

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PABLO SANTANA ARELLANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

/s/ Kevin Joel Page

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Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered March 23, 2023.
United States v. Arellano, Dist. Court 2:21-CR-88-Z.

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10199
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

March 18, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PABLO SANTANA ARELLANO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-CR-88-1

Before WIENER, STEWART, and DOUGLAS, *Circuit Judges*.

PER CURIAM:*

Defendant-Appellant Pablo Santana Arellano appeals his jury trial convictions for (1) conspiracy to distribute and possess 400 grams or more of a mixture or substance containing a detectable amount of fentanyl with intent to distribute (Count One) and (2) possession of a mixture or substance containing a detectable amount of fentanyl with intent to distribute (Count

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

No. 23-10199

Two). He asserts that the district court violated his right to confrontation by limiting his cross-examination of his codefendant, Bridgette Star Gardeazabel. He maintains that the district court did not allow him to expose Gardeazabel's hope for a sentence of probation and avoidance of a 10-year mandatory minimum term of imprisonment.

"We review alleged Sixth Amendment Confrontation Clause violations de novo, but any violations are subject to a harmless error analysis." *United States v. Templeton*, 624 F.3d 215, 223 (5th Cir. 2010). "If there is no Confrontation Clause violation, we review the district court's limitation of cross-examination for abuse of discretion." *Id.* To demonstrate an abuse of discretion, the defendant must show clear prejudice. *United States v. Davis*, 393 F.3d 540, 548 (5th Cir. 2004). "That is, the defendant must show that a reasonable jury might have had a significantly different impression of the witness's credibility if defense counsel had been allowed to pursue the questioning." *Id.*

The Confrontation Clause is generally satisfied when defense counsel has been "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *United States v. Restivo*, 8 F.3d 274, 278 (5th Cir. 1993) (internal quotation marks and citation omitted). "The relevant inquiry is whether the jury had sufficient information to appraise the bias and motives of the witness." *United States v. Tansley*, 986 F.2d 880, 886 (5th Cir. 1993).

The district court did not violate the Confrontation Clause of the Sixth Amendment or abuse its discretion by limiting the cross-examination of Gardeazabel. Her potential bias and motivation were adequately addressed by defense counsel on cross-examination. *See Tansley*, 986 F.2d at 886. The only limitations on defense counsel's cross-examination of Gardeazabel were

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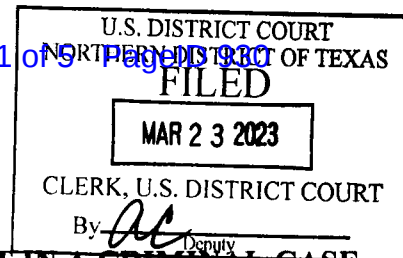
that counsel could not ask Gardezabel about the specific sentence she hoped she would receive or about the specific mandatory minimum for Count One. The jury was made aware that (1) Gardezabel had entered into a plea agreement with the Government; (2) the Government had agreed to dismiss one of the counts against her, which carried a mandatory minimum term of imprisonment and a maximum of life; (3) the count to which she pleaded guilty carried a 20-year maximum but no mandatory minimum; and (4) she had agreed to cooperate with the Government by providing truthful testimony, in return for which the Government would ask for a lesser sentence. “[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Arellano has not shown that reasonable jurors would have received a significantly different impression of Gardezabel’s credibility had she testified about the specific sentence she hoped to receive or about the specific mandatory minimum for Count One. *See Davis*, 393 F.3d at 548.

Finally, after Arellano filed his notice of appeal, the district court amended the judgment pursuant to Federal Rule of Criminal Procedure 36 to correct a clerical error as to Arellano’s United States Marshal’s number. The district court, however, was without jurisdiction to enter the amended judgment during the pendency of this appeal because Arellano’s “notice of appeal . . . divested the district court of jurisdiction to act under Rule 36.” *United States v. Willis*, 76 F.4th 467, 472 (5th Cir. 2023).

Accordingly, the original judgment of the district court is AFFIRMED, but we REMAND for the limited purpose of allowing the district court to correct the original judgment’s clerical error. *See* FED. R. CRIM. P. 36.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Amarillo Division



UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 2:21-CR-088-Z-BR(1)

U.S. Marshal's No.: 64819-097

PABLO SANTANA ARELLANO

Meredith Elizabeth Pinkham, Assistant U.S. Attorney

Eric Coats, Attorney for the Defendant

On October 20, 2022 the defendant, PABLO SANTANA ARELLANO, was found guilty by a jury as to Counts One and Two of the Indictment filed on October 13, 2021. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 846	CONSPIRACY TO DISTRIBUTE AND POSSESS WITH INTENT TO DISTRIBUTE 400 GRAMS OR MORE OF FENTANYL	09/24/2021	One
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	POSSESSION WITH INTENT TO DISTRIBUTE FENTANYL	09/24/2021	Two

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One and \$100.00 as to Count Two of the Indictment filed on October 13, 2021, for a total of \$200.00

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed February 22, 2023.

MATTHEW J. KACSMARKY
UNITED STATES DISTRICT JUDGE

Signed March 23, 2023.

***Corrected USMN

Judgment in a Criminal Case
Defendant: PABLO SANTANA ARELLANO
Case Number: 2:21-CR-088-Z-BR-(1)

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IMPRISONMENT

The defendant, PABLO SANTANA ARELLANO, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Two Hundred Forty (240) months as to Count One and Two Hundred Forty (240) months as to Count Two** of the Indictment filed on October 13, 2021, **to be served concurrently for a total term of imprisonment of 240 months.**

The Court makes the following recommendations to the Bureau of Prisons:

1. that the Defendant be allowed to participate in a dental evaluation to address the myriad conditions with possible initial placement at a federal medical facility to address dental issues; and be allowed to participate in any and all substance abuse treatment and rehabilitation programs, including the Residential Drug Abuse Program, while in the custody of the Federal Bureau of Prisons, if eligible, if consistent with security classification;
2. that the Defendant be allowed to participate in any and all educational and vocational training, if possible, culinary arts, welding and HVAC, if eligible, if consistent with security classification; and
3. that the Defendant be allowed to serve his term of incarceration at a facility nearest Fresno, California, if possible, if eligible, if consistent with security classification.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Five (5) years as to Count One and Five (5) years as to Count Two** of the Indictment filed on October 13, 2021, **to be served concurrently for a total term of Supervised Release of Five (5) years.**

While on supervised release, in compliance with the Standard Conditions of supervision adopted by the United States Sentencing Commission at Section 5D1.3(c), the defendant shall:

1. The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
3. The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
4. The defendant shall answer truthfully the questions asked by the probation officer.

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Defendant: PABLO SANTANA ARELLANO

Case Number: 2:21-CR-088-Z-BR-(1)

5. The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
7. The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
13. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

Also, as set forth in the Notice of Intent to Impose Conditions of Supervised Release signed and dated February 22, 2023, the Defendant shall comply with the below-listed other conditions of supervised release, which are derived from Sections 5D1.3(a), (b), (d), and (e), in relevant part:

1. The defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3583(d)).
2. The defendant shall not unlawfully possess a controlled substance (*see* 18 U.S.C. § 3583(d)).

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3. The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (*see* 18 U.S.C. § 3583(d)).
4. The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3583(d)).
5. If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)).
6. The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.
7. If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).
8. The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (34 U.S.C. § 40702).
9. As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duly authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States unless legally authorized to reenter. In the event the defendant is not deported upon release from imprisonment or surrendered to a duly authorized immigration officer for deportation as described above, or should the defendant ever be within the United States during any portion of the term of supervised release, the defendant shall comply with the standard conditions recommended by the U.S. Sentencing Commission and shall comply with the mandatory and special conditions stated in the Judgment.
10. In the event the defendant is not deported upon release from imprisonment or surrendered to a duly authorized immigration official, the defendant must immediately report, continue to report, or surrender to U.S. Immigration and Customs Enforcement and follow all of their instructions and reporting requirements until any deportation proceedings are completed.
11. The defendant shall not illegally reenter the United States if deported or allowed voluntary departure.

Judgment in a Criminal Case

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Defendant: PABLO SANTANA ARELLANO

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12. The defendant shall participate in an outpatient program approved by the probation officer for treatment of narcotic, drug, or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, and contributing to the costs of services rendered (copayment) at the rate of at least \$40 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY _____
Deputy Marshal

APPENDIX C

1 **A.** Yes.

2 **Q.** So when Ms. Pinkham asked you that question, you lied?

3 **A.** Yes.

4 **Q.** Okay. Would it be fair to say that when you get in a
5 spot, your go-to move is to lie?

6 **A.** No.

7 **Q.** When you were arrested in March of 2022 on this, did you
8 tell the officers then that you were pregnant?

9 **A.** Can you repeat that?

10 **Q.** When you were arrested on this warrant in March of 2022,
11 did you tell the officers who arrested you that you were
12 pregnant then as well?

13 **A.** Yes.

14 **Q.** And was that true?

15 **A.** I don't remember.

16 **Q.** Okay. Well, let's talk about your recent change of
17 heart. You have talked with your attorney; is that right?

18 **A.** Yes, I do talk to my attorney.

19 **Q.** Okay. And you pled guilty to the charge in Charge 2; is
20 that right?

21 What's your understanding to what you pled guilty
22 to?

23 **A.** To intent to distribute.

24 **Q.** Okay. What were you intending to distribute?

25 **A.** Drugs.

1 Q. What type of drugs?

2 A. Fentanyl.

3 Q. Okay. You alluded to the fact that you had been hooked
4 on methamphetamine for a while, at least a couple of years. Is
5 that accurate?

6 A. Yep.

7 Q. Where was the methamphetamine in the car, Bridgette?

8 A. In the front.

9 Q. You said "in the front." Where in the front?

10 A. In the front seat.

11 Q. In the front seat?

12 A. Yes.

13 Q. But, yet, none of the officers in any of the reports
14 mentioned any methamphetamine ever being found in the vehicle.
15 So are you saying that they just gave you the methamphetamine?

16 A. No. We smoked in that vehicle, so that's why I'm saying
17 that.

18 Q. Okay. But you told Ms. Pinkham that you were an active
19 methamphetamine user for a lengthy period of time before this
20 stop. Is that accurate?

21 A. Yes.

22 Q. And that that is why you can't remember things and that
23 is a problem for you?

24 A. Yes.

25 Q. But where is your methamphetamine? Where was that

1 located? Did the police officers not find it and you just
2 drove away with it?

3 A. I don't remember.

4 Q. As a daily routine, when you smoked methamphetamine, how
5 many grams were you going through a day?

6 A. I'm not sure.

7 Q. Was it over 4?

8 A. I don't know.

9 Q. Okay. Let's talk about what you understand that you are
10 benefiting. At this point in time, because of pleading to the
11 Charge 2, your maximum exposure to any prison sentence would be
12 a maximum of 20 years. Is that what you understand?

13 A. Yes.

14 Q. Okay. You understand that your cooperation is important
15 to whatever the government might recommend the judge to lower
16 your sentence. Do you understand that?

17 A. Yes.

18 Q. Okay. So just tell me what you think you need to do for
19 the government to ask the judge to lower your sentence.

20 A. I'm not-- I need a minute.

21 Q. Okay.

22 A. I would ask the courts to lower it just due to the fact
23 that I'm not the same person anymore and that I changed.

24 Q. Okay. Okay. Ms. Gardeazabel, the government made this
25 agreement with you because they wanted you to testify here

1 today. Right?

2 A. Yes.

3 Q. When they talked to you about testifying, they wanted you
4 to testify against Mr. Arellano. Correct?

5 A. Yeah.

6 Q. Okay. And if you did well--and only they are the persons
7 who choose to decide whether you do well--then they can decide
8 how much less you might get on a sentence, or what they would
9 maybe request the judge to consider. Is that your
10 understanding?

11 A. Yes.

12 Q. Ms. Gardeazabel, what do you think is going to happen?

13 A. I'm not sure.

14 Q. Did you provide the government with information to help
15 them arrest other people?

16 A. No.

17 Q. Did they tell you that this would only happen if you were
18 truthful with your information?

19 A. Yes.

20 Q. And you understood that?

21 A. Yes.

22 Q. Ms. Gardeazabel, after you were released on 9-24, how
23 soon was it before you got home to Fresno?

24 A. I don't remember.

25 Q. Well, was it within a couple of weeks? Was it within a

1 couple of days?

2 **A.** A couple of days.

3 **Q.** Okay. And did you arrive back home with the car?

4 **A.** No.

5 **Q.** Did you drop the car off where you had gotten it?

6 **A.** I dropped it off somewhere. I don't remember where.

7 **Q.** Did you make a call and tell somebody they needed to come
8 pick it up?

9 **A.** No.

10 **Q.** So you just abandoned the vehicle that you wanted so
11 badly?

12 **A.** I didn't want it so badly and I--I left it somewhere.

13 **Q.** Okay. Did the government ask you where you left this
14 vehicle?

15 **A.** Yes.

16 **Q.** And did you tell them?

17 **A.** Yes, I did.

18 **Q.** You realize that you are here under oath?

19 **A.** Yes.

20 **Q.** So I'm asking you, Ms. Gardeazabel, where did you leave
21 the vehicle?

22 **A.** I left it at a shop.

23 **Q.** At a shop?

24 **A.** Yes.

25 **Q.** Did they pay you-- Did you sell the vehicle?

1 **A.** No.

2 MS. McELROY: Can I have just a moment, Your Honor?

3 THE COURT: Yes, you may. And I'll order that the
4 microphones be disabled so you can have a confidential
5 conversation with counsel.

6 MS. McELROY: Thank you.

7 (PAUSE)

8 THE COURT: Ms. McElroy, you may continue.

9 MS. McELROY: Thank you, Judge.

10 **Q.** (BY MS. McELROY) I just have a couple of other
11 questions. And that is, by your plea to a charge that has a
12 maximum of 20 years, did the government also agree to recommend
13 to dismiss their Charge Number 1, which would have had a
14 possible life sentence?

15 **A.** Yes.

16 MS. McELROY: I'll pass the witness, Your Honor.

17 THE COURT: And redirect, Ms. Pinkham?

18 MS. PINKHAM: Very briefly, Your Honor.

19 REDIRECT EXAMINATION

20 BY MS. PINKHAM:

21 **Q.** Ms. McElroy asked you several times about your pregnancy.
22 Were you, at one time, pregnant--

23 **A.** Yes.

24 **Q.** --with Mr. Arellano's child?

25 **A.** Yes.

1 Q. Did you have a miscarriage or lose that baby?

2 A. Yes.

3 Q. Was that before or after you got stopped here in
4 Amarillo?

5 A. That was before.

6 Q. Okay. And did you know you had lost the baby?

7 A. Yes.

8 Q. But you did tell the officers that you were still
9 pregnant; is that right?

10 A. Yes.

11 Q. Now, on September 24th, we've already talked about that
12 you were released that day. Do you remember that?

13 A. Yes.

14 Q. And that you left in the car that you-all were in; is
15 that right?

16 A. Yes.

17 Q. What kind of car--what kind of transmission did that car
18 have? Was it automatic or standard?

19 A. It was stick.

20 Q. Do you know how to drive a stick?

21 A. No.

22 Q. Do you know how to drive an automatic car?

23 A. Yes.

24 Q. Have you ever had a driver's license?

25 A. No.

1 Q. But you've had a valid ID?

2 A. Yes.

3 Q. Have you ever learned how to drive a stick-shift car?

4 A. No.

5 Q. Did you leave in that stick-shift car?

6 A. Yes.

7 Q. How did that go?

8 A. Well, I somehow took it off--off the lot from there, but
9 I didn't know how to--it started shifting gears, which I didn't
10 know how to--how to do it, so some guy offered to help me park
11 it somewhere.

12 Q. Okay. Do you know where you parked it?

13 A. It was, like, a shop, a shop-type. I don't know what
14 kind it was.

15 Q. How far from the jail was the shop?

16 A. Not that far. Like ten minutes.

17 Q. Okay. How far did you make it before the guy offered to
18 help you?

19 A. Not that far.

20 Q. Did you have any money with you when you left the jail?

21 A. Yes.

22 Q. Was that your money or Pablo's money?

23 A. That was Pablo's money.

24 Q. How did you get that money?

25 A. When we got to Potter County, the officer had asked--he

1 had asked me, what do you want to do with all the money?

2 And I said, it's not my money; it's Pablo's. You
3 can ask him.

4 And he said, okay.

5 So he went and asked Pablo, hey, she said it's all
6 yours; what do you want to do with it?

7 And he agreed to give me half of it, and he stayed
8 with the other half.

9 Q. Do you know how much it was?

10 A. I don't remember.

11 Q. What about the suitcase that all these clothes were in,
12 and the drugs? Did you leave with that?

13 A. Yes.

14 Q. Okay. Were the clothes still in it?

15 A. Yes.

16 Q. After you parked the car at the shop, then what happened?

17 A. I called my grandma and I got on a plane. I made a--I
18 bought a ticket to go back home.

19 Q. Okay. Did you buy that with cash, or did you have debit
20 cards or anything?

21 A. That one was with cash.

22 Q. Did you buy it at the airport?

23 A. Yes.

24 Q. How did you get to the airport?

25 A. I asked for a ride, and someone offered me--to take me to

1 the airport. And I told them--before that, I told them that I
2 wasn't from here, who I was, and I just wanted to go home to my
3 family. And they said--they offered me a ride to the airport,
4 and they left me there, and I bought a ticket.

5 Q. Was that here in Amarillo?

6 A. Yes.

7 Q. Now, Ms. McElroy asked you about your meth use, if you
8 were using more than 4 grams of meth a day. Do you know how
9 much a gram is?

10 A. No.

11 Q. What do you call the unit of meth you were using?

12 A. I would say "twenty," because I would buy weed, so that's
13 how I would go off of it. And I don't know how many grams is--
14 or the difference of meth.

15 Q. Is that \$20 worth?

16 A. \$20 worth.

17 Q. Okay. Where did you get the money to buy meth?

18 A. Usually people would give it to me.

19 Q. Give you meth or give you money?

20 A. They would give me meth.

21 Q. Did you give anything to them in return?

22 A. No.

23 Q. Now, Ms. McElroy asked you about the benefit that you
24 expect to receive here. Is it true that we have never talked
25 about what specific thing that you might get?

1 **A.** Yes.

2 **Q.** And in your plea papers, the government gave you the
3 choice of whether to testify or not; is that right?

4 **A.** Yes.

5 **Q.** And you chose to do so?

6 **A.** Yes.

7 **Q.** Ms. McElroy asked you about other information that you
8 gave the government about other people. Do you know of anyone
9 else who sells drugs or uses drugs or anything like that?

10 **A.** No.

11 **Q.** Do you know about anyone else, especially here in Texas?

12 **A.** No.

13 **Q.** And we talked already about Juanito and Omar. Did you
14 talk about them in our meetings?

15 **A.** Yes.

16 **Q.** And you know them to be involved in the drug trade
17 somehow?

18 **A.** Yes.

19 MS. PINKHAM: May I have a second, Your Honor?

20 THE COURT: You may. And I'll order that the
21 microphones be disabled.

22 (PAUSE)

23 MS. PINKHAM: Thank you, Your Honor.

24 **Q.** (BY MS. PINKHAM) Just to be clear, I asked you a minute
25 ago about anybody else that you knew that used or sold drugs.

1 That doesn't include the people that would give it to you in
2 California; is that right?

3 A. Yes.

4 Q. Do you know anybody else that sells big amounts of drugs
5 or anything like that?

6 A. No.

7 Q. The people that gave you meth or marijuana, would that be
8 just, like, user amounts that they had and would share with
9 you?

10 A. Yes.

11 MS. PINKHAM: Pass the witness.

12 THE COURT: And recross from defense?

13 Sorry--

14 MS. McELROY: Your Honor, may we approach for a
15 minute?

16 THE COURT: You may. Sorry, the microphone was
17 disabled. But you do have a recross.

18 -----

19 (AT THE BENCH)

20 MS. McELROY: Okay. Before I ask her, I want to
21 make sure. I wanted to ask her specifically about the
22 paragraph in the proffer agreement and the paragraph in the
23 plea agreement where she says--

24 THE COURT: So I have these two. I have the plea
25 agreement and the supplement.

1 MS. McELROY: Yeah, the plea agreement
2 specifically, where she agrees to go over this agreement; they
3 won't bring additional charges. In Section 8, her agreement
4 she's going to give complete and truthful information/
5 testimony about her participation in the offense of conviction,
6 if she understood what that meant.

7 THE COURT: Okay. Any objection to her making
8 reference to that portion that's not in evidence, but it can be
9 used as impeachment?

10 MS. McELROY: And then the proffer agreement where,
11 you know, it basically says the government is in control
12 about--they decide whatever your--basically your performance.
13 And if you give me a minute--

14 THE COURT: I'm confused about the proffer. I have
15 these two documents, but is that a separate document?

16 MS. McELROY: Uh-huh. It's the proffer agreement.
17 And I will tear the rest of my desk up and find it. It was
18 sitting right there, and now it's--

19 THE COURT: Everybody is on the same page about
20 what it states?

21 MS. PINKHAM: I believe it states--

22 MS. McELROY: It's the standard--

23 MS. PINKHAM: --in the government's opinion,
24 basically if we think that you have given truthful testimony,
25 we will then move the Court to--

1 THE COURT: Right. So this is a (c)(1)(A) form?

2 MS. PINKHAM: It essentially says the same thing,
3 Your Honor.

4 MS. McELROY: It's just in a different form.

5 THE COURT: Okay.

6 MS. McELROY: If you want, I'll--

7 THE COURT: If everybody is on the same page and
8 you stay within that template language, you may do so.

9 MS. McELROY: Okay.

10 THE COURT: Okay.

11 -----

12 (IN OPEN COURT)

13 THE COURT: Okay. Just so the jury understands,
14 there are instances where, by this Court's order, I have
15 instructed counsel to approach if they need a ruling on
16 particular evidence or testimony that requires us to discuss
17 the relevant law. That's all that took place at that
18 conference at the bar, so don't infer too much from that. I
19 have instructed the attorneys to approach if they need a ruling
20 from the Court before they proceed further. So that's what
21 that was, and give it no further weight.

22 RECROSS-EXAMINATION

23 BY MS. McELROY:

24 Q. Ms. Gardeazabel, I believe you testified earlier that,
25 during the course of your meetings with your attorney, you

1 would have signed a plea agreement?

2 **A.** Yes.

3 **Q.** And then you would have gone over a plea agreement
4 supplement?

5 **A.** Yes.

6 **Q.** And on both of these documents, there's a place for your
7 signature. Do you remember signing these documents?

8 **A.** Yes.

9 **Q.** Specifically in the plea agreement, under paragraph 7,
10 that you agree to give complete and truthful information
11 concerning your participation in the offense of conviction.

12 Do you remember going over that with your attorney?

13 **A.** Yes.

14 **Q.** In the government's agreement, in paragraph 8 of the plea
15 agreement, it said that they won't bring any additional charges
16 against you and that if--all things being equal, that the
17 government will then ask the Court to dismiss the remaining
18 charges in your indictment.

19 **A.** Yes.

20 **Q.** Is that what you understood?

21 **A.** Yes.

22 **Q.** Okay. In your plea agreement supplement, you agreed to
23 fully cooperate with the government agencies and law
24 enforcement and provide truthful and complete information or
25 testimony before any federal grand jury, United States District

1 Court, or in any other proceeding concerning your participation
2 in the offense of conviction or your knowledge of criminal
3 activities, including those criminal activities of
4 co-conspirators, against whom you would cooperate?

5 **A.** Yes.

6 **Q.** What do you think that means?

7 **A.** To cooperate with you guys.

8 **Q.** During the times that you've met--and I believe
9 Ms. Pinkham was forthcoming that you had met on several
10 occasions with both of the AUSA's and with some of the agents,
11 as well. Have there been any times where they told you that,
12 you know, well, you probably should say this or you should
13 probably not say that? Did they help you with your testimony?

14 **A.** No.

15 **Q.** Okay. So everything that you're saying is coming from
16 you?

17 **A.** Yes.

18 **Q.** Okay. Did they tell you that you shouldn't lie when you
19 get on the stand?

20 **A.** Yes.

21 **Q.** But you have lied?

22 **A.** Yes.

23 **Q.** Okay. Did they tell you that, in the plea agreement
24 supplement, that it is in the government's sole discretion
25 whether or not you would be getting any kind of substantial

1 assistance from them?

2 **A.** Can you repeat that?

3 **Q.** Yes, ma'am. Did you understand, in paragraph 2 of the
4 plea agreement supplement, that the language says that it's in
5 the government's sole discretion. That means they are the sole
6 decider as to whether or not you did enough or provided
7 substantial assistance in order to ask for more time off your
8 sentence?

9 **A.** Yes.

10 **Q.** They also said in this agreement that, given any of these
11 other things that you might talk about, or other offenses, you
12 wouldn't have your sentence increased. Is that your
13 understanding?

14 **A.** Yes.

15 **Q.** In your proffer agreement that you signed with the
16 government--do you remember signing that?

17 **A.** Yes.

18 **Q.** That was dated September 16th of 2022. This was signed,
19 I believe-- Is this your signature? Can you see?

20 **A.** I can't see from there.

21 MS. McELROY: May I approach the witness, Your
22 Honor?

23 THE COURT: You may approach.

24 (PAUSE)

25 **Q.** (BY MS. McELROY) Is this you?

1 A. Yes.

2 Q. Okay. Ms. Gardeazabel, when you were able to review the
3 signature date of 9-19-2022 on the proffer agreement, was that,
4 indeed, your signature?

5 A. Yes, that's my signature.

6 Q. And you agreed that you were going to tell the truth and
7 not withhold any information?

8 A. Yes.

9 Q. And have you done that?

10 A. Yes.

11 Q. Okay.

12 MS. McELROY: I have no further questions at this
13 time, Your Honor.

14 THE COURT: Okay. And because the parties
15 requested a ruling on a specific point of evidence, I'll allow
16 for a re-redirect, because you were waiting on a ruling from
17 the Court. So--but please limit it to anything that was
18 elicited during recross.

19 MS. PINKHAM: Yes, Your Honor. I'll be very brief.
20 May I have just one second, please?

21 THE COURT: You may.

22 MS. PINKHAM: Thank you.

23 (PAUSE)

24 THE COURT: You may proceed.

25 MS. PINKHAM: Thank you, Your Honor.

1 FURTHER DIRECT EXAMINATION

2 BY MS. PINKHAM:

3 Q. Bridgette, just to clarify, you lied to the agents on the
4 day that you were arrested on September 24th; is that right?

5 A. Yes, that's correct.

6 Q. Are you telling the truth in court today?

7 A. Yes.

8 MS. PINKHAM: No further questions, Your Honor.

9 THE COURT: Now, the attorneys conferred with the
10 Court at one of the breaks about a potential matter relevant to
11 additional testimony that might be elicited from this witness.
12 At this point, I'll ask counsel if we need to do any additional
13 recordkeeping or any appellate work outside the presence of the
14 jury with this witness before I excuse her.

15 MS. PINKHAM: Not from the government, Your Honor.

16 THE COURT: Okay. And from the defense?

17 MS. McELROY: We'd request additional work, Your
18 Honor.

19 THE COURT: Okay. So this is for appellate work.
20 I want to make certain that we have a record that allows the
21 parties to appeal, if necessary, different rulings that the
22 Court has made. That will require some additional questions
23 and answers from the witness.

24 So at this time, I'm going to instruct the marshals
25 to escort you to the jury deliberation room. We will be

1 efficient as possible; then we'll return and resume the trial
2 at that point.

3 (THE JURORS EXIT THE COURTROOM)

4 THE COURT: Please be seated.

5 And, Ms. Arellano, because it might affect appeals
6 filed by either the government or the defense, there's some
7 additional questioning.

8 At this point, I will allow defense counsel to voir
9 dire the witness directly, outside the presence of the jury,
10 for purposes of any offer of proof and any record that you need
11 to make in response to this Court's order in limine and orders
12 regarding Defendant's testimony at trial.

13 You may proceed.

14 MS. McELROY: Thank you, Your Honor. May I have
15 just a moment?

16 (PAUSE)

17 THE COURT: And, ma'am, just as a reminder, you
18 continue to be under oath at this point. This is just a
19 different proceeding. So I'll just caution you that you remain
20 under oath.

21 EXAMINATION

22 BY MS. McELROY:

23 Q. Ms. Gardeazabel, you've pled to the possession with
24 intent to distribute, which is Count 2 in your indictment.
25 Correct?

1 **A.** Correct.

2 **Q.** You understand that that means that you have not been
3 made to plead to Charge 1, or Count 1, which would have had a
4 10-year mandatory minimum sentence, all the way to life?

5 **A.** Yes.

6 **Q.** So as you sit here today, you've received a pretty large
7 reduction in sentence.

8 **A.** Yes.

9 **Q.** Correct?

10 **A.** Yes.

11 **Q.** Okay. You and your attorney would have gone over
12 whatever your guideline range was. Correct?

13 **A.** Yes.

14 **Q.** And you understood and you decided that it was in your
15 best interest to enter into an agreement with the government?

16 **A.** Yes.

17 **Q.** When you and your attorney spoke about this, what did he
18 tell you was a possible outcome for you, or what's your
19 understanding of what benefit you're going to get?

20 MS. PINKHAM: Your Honor, objection. That's within
21 the attorney/client privilege.

22 THE COURT: Okay.

23 MS. McELROY: I think those are revealable, Your
24 Honor. I think that, in discussions about what kind of
25 sentence that she would get--I'm not talking about anything

1 other than what sentence she would get, and I believe that's
2 entirely revealable.

3 THE COURT: So these would not be conversations
4 with the government about the plea agreement and process, but
5 instead, attorney/client privileged conversations with a
6 third-party counsel, and at that point, I would argue--I would
7 accept the government's argument those are within privilege.

8 MS. McELROY: Let me rephrase.

9 Q. (BY MS. McELROY) Based on your consultation with your
10 attorney, what is your expectation? What is your hope for your
11 sentencing outcome?

12 MS. PINKHAM: Your Honor, I think that's the same
13 question.

14 MS. McELROY: It is not the same question, because
15 it goes to what she believes--

16 THE COURT: Without divulging any attorney/client
17 privileged information, you may speak to your expectation for
18 what will happen at sentencing. But do not get into any
19 particular conversations that you had with your attorney about
20 guidelines ranges and the rest.

21 A. I just hope that you guys will see that I'm not the same
22 person, and I'm changed from--you know, from how I was. Taking
23 the class that I took, it changed me for--for my life. It's
24 not something I want to go back to. I have the tools now to go
25 forward in my future life.

1 Q. (BY MS. McELROY) So to break that down, does that mean
2 that you want to be placed on probation?

3 A. Yes.

4 Q. And so that's something that you've talked about?

5 A. Yes.

6 Q. Okay. You've already said--well, I think that you've
7 already said that the government has been basing whatever
8 reduction that they would want to extend based on your
9 cooperation. Is that right?

10 A. Yes.

11 Q. And your truthful testimony?

12 A. Yes.

13 Q. As you sit here today, you've gone from a possible
14 maximum life sentence to a minimum sentence of zero, or maybe
15 probation. Was that the goal in your defensive strategy?

16 A. Yes.

17 MS