filed* to the factual findings made by the magistrate judge, which relied on both the undersigned's declaration and testimony at the evidentiary hearing.") (emphasis added).

The court also finds that Price's motion to intervene is untimely. In the Ninth Circuit, courts evaluate the timeliness of a motion to intervene based on "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (citing *Cal. Dep't. of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F. 3d

1113, 1119 (9th Cir. 2002)). Here, Price has waited until the proceedings in this case were nearly at an end,[2] with dispositive findings and recommendations submitted to the district judge, to intervene. And there is no justifiable reason for the delay. Price's performance has been at issue in this case since movant filed his pro se section 2255 motion in July of 2019. ECF No. 96. And Price was certainly on notice that his performance would be relevant when the proposed first amended section 2255 motion was filed in July of 2020. ECF No. 111. That motion explicitly argues that Price's representation prior to sentencing was ineffective. To wit:

> Mr. Price's s failure to advise Mr. Figueras prior to entry of his pleas and sentencing that the possession of stolen mail count would be an aggravated felony constitutes clear error, as the terms of the relevant immigration statute are clear. Moreover, this error resulted in prejudice to Mr. Figueras because, if he had known the actual immigration consequences prior to negotiation of the plea agreement or sentencing, he would have had the opportunity to negotiate a limitation to a sentence of less than one year in the plea agreement, or to request a sentence of less than one year on that count at sentencing, which would have avoided conviction of an aggravated felony, preserved his best defenses to removal, and, as a reasonable probability, might well have allowed him to avoid an order of removal.

ECF No. 111-2 at 19-20. Thus, even assuming intervention was permissible, if Price believed that an attack on his pre-sentencing representation necessitated his intervention, he should have acted after reading the proposed motion.[3] And, as movant points out in his opposition, there would be prejudice to him if adjudication of this case were delayed to allow Price to weigh whether to file objections. The court already found that time was of the essence when it shortened time to hear the section 2255 motion. That has not changed. Movant remains in the Sacramento County jail awaiting the conclusion of this case and the relief from the earlier adverse immigration consequences that would be provided by resentencing (assuming the findings and recommendations are adopted). That relief currently remains out of reach and movant faces imminent deportation based on the aggravated felony conviction.

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[2] The request was not presented until after the close of briefing and after the testimony was concluded, oral argument was heard, the matter ordered submitted, and proposed findings and recommendation were filed. Under any objective standard, the request is untimely.

[3] In fact, Price submitted a declaration in conjunction with the motion for leave to file an amended section 2255 motion. ECF No. 111-1 at 2-4, Ex. A.

The court is also persuaded by *United States v. Collyard*, the case relied upon by movant in his opposition. No. 12-0058 (SRN), 2013 U.S. Dist. LEXIS 49077 (M.N. Dist. 2013). In *Collyard*, the court denied a motion to intervene by the defendant's former attorney in a criminal case. *Id.* at * 6. There the attorney sought to intervene in the case in order to protect his license to practice law. *Id.* at *5-6. The court reasoned that the motion should be denied because the attorney's "right in his license to practice law is not before the Court in this criminal proceeding, and because the right of intervention in criminal proceedings is narrowly circumscribed . . . ." *Id.* at * 6. Price argues that *Collyard* is inapposite because it dealt with criminal proceedings rather than a section 2255 motion. ECF No. 143 at 4. That may be, but it remains true that any negative collateral consequences to Price's law license, bar membership, or standing among his peers that result from the findings are not before the court.

In his reply, Price contends that he is merely trying to ensure the accuracy of the record upon which the district judge will make a final determination. *Id.* at 2. He takes issue with the findings and recommendations insofar as they state that he misadvised movant as to the immigration consequences of Count 10 at the plea stage. *Id.* He argues that he did tell movant he "would be deported (was deportable)." *Id.* There is an obvious distinction, however, between being made aware of the possibility of deportation and being told that deportation is a legal certainty. In his declaration, Price acknowledges that he "recalls having conversations with [movant]" in which he advised him that the counts he was pleading to would not be aggravated felonies. ECF No. 111-1 at 3, ¶ 4, Ex. A. He admits that he did not advise movant that a sentence of more than one year on Count 10 would constitute an aggravated felony. *Id.* And movant, in his own declaration, states that his conversations with Price led him to believe that, although accepting the plea would render him deportable, he would not be convicted of an aggravated felony and rendered defenseless to deportation. *Id.* at 14, ¶3, Ex. C.

Price suggests in his reply that he may want to develop a time distinction for when his ineffective assistance occurred. ECF No. 143 at 3. It appears that he wants to show that his mistake occurred at the time of the sentencing hearing rather than at some prior point in the proceedings. Price does not explain why this distinction is material. Regardless, the court is

convinced that there is no point in waiting on the transcript and delaying final adjudication of the motion. Indeed, even in his reply Price drives home the point that he made the very mistake that is identified in the court's findings and recommendation as the basis for finding ineffective assistance. Price concedes that at the time of sentencing he was unaware "that a request for one-day less would have preserved Mr. Figueras's right to fight deportation." ECF No. 143 at 3. And he confirms that "he should have asked for the same total sentence, but a day less on Count 10." *Id.* The transcript, whatever else it might show, will not alter that outcome. Price agrees he made the mistake, and, as was explained in detail in the findings and recommendation to grant movant's section 2255 motion, the mistake resulted in an aggravated felony conviction on Count 10 which deprived movant of an opportunity to contest his deportation. Price has not shown that allowing him to intervene and file objections would add any meaningful information or context to the issues in this case.

Finally, the court has weighed allowing Price to file an *amicus curiae* brief in place of intervening. It concludes that the standard for such a filing is not met here, however. In determining whether to allow the participation of amicus curiae, a court should consider the content of the proposed brief. *See Ellis v. Housenger*, No. 13-cv-01266-MMC, 2016 U.S. Dist. LEXIS 57521, *3 (N.D. Cal. 2016). Here, Price has not settled on the content of his objections or even whether he would file them if allowed to intervene, and thus the court is unable to determine precisely what any amicus brief would contain. And the purpose of an amicus brief is "to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration." 4 Am. Jur. 2d Amicus Curiae § 6 (2004). It cannot raise issues not previously raised by the parties themselves. *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 160 n.3 (7th Cir. 1977). And, whatever else any amicus brief might include, Price seems prepared to act in conjunction with or, perhaps in place of, the government. *See* ECF No. 143 at 4 ("Although the government would traditionally be the party who would introduce countervailing evidence in a § 2255 proceeding, here the government elected not to contact the undersigned at all, so the government was unaware of key facts it could have used in arguing whether counsel's performance was constitutionally adequate at the plea stage."). Such a posture is inappropriate for

an amicus curiae. *See In re Forge Grp. Power Pty LTD*, No. 17-cv-02045-PJH, 2017 U.S. Dist. LEXIS 100488, *3 (N.D. Cal. 2017) ("[A]n amicus curiae is merely a 'friend of the court,' not a party to the action, and to that end, an amicus may not assume the functions of a party, nor may it initiate, create, extend, or enlarge the issues.").

Accordingly, it is RECOMMENDED that Mr. Price's motion to intervene and motion for extension of time to file objections (ECF No. 140) be DENIED.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within seven days after being served with these findings and recommendations, Mr. Price (and either party if they so desire) may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 30, 2020.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

DECLARATION OF JEROME PRICE, JR., ESQ.

I, Jerome Price, Jr., Esq., declare at follows:

1. I am an attorney licensed to practice law in the State of California and employed by the Federal Defender's Office for the Eastern District of California as an assistant federal defender. I represented Raleigh Figueras in his federal criminal case no. 2:16-cr-00045-MCE in the Eastern District of California. My representation spanned from February 26, 2016 through his guilty plea and sentencing.

2. Throughout my representation of Mr. Figueras, I was aware that he was a noncitizen, who had status as a lawful permanent resident. Prior to the entry of his guilty plea, we had discussed the possible immigration consequences of the criminal charges he faced. We also discussed what I thought were immigration consequences of the plea offer extended by the government, which was the offer he ultimately accepted as the controlling plea agreement in his case. I was also aware that Mr. Figueras had two children who were United States citizens, he had close family who resided in the United States, and that Mr. Figueras, himself, had resided in the United States since he was a minor.

3. Prior to Mr. Figueras's decision to accept the government's plea offer, I had consulted with him about the offer. I reviewed each part of the plea offer with him and advised him consistently with the written terms of the offer. Specifically, I advised him that he would be pleading guilty to felony charges that may have adverse immigration consequences, including removal/deportation. Further, I advised him that he would be deported (was deportable) as a result of pleading guilty to the four counts set forth in his plea agreement, including count 10 alleging a violation of 18 U.S.C. § 1708, possession of stolen mail. I gave that advice based on

what I understood about immigration law and the information I read in the discovery provided by the government.

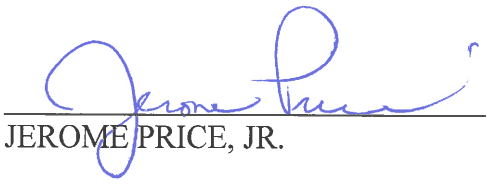
4. I recall having conversations with Mr. Figueras during which I advised him that because the total loss on any count involving fraud was less than $10,000, conviction of those counts would not be aggravated felonies per 8 U.S.C. § 1101(a)(43)(M)(i). I knew that a conviction of an aggravated felony could result in adverse immigration consequences for a noncitizen such as Mr. Figueras. I did not advise Mr. Figueras, however, that Count 10 was technically "a theft offense" under 8 U.S.C. § 1101(a)(43)(G) —meaning a conviction on Count 10 would constitute an aggravated felony only if the sentence was one year or more—and that the loss amount was irrelevant for purposes of classifying the conviction as an aggravated felony under immigration law.

5. By the time of sentencing, Mr. Figueras had demonstrated extraordinary rehabilitation. My sentencing advocacy and strategy was geared toward requesting a substantial downward variance from the sentencing guidelines range, resulting in the least amount of time spent in prison. When fashioning my request to the Court, I was unaware that Mr. Figueras's conviction for Count 10 would only be considered an aggravating felony if he was sentenced to less than 12 months. Consequently, instead of asking for less than a 12-month sentence on Count 10, I requested a 12-month sentence.

6. I later learned that Mr. Figueras's sentence of 12 months on Count 10 may make the difference in his ability to challenge removal, notwithstanding the advice I gave him prior to his decision to plead guilty. Given Mr. Figueras's extraordinary rehabilitation, I believe restructuring my sentencing request to ask for a sentence of 11 months and 29 days on Count 10—while requesting a 12-month sentence on Counts 4 and 11—to run concurrently to each

other and consecutively to Count 9 (a mandatory 2-year consecutive sentence) would have been at least as reasonable as my actual request of 12 months on Counts 4, 10, and 11. Knowing the impact such a request would have meant for Mr. Figueras, I would have made the request for a less-than-12-month sentence on Count 10.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Sacramento, California on the 20 day of July, 2020.



JEROME PRICE, JR.

DECLARATION OF CHRISTOPHER TODD

I, Christopher Todd, declare as follows:

1. I am an immigration counsel, and I am licensed to practice law in the State of New York. I practice immigration law before the Executive Office of Immigration Review (the Immigration Court and the Board of Immigration Appeals), the Ninth Circuit Court of Appeals, before the US Citizenship and Immigration Services and before the Department of State. The majority of my practice is devoted to the immigration issues surrounding non-citizens who have been convicted of criminal offenses, in particular defending immigrants in removal proceedings. I have been practicing immigration law since 2002. I have been advising criminal defense attorneys regarding the immigration consequences of state and federal convictions since 2003.

2. The majority of my practice is devoted to the immigration issues surrounding non-citizens who have been convicted of criminal offenses, in particular defending immigrants in removal proceedings. In this role, I have been providing immigration consultations by contract to the conflicts panel in Sacramento, CA, for the past 17 years through my association with Jim Smith, Esq.

3. I have reviewed Mr. Figueras's criminal history, as represented in the presentence report and the Sacramento County Superior Court website.[1] Based upon his convictions in the present case, and despite being a Lawful Permanent Resident (LPR), at the time Mr. Figueras was sentenced he became not only removable but also ineligible for any realistic relief from removal.

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[1] Mr. Figueras's defense attorney, Erin Radekin, has ordered the court files for these cases; however, due to coronavirus closures or partial closures she has not yet obtained these files.

CURRENT CONSEQUENCES OF THE CONVICTIONS IN THIS CASE

4. Mr. Figueras has been a lawful permanent resident of the United States since his initial entry as a 17-year-old in 1998. He has two US citizen children. He is married to a US citizen. His mother and other extended family also live in the US.

5. All four of his federal convictions are fraud- and/or theft-related. There are two aggravated felony provisions that appear relevant. A permanent resident convicted of an aggravated felony at any time after admission is removable. 8 USC § 1227(a)(2)(A)(iii). An aggravated felon is ineligible for the common discretionary relief "cancellation of removal". 8 USC § 1229a(a). An aggravated felon is barred from applying for a "212(h)" waiver as a defense to removal. 8 USC § 1182(h).

6. Under 8 USC § 1101(a)(43)(M), a conviction for an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000 is an aggravated felony.

7. A conviction of a "**theft offense** (including receipt of stolen property) or burglary offense **for which the term of imprisonment is at least one year**" is an aggravated felony. 8 USC § 1101(a)(43)(G).

8. Here, all but one of these convictions are crimes of "fraud or deceit." However, as the record is clear that the loss to the victims did not exceed $10,000, the "fraud offense" aggravated felony ground is not implicated.

9. However, each of the counts has a sentence of twelve months or more attached to it. This raises the possibility that the "theft offense" aggravated felony would be implicated.

10. The conviction of 18 USC § 1708, possession of stolen US Mail, is a clear theft offense. See Randhawa v. Ashcroft, 298 F.3d 1148 (9th Cir. 2002). Because Mr. Figueras received a sentence of "one year or more", it is a clear aggravated felony.

11. The conviction of 18 USC § 1028A(a)(1), aggravated identity theft, does not appear to be a "theft offense". While no published case law has pronounced this result in the immigration context, it seems clear from the case law defining the elements of the offense. A theft offense aggravated felony statute must contain all of the elements of a generic "theft" offense; these are the "taking of property or an exercise of control

over property without consent with the criminal intent to deprive the owner of the rights and benefits of ownership." United States v. Corona–Sanchez, 291 F.3d 1201, 1205 (9th Cir.2002). However, 18 USC § 1028A(a)(1) does not contain an element of "taking". As the Ninth Circuit has explained, § 1028A does not require actual theft or misappropriation. See United States v. Osuna–Alvarez, 788 F.3d 1183, 1185 (9th Cir.2015) (per curiam); United States v. Mahmood, 820 F.3d 177, 187-88 (5th Cir. 2016) ("Theft or misappropriation of a victim's identity is not an essential element of the offense"). Thus, even with a two-year sentence, this is not an aggravated felony.

12. Similarly, neither the bank fraud nor the unlawful possession of identity documents appear to carry "theft offense" risk, as neither contains an element of an unlawful taking.

13. Here, at the time Mr. Figueras was sentenced, he became a removable aggravated felon based on his conviction of possession of stolen mail, on which he was sentenced to 12 months. Indeed, my understanding is that he has been ordered removed by an immigration judge based on a finding this conviction constitutes an aggravated felony. My understanding is that he has raised defenses under the UN Convention Against Torture (CAT) and withholding of removal. He is presently appealing these denials in the Ninth Circuit; however, based on my understanding of the bases for his claims, the fact that CAT claims are rarely successful, the fact that he appears ineligible for withholding of removal, and the fact that his claims for relief have already been denied by an immigration judge, it is my assessment that it is highly unlikely his appeal will be successful.

14. The immigration consequences of his possession of stolen mail conviction are wide-ranging and disastrous. It is an aggravated felony, so renders him removable under 8 USC § 1227(a)(2)(A)(iii). It renders him subject to mandatory detention under 8 USC § 1226(c). It renders him statutorily permanently ineligible to naturalize. 8 USC § 1427; 8 C.F.R. § 316.10.

15. The aggravated felony conviction renders him legally ineligible for any viable form of relief from removal. **As an aggravated felon, he is statutorily ineligible for the most-often used form of discretionary relief from removal – cancellation of removal under 8 USC § 1229b(a).**

16. I note he is also removable on crime involving moral turpitude (CIMT) grounds (8 USC § 1227(a)(2)(A)). Each of the four federal convictions are likely CIMTs. As detailed below, his numerous prior state convictions include at least two CIMT convictions. Thus, he is clearly removable on CIMT grounds – **but CIMT convictions do not bar "cancellation eligibility" and they can be waived with a "212(h)" waiver.**

17. Mr. Figueras is ineligible for political asylum, and very likely was found ineligible for withholding of removal in immigration court, as his conviction of possession of stolen mail with a sentence of one year or more may well constitute a "particularly serious crime." Indeed, his claim of withholding of removal has been denied by the immigration judge. His sole remaining eligibility for relief is deferral of removal under the CAT. To win this temporary reprieve from removal, he would need to establish that the government of the Philippines was more likely than not to torture him if returned. My understanding is that his CAT claim has been denied by the immigration court. CAT claims are notoriously difficult to win given the high burden of proof and the fact that torture involves very serious physical harm.

18. Were a US citizen ("USC") relative, such as his spouse, to file an Alien Relative Petition on his behalf, he could apply to "re-adjust" status (receive permanent residence all over again) in conjunction with a waiver under 8 USC § 1182(h) (a "212(h)") waiver. Critically here, **an aggravated felony conviction renders an LPR ineligible for this waiver. Had he avoided an aggravated felony, he would have preserved eligibility for this form of relief.**

19. Actual removal results in further adverse consequences. Once removed, should he return to the US without the express permission of the Department of Homeland Security, he would be subject to felony criminal prosecution and exposed to a federal penitentiary sentence. 8 USC § 1326. Moreover, the fact of the actual removal is itself a ground for inadmissibility. 8 USC § 1182(a)(9)(A).

20. Had Mr. Figueras avoided conviction of an aggravated felony, he might have avoided an order of removal. He would have remained removable on CIMT grounds, but he would have preserved his eligibility for cancellation of removal or, in the alternative, a "212(h)" waiver. Both are discretionary – and in light of his long residence, his

family ties, and his clear rehabilitative efforts, it appears he could present a strong claim for relief under either provision.

21. Moreover, in light of his history of controlled substance abuse connected with criminal convictions, it is quite possible that removal to the Philippines carries significant risk to his life under current conditions. Thus, the aggravated felony bar to asylum, and the "particularly serious crime" bar to withholding of removal, become important here as well. Preservation of asylum eligibility in particular might be critical for him, as current country conditions in the Philippines appear to be such that he could establish a well-founded fear of persecution.

PRIOR CRIMINAL HISTORY

22. Mr. Figueras has several California convictions. It appears that these convictions include two CIMTs, thus Mr. Figueras is removable regardless of his federal convictions. **However, and critically, none of his priors appear to constitute aggravated felonies**. Thus, the aggravated felony conviction in the current case is the only criminal bar to relief from removal – "212(h)" or "cancellation of removal."

23. His possession of forged documents, Cal. PC § 475(c), convictions, are likely CIMTs, but cannot be aggravated felonies, as he did not receive sentences of one year or more. See 8 USC § 1101(a)(43)(R).

24. His identity theft, PC § 530.5, convictions may be CIMTs, but they are neither "theft" nor "fraud" aggravated felonies.

25. His two PC § 496(a), and one PC § 496D(a), convictions are crimes of "receipt of stolen property," thus they carry aggravated felony risk as "theft offenses."

26. The sentence in the 2005 case was eight months in state prison, thus it was less than one year. See United States v. Jimenez, 258 F.3d 1120, 1125 (9th Cir. 2001) (the "term of imprisonment in definition of aggravated felony refers to 'the actual sentence imposed by the judge,'" thus where defendant initially sentenced to 365 days for a violation of Cal. PC § 273.5 as a condition of probation then, when probation revoked, two years in state prison, the term of imprisonment counted for aggravated felony purposes is two years); see also People v. Billetts, 89 Cal.App.3d

302, 309 (1979) ("the termination of probation requires that the court impose sentence on the original offense."), Cal. PC § 1203.2(c); Cal. PC § 2900.5(c) (upon revocation of probation and sentencing to state prison defendant entitled to credit for the entire term served as condition of probation).

27. His 2011 PC § 496D(a) conviction carried a sentence of 180 days only, thus it is not an aggravated felony.

28. His 2006 PC § 496(a) conviction does not appear to have had a sentence of one year or more imposed. While the total prison term imposed in that case, which had three counts, was two years, according to the presentence report, 180 days was imposed on the § 496(a) count.

29. The burglary conviction under PC § 459(a) in that same 2006 case cannot be an aggravated felony, even if the sentence is one year or more.

30. Finally, with respect to the conviction of PC § 22210 (possession of a billy club), such a conviction has no adverse immigration consequences.

ALTERNATIVE SENTENCING OPTIONS

31. Here, it appears that Mr. Figueras had sentencing options available to him that should have been acceptable to a reasonable prosecutor and to the court that would have resulted in similar criminal consequences but significantly less serious immigration consequences.

32. Had he been sentenced to 364 days or less on the 18 U.S.C. § 1708 count, he would not now be an aggravated felon. Had he been sentenced to longer period, even a matter of a month, on the 18 U.S.C. § 1344(2) count or the 18 U.S.C. § 1028(a)(3) count, neither would have become an aggravated felony. This small change – which would not have shortened his overall sentence – would have had left him in a fundamentally different immigration position. The aggravated felony bar to 8 USC § 1229b(a) (cancellation of removal) or 8 USC § 1182(h) ("212(h)") relief would not apply, and he would be eligible for the defense of asylum. Given his ties to the United States, including his marriage to a US citizen and US citizen children, his strong rehabilitation, and his well-founded fear of persecution if returned to the

Philippines, it is reasonably probable he would have avoided an order of removal if he was not an aggravated felon.

33. Despite the fact that Mr. Figueras's immigration case is presently on appeal, if the sentence on the possession of stolen mail count were modified to less than one year, he would have grounds for a motion to reopen the removal proceedings. Such motions are routinely granted where there has not been significant delay. If the removal case is reopened, he would have the opportunity to assert the defenses of cancellation of removal and asylum, and, as noted, it is reasonably likely he would avoid removal.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 22, 2020 in Mill Valley, California.

Christopher J Todd, Esq.

DECLARATION OF CHRISTOPHER TODD

I, Christopher Todd, declare as follows:

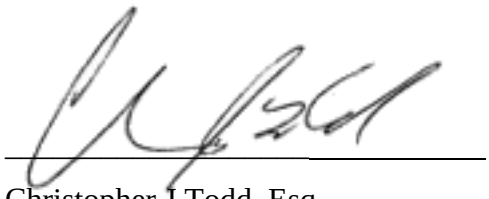
1. I represent Mr. Figueras at the Ninth Circuit Court of Appeals. He filed a Petition for Review at that Court pro se. The court ordered a stay of removal.
2. The Attorney General, on April 10, 2020, moved the court to summarily dismiss the Petition for Review. Mr. Figueras, proceeding pro se, did not respond to this motion.
3. On July 24, 2020, the court granted the motion for summary dismissal. The court dismissed the petition in part and denied the petition in part. I entered the case after this order issued.
4. I filed a Petition for Rehearing with the Ninth Circuit, which I believed was warranted.
5. On January 5, 2021, the Ninth Circuit denied the Petition for Rehearing and declared that "No further filings will be entertained in this closed case."
6. The Ninth Circuit's previously-granted stay of removal remains in effect until the issuance of the mandate. Now that rehearing has been denied, the mandate will come in a matter of days.
7. Once the mandate issues, the stay is lifted, and Mr. Figueras's removal order can be executed. Given that he is detained, I would expect the execution of the order to happen immediately.
8. At this point, there are no grounds upon which to base a motion to reopen with the BIA. Without such a motion, there is no vehicle through which Mr. Figueras could seek a stay of removal with the BIA. If the conviction (or sentence) is indeed vacated, such "new evidence" would support a motion to reopen, and I could move the BIA to stay removal while the motion to reopen was pending. Even if this were to happen, it is unclear whether I would be able to act quickly enough, given removal is imminent.
9. US-ICE can, at its discretion, stay removal. In my experience, in circumstances such as these, ICE will not grant a discretionary stay of removal. Specifically, just last year

ICE executed a removal order against a detained alien even though I provided proof of the vacatur of the conviction upon which the removal order was based.

10. It is my opinion that the District Court's December 11, 2020 order that Mr. Figueras "should remain at the Sacramento County Jail pending the conclusion of his 28 U.S.C. § 2255 action" will not be interpreted as a stay of removal by US-ICE.

11. Mr. Figueras is subject to a removal order. Upon the expiration of the stay, there is no legal impediment to the execution of the removal order. The practical aspects of the execution of the order, given that Mr. Figueras is not physically in immigration custody, are unclear. However, without a specific injunction against executing the order, there is no legal impediment to the execution of the order.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 6, 2021 in Mill Valley, California.



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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MICHELE REYES SERRANO et al., Defendants.	CASE NO. 2:16-cr-00045-MCE **PLEA AGREEMENT**

1. The Indictment in this case charges defendant, Raleigh Rana Figueras, with violations of 18 U.S.C. § 1344(2) – Bank Fraud and Attempted Bank Fraud; 18 U.S.C. § 1028A(a)(1) - Aggravated Identity Theft; 18 U.S.C. § 1708 - Possession of Stolen U.S. Mail; 18 U.S.C. § 1029(a)(3) – Possession of Fifteen or More Access Devices; and 18 U.S.C. § 1028(a)(3) – Unlawful Possession of Five or More Identification Documents. This document contains the complete plea agreement between the United States Attorney's Office for the Eastern District of California (the "government") and the defendant regarding this case. This plea agreement is limited to the United States Attorney's Office for the Eastern District of California and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities.

2. The Court is not a party to this plea agreement. Sentencing is a matter solely within the discretion of the Court, and the Court may take into consideration any and all facts and circumstances concerning the criminal activities of the defendant, including activities which may not have been

mr 2/9/17

charged in the Indictment. The Court is under no obligation to accept any recommendations made by the government, and the Court may in its discretion impose any sentence it deems appropriate up to and including any statutory maximum stated in this plea agreement.

3. If the Court should impose any sentence up to the maximum established by statute, the defendant cannot, for that reason alone, withdraw his guilty plea, and he will remain bound to fulfill all of the obligations under this plea agreement. The defendant understands that neither the prosecutor, defense counsel, nor the Court can make a binding prediction or promise regarding the sentence he will receive.

4. The defendant will plead guilty to the following Counts in the Indictment:

Count 4 – charging a violation of 18 U.S.C. § 1344(2)– Bank Fraud and Attempted Bank Fraud
Count 9 – charging a violation of 18 U.S.C. § 1028A(a)(1)– Aggravated Identity Theft
Count 10 – charging a violation of 18 U.S.C. § 1708 – Possession of Stolen U.S. Mail
Count 11 – charging a violation of 18 U.S.C. § 1028(a)(3) – Unlawful Possession of Five or More Identification Documents

The defendant also agrees to forfeiture of all seized items, materials, documents, and proceeds and that such forfeiture be ordered by the district court at sentencing. The defendant agrees that he is in fact guilty of these charges and that the facts set forth in the Factual Basis for Plea attached hereto as Exhibit A are accurate. The defendant agrees that this plea agreement will be filed with the Court and become a part of the record of the case. The defendant understands and agrees that he will not be allowed to withdraw his plea(s) should the Court not follow sentencing recommendations or stipulations, if any, contained herein. The defendant agrees that the statements made by him in signing this Agreement, including the factual admissions set forth in the factual basis, shall be admissible and useable against the defendant by the United States in any subsequent criminal or civil proceedings, even if the defendant fails to enter a guilty plea pursuant to this Agreement. The defendant waives rights to further discovery, if any, and waives any rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410, to the extent that these

rules are inconsistent with this paragraph or with this Agreement generally. The defendant acknowledges that he shall remain remanded into federal custody after the entry of his pleas.

5. The defendant agrees that his conduct is governed by the Mandatory Restitution Act pursuant to 18 U.S.C. §§ 3663A(c)(1) and (2) and agrees to pay the full amount of restitution to all victims affected by all of his offense conduct, including, but not limited to, the victims covered in the factual basis, victims covered in those counts to be dismissed as part of the plea agreement pursuant to 18 U.S.C. § 3663A(a)(3), and other victims as a result of the defendant's relevant conduct for the offenses charged and for his uncharged offenses as indicated in the underlying complaint and relevant conduct. The defendant understands that the factual basis of this plea agreement binds only the United States Attorney's Office for the Eastern District of California in this criminal case, and does not bind any agency of the United States in any other judicial, administrative, or other proceeding. The defendant further agrees that he will not seek to discharge any restitution obligation or any part of such obligation in any bankruptcy proceeding.

6. The defendant agrees to pay any fine imposed by the district court and he shall pay a special assessment of $100 per count at the time of sentencing by delivering a check or money order (payable to the United States District Court) to the United States Probation Office immediately before the sentencing hearing. If the defendant is unable to pay the special assessment at the time of sentencing, he agrees to earn the money to pay the assessment, if necessary by participating in the Inmate Financial Responsibility Program.

7. If the defendant violates this plea agreement in any way, withdraws his plea, or tries to withdraw his plea, this plea agreement is voidable at the option of the government. The government will no longer be bound by its representations to the defendant concerning the limits on criminal prosecution and sentencing as set forth herein. One way a defendant violates the plea agreement is to commit any crime or provide any statement or testimony which proves to be knowingly false, misleading, or materially incomplete. Any "post-plea" conduct by a defendant constituting obstruction of justice or aiding or abetting a federal fugitive will also be a violation of the agreement. The determination whether the defendant has violated the plea agreement will be under a probable cause standard.

8. If the defendant violates the plea agreement, withdraws his plea, or tries to withdraw his plea,

the government shall have the right (1) to prosecute the defendant on any of the counts to which he pleaded guilty; (2) to reinstate any counts that may be dismissed pursuant to this plea agreement; and (3) to file any new charges that would otherwise be barred by this plea agreement. The defendant shall thereafter be subject to prosecution for any federal criminal violation of which the government has knowledge, including perjury, false statements, and obstruction of justice. The decision to pursue any or all of these options is solely in the discretion of the United States Attorney's Office.

9. By signing this plea agreement, the defendant agrees to waive any objections, motions, and defenses that the defendant might have to the government's decision. Any prosecutions that are not time-barred by the applicable statute of limitations as of the date of this plea agreement may be commenced in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this plea agreement and the commencement of any such prosecutions. The defendant agrees not to raise any objections based on the passage of time with respect to such counts / charges including, but not limited to, any statutes of limitation or any objections based on the Speedy Trial Act or the Speedy Trial Clause of the Sixth Amendment to any counts / charges that were not time-barred as of the date of this plea agreement.

10. In addition, (1) all statements made by the defendant to the government or other designated law enforcement agents, or any testimony given by the defendant before a grand jury or other tribunal, whether before or after this plea agreement, shall be admissible in evidence in any criminal, civil, or administrative proceedings hereafter brought against the defendant; and (2) the defendant shall assert no claim under the United States Constitution, any statute, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by the defendant before or after this plea agreement, or any leads derived therefrom, should be suppressed. By signing this plea agreement, the defendant waives any and all rights in the foregoing respects.

11. The defendant agrees to forfeit to the United States voluntarily and immediately all of his right, title, and interest to any and all seized items. The defendant agrees to fully assist the government in the forfeiture of the seized items and to take whatever steps are necessary to pass clear title to the United States. The defendant agrees not to file a claim to any of the seized and or forfeited property in any civil proceeding, administrative or judicial, which may be initiated. The defendant agrees to waive

his right to notice of any forfeiture proceeding involving this property, and agrees to not file a claim or assist others in filing a claim in that forfeiture proceeding.

12. The defendant knowingly and voluntarily waives his right to a jury trial on the forfeiture of seized assets and items. The defendant knowingly and voluntarily waives all constitutional, legal and equitable defenses to the forfeiture of these assets in any proceeding. The defendant agrees to waive any jeopardy defense, and agrees to waive any claim or defense under the Eighth Amendment to the United States Constitution, including any claim of excessive fine, to the forfeiture of the assets by the United States, the State of California or its subdivisions.

13. The defendant waives oral pronouncement of forfeiture at the time of sentencing, and any defenses or defects that may pertain to the forfeiture.

14. The defendant agrees to make a full and complete disclosure of his assets and financial condition, and will complete the United States Attorney's Office's "Authorization to Release Information" and "Financial Affidavit" within five (5) weeks from the entry of the defendant's change of plea. The defendant also agrees to have the Court enter an order to that effect. The defendant understands that this plea agreement is voidable at the option of the government if the defendant fails to complete truthfully and provide the described documentation to the United States Attorney's office within the allotted time.

15. The government agrees to move, at the conclusion of the sentencing hearing, to dismiss without prejudice the remaining counts against defendant Figueras in the pending Indictment. The government also agrees not to reinstate any dismissed count except if this agreement is voided. The government will recommend a two-level reduction (if the offense level is less than 16) or a three-level reduction (if the offense level reaches 16) in the computation of his offense level if the defendant clearly demonstrates acceptance of responsibility for his conduct as defined in U.S.S.G. § 3E1.1. This includes the defendant meeting with and assisting the probation officer in the preparation of the pre-sentence report, being truthful and candid with the probation officer, and not otherwise engaging in conduct that constitutes obstruction of justice within the meaning of U.S.S.G § 3C1.1, either in the preparation of the pre-sentence report or during the sentencing proceeding. If Figueras fully accepts responsibility and if the U.S. Probation Office in its final pre-sentence report recommends a low-end sentence within the

applicable guidelines range, then the United States agrees to recommend the low-end of the applicable guideline range found by the U.S. Probation Office in its final presentence report, plus 24 months consecutive. Otherwise, the parties reserve all other rights under the sentencing guidelines and 18 U.S.C. § 3553 factors.

16. The government is free to provide full and accurate information to the Court and Probation, including answering any inquiries made by the Court and/or Probation and rebutting any inaccurate statements or arguments by the defendant, his attorney, Probation, or the Court. The defendant also understands and agrees that nothing in this Plea Agreement bars the government from defending on appeal or collateral review any sentence that the Court may impose.

17. **As to Count 4 (Bank Fraud),** the defendant agrees that, at trial, the United States would be required to prove beyond a reasonable doubt during the time charged the following:

1) In the Eastern District of California, the defendant knowingly executed a scheme or plan to obtain money or property from financial institutions, as charged in the Indictment, by means of false or fraudulent pretenses, representations, or promises;
2) the defendant acted with specific intent to defraud such financial institutions;
3) the false pretenses, representations, or promises that the defendant made were material;
4) the defendant placed the financial institutions at risk of civil liability or financial loss; and
5) the financial institutions were federally insured.

As to Count 9 (Aggravated I.D. Theft), the defendant agrees that, at trial, the United States would be required to prove beyond a reasonable doubt during the time charged the following:

1) The defendant acted in the Eastern District of California;
2) By his actions, the defendant knowingly and intentionally possessed and used, without lawful authority, means of identification of another person; and
3) the possession and use of the means of identification was during and in relation to a felony bank fraud scheme to obtain money, goods, and services (by use of stolen mail and contents of stolen mail, to include stolen access devices and other negotiable items and financial and identification information) from federally insured financial institutions by false pretenses, representations, and promises.

As to Count 10 (Possession of Stolen U.S. Mail), the defendant agrees that, at trial, the United States would be required to prove beyond a reasonable doubt during the time charged the following:

1) The defendant acted within the Eastern District of California;
2) The charged items were stolen from an authorized receptacle or depository for U.S. mail matter; and
3) The defendant possessed the charged items knowing that the items had been stolen.

As to Count 11 (Unlawful Possession of Five or More Identification Documents), the defendant agrees that, at trial, the United States would be required to prove beyond a reasonable doubt during the

time charged the following:

1) The defendant acted within the Eastern District of California;
2) The defendant knowingly possessed five or more authentication features and false identification documents;
3) The defendant intended to use and transfer unlawfully those authentication features and false identification documents; and
4) The authentication features and false identification documents were or appeared to be issued by or under the authority of the United States or California.

By his signature hereto, the defendant declares that he fully understands the nature and elements of the crimes charged in the Indictment to which he is pleading guilty, together with the possible defenses thereto, and he has discussed the felony offenses with his attorney. The defendant also understands: (a) the maximum penalties for his felony violations are as follows:

COUNT	OFFENSE	MAXIMUM PENALTY DESCRIPTION
4	18 U.S.C. § 1344(2) – Bank Fraud	30 years in prison, 5 years supervised release, $1,000,000 fine, restitution
9	18 U.S.C. § 1028A(a)(1) – Aggravated I.D. Theft	2 years consecutive to prison term for Count 4, 1 year supervised release, $250,000 fine, restitution
10	18 U.S.C. § 1708 – Possession of Stolen U.S. Mail	5 years in prison, 3 years of supervised release, $250,000 fine, restitution
11	18 U.S.C. § 1028(a)(3) – Unlawful Possession of Five or More Identification Documents	15 years in prison, 3 years supervised release, fine up to $250,000, restitution

(b) if the term of supervised release for his convictions is revoked, a 3 year additional period of consecutive incarceration may be imposed; and (c) a mandatory $100 penalty assessment for each felony conviction will be imposed in addition to any penalty imposed by the Court.

18. By signing this plea agreement, the defendant also agrees that the Court can order the payment of restitution for the full loss, to include relevant conduct, caused by the defendant's wrongful conduct. The defendant agrees that the restitution order is not restricted to the amounts alleged in the specific count(s) to which she is pleading guilty. The defendant further agrees, as noted above, that he will not attempt to discharge in any present or future bankruptcy proceeding any restitution imposed by the Court.

19. The defendant understands that the Court must consult the Federal Sentencing Guidelines

and must take them into account when determining a final sentence. The defendant understands that the Court will determine a non-binding and advisory guideline sentencing range for this case pursuant to the Sentencing Guidelines and must take them into account when determining a final sentence. The defendant further understands that the Court will consider whether there is a basis for departure from the guideline sentencing range (either above or below the guideline sentencing range) because there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. The defendant further understands that the Court, after consultation and consideration of the Sentencing Guidelines, must impose a sentence that is reasonable in light of the factors set forth in 18 U.S.C. § 3553(a). Except as stipulated herein, the parties reserve all rights regarding application of the Sentencing Guidelines and sentencing factors under 18 U.S.C. § 3553.

20. The defendant understands that by pleading guilty he is waiving the following constitutional rights: (a) to plead not guilty and to persist in that plea if already made; (b) to be tried by a jury; (c) to be assisted at trial by an attorney, who would be appointed if necessary; (d) to subpoena witnesses to testify on his behalf; (e) to confront and cross-examine witnesses against him; and (f) not to be compelled to incriminate himself.

21. The defendant understands that the law gives the defendant a right to appeal his guilty plea, conviction, and sentence. The defendant agrees as part of his plea(s), however, to give up the right to appeal the guilty plea, conviction, and the sentence imposed in this case as long as the sentence does not exceed the statutory maximums for the offenses to which he is pleading guilty. The defendant specifically gives up the right to appeal any order of restitution the Court may impose. Notwithstanding the defendant's waiver of appeal, the defendant will retain the right to appeal if one of the following circumstances occurs: (1) the sentence imposed by the District Court exceeds the statutory maximum; and/or (2) the government appeals the sentence in the case. The defendant understands that these circumstances occur infrequently and that in almost all cases this Agreement constitutes a complete waiver of all appellate rights. In addition, regardless of the sentence the defendant receives, the defendant also gives up any right to bring a collateral attack, including a motion under 28 U.S.C. § 2255 or § 2241, challenging any aspect of the guilty plea, conviction, or sentence, except for non-waivable

claims. The government will move to dismiss counts against the defendant at the conclusion of the sentencing hearing. However, if the defendant ever attempts to vacate his plea(s), dismiss the underlying charges, or modify or set aside his sentence on any of the counts to which he is pleading guilty, the government shall have the rights to charge the defendant with any dismissed counts.

22. The defendant agrees to waive all rights under the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), to recover attorneys' fees or other litigation expenses in connection with the investigation and prosecution of all charges in the above-captioned matter and of any related allegations, including without limitation any charges to be dismissed pursuant to this plea agreement and any charges previously dismissed.

23. The defendant understands that, before entering guilty plea(s) pursuant to this plea agreement, he could request DNA testing of evidence in this case. The defendant further understands that, with respect to the offense(s) to which he is pleading guilty pursuant to this plea agreement, he would have the right to request DNA testing of evidence after conviction under the conditions specified in 18 U.S.C. § 3600. Knowing and understanding his right to request DNA testing, the defendant knowingly and voluntarily gives up that right to test all items of evidence there may be in this case that might be amenable to DNA testing. The defendant understands and acknowledges that by giving up this right, he is giving up any ability to request DNA testing of evidence in this case in the current proceeding, in any proceeding after conviction under 18 U.S.C. § 3600, and in any other proceeding of any type. The defendant further understands and acknowledges that by giving up this right, he will never have another opportunity to have the evidence in this case, whether or not listed above, submitted for DNA testing, or to employ the results of DNA testing to support a claim that defendant is innocent of the offenses to which he is pleading guilty.

24. The defendant recognizes that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including offense(s) to which the defendant is pleading guilty. Removal and other immigration consequences are the subject of a separate proceeding, however, and the defendant understands that no one, including his attorney or the district court, can predict to a certainty the effect of his conviction on his immigration status. The defendant nevertheless affirms that he wants to plead

guilty regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal from the United States.

25. Other than this plea agreement, no agreement, understanding, promise, or condition between the government and the defendant exists, nor will such agreement, understanding, promise, or condition exist unless it is committed to writing and signed by the defendant, counsel for the defendant, and counsel for the United States.

26. The defendant further agrees that he has been advised by his attorney of all his rights under the Federal Rules of Criminal Procedure, including FRCP 11 and 32, and all his rights under the U.S. Constitution. The defendant agrees that he fully understands those rights and that he is satisfied with his attorney's representation.

27. I, Raleigh Rana Figueras, have consulted with my attorney at great length, and I fully understand all my rights, including those rights contained in FRCP 11 and my constitutional rights, with respect to the offenses charged in the Indictment against me. I have read this plea agreement, including its incorporated Exhibit A, and I have carefully reviewed every part of it with my attorney. In signing this plea agreement, I was not under the influence of any disabling or mentally impairing drug, medication, liquor, intoxicant or depressant. Further, I was alert, attentive and fully capable of understanding the terms and conditions of this plea agreement. I understand the charges against me and the charges (by Indictment in Counts 4, 9, 10 and 11) to which I am pleading guilty. I agree that I be sentenced to a term of incarceration under the Sentencing Guidelines and 18 U.S.C. § 3553 for my criminal conduct and to pay full restitution for all of my criminal conduct. I am fully satisfied with my attorney's representation. I understand this plea agreement, and I voluntarily agree to this written plea agreement. I understand that no other terms or oral agreements exist, other than what appears in this plea agreement.

Dated: 1/27/17

RALEIGH RANA FIGUERAS
Defendant

28. I, JEROME PRICE, am defendant Figueras' attorney. I have fully explained to Mr. Figueras the terms of this plea agreement and his rights with respect to all the charges against him and all potential charges against him. Mr. Figueras wishes to plead guilty to the charges set forth in the

Indictment in Counts 4, 9, 10 and 11. To my knowledge, Mr. Figueras' decision to enter into this plea agreement is an informed and voluntary decision. Mr. Figueras understands and agrees that he is guilty as charged in Counts 4, 9, 10 and 11. In signing this plea agreement, Mr. Figueras did not appear to be under the influence of any disabling or mentally impairing drug, medication, liquor, intoxicant or depressant. Further, from what I could discern based on my extensive discussion and "question and answer" experiences with Mr. Figueras regarding the Indictment, Complaint, the statutory charges, and the plea agreement, I have reason to believe that, considering the mental state under which he signed this plea agreement, Mr. Figueras was alert, attentive and fully capable of understanding the terms and conditions of this plea agreement.

Dated: 1/27/17

JEROME PRICE, Esq.
Attorney For Defendant

29. The undersigned Assistant United States Attorney hereby accepts and agrees to this plea agreement for the United States.

Benjamin B. Wagner
United States Attorney

Dated: 2/9/17

MICHELLE RODRIGUEZ
Assistant U.S. Attorney

EXHIBIT A (Factual Basis For Pleas)

30. The defendant, Figueras, with the advice and assistance of his defense counsel, acknowledges and agrees that the following factual summary accurately describes the events underlying his criminal conduct and offenses of conviction.

1) Between June 1, 2015, and January 21, 2016, Figueras along with his co-defendant, Michele Serrano, created a plan to steal by fraud from federally insured financial institutions. Figueras and his co-defendant executed and aided and abetted the scheme by obtaining, rifling, profiling, and altering financial instruments from stolen U.S. Mail and from other stolen property. They also obtained for unauthorized and unlawful use personal and financial information of victims. Figueras and his co-defendant further executed the scheme by using stolen personal information to pose as victims, by using victims' stolen bank account and access device numbers on altered checks and access devices, and by presenting such access devices, and checks to get money, goods, and services at the expense of the financial institutions.

2) In November 2015, victim Raynguard mailed check #30077 for $692.00, drawn on its Folsom Lake Bank (a federally insured financial institution), account ending 2991. On December 29, 2015, after stealing Raynguard's check, Figueras cashed that check at a Wal-Mart store located in Sacramento, California. At the time Figueras cashed the check, the payee name on the check had been altered to read Raleigh Figueras, 572 Gregory Drive, Vacaville, CA 95687. That address was the same address listed on Figueras' current driver license. Surveillance images captured Figueras cashing Raynguard's check, and Figueras later admitted to possessing and cashing Raynguard's stolen check.

3) In December 2015, Figueras and his co-defendant opened a line of credit at Target, using victim Gilbert A.'s true name, date of birth, address, social security number and driver license information. As a result, TD Bank USA, a federally insured financial institution that issues Target Red Cards, issued a Target credit card for victim Gilbert A.'s new account ending in 3102.
   a. Between January 2, 2016, and January 19, 2016, Figueras and his co-defendant used Gilbert A.'s Target card during 13 transactions, at stores in the greater Sacramento area, for a total of $1,354.21. Surveillance images taken of those 13 transactions depict Figueras and Serrano as the persons conducting each of those 13 transactions, or alternatively posing as Gilbert A. in each transaction.
   b. On January 21, 2016, Figueras possessed at his Sacramento residence or on his person, or vehicle the personal identification information of Gilbert A. and the Target Red Card ending in 3102, which was used in the fraudulent purchases.

4) On January 21, 2016, at his Sacramento residence or on his person, or vehicle Figueras possessed a Bank of America (a federally insured financial institution) issued check #4804 belonging to victim Thinh P., along with a counterfeit California Driver License bearing the true name, address, date of birth, and driver license number of victim Thinh P., but with a picture of Figueras. Figueras created the counterfeit Thinh P. driver license on his computer. Using that counterfeit driver license, Figueras negotiated check #4804 for $387.46 at a Wal-Mart store located in Sacramento, California. After negotiating stolen check #4804, Figueras retained his Wal-Mart receipt associated with that $387.46 purchase.

5) On January 21, 2016, Figueras possessed and aided his co-defendant Serrano in possessing over 10 items of U.S. Mail stolen from Sacramento County residents in Figueras' possession, including from victims Marlin W., John C., Shirley C., Jade J., Jennifer C., Randy D., Gilbert A., Nikia M., Stephen C. and Janet S. Figueras and his co-defendant each separately admitted to stealing U.S. Mail on a regular basis, and knowingly possessing the stolen mail items, which had been stolen, taken, and abstracted from an authorized U.S. Mail receptacle or facility at his Sacramento residence or on his person, or vehicle.

6) On January 21, 2016, Figueras possessed at his Sacramento residence or on his person, or vehicle, and aided his co-defendant Serrano in possessing over 5 different stolen and counterfeit identification documents (at least 10 different ones, including some altered identification documents, and materials to manufacture identifications). Each identification document contained true identification information of a different victim. Also, each identification document contained an official authentication feature of the State of California.

#	Document Type	Issuing Agency	Victim Name
1	California Driver License	California DMV	Jana K.
2	California Driver License	California DMV	Jamie M.
3	California Driver License	California DMV	Michael C.
4	California Driver License	California DMV	Ryan M.
5	California Driver License	California DMV	Erik B.

31. I, RALEIGH RANA FIGUERAS, have read Exhibit A, the above Factual Basis for Plea, and agree that it is true and accurate.

Dated: 1/27/17

RALEIGH RANA FIGUERAS
Defendant

32. I, JEROME PRICE, ESQ., have read Exhibit A, the above Factual Basis for Plea, and agree that it is consistent with the discovery in this case and the documents, materials and evidence in this case.

Dated: 1/27/17

JEROME PRICE, ESQ.
Defendant's Counsel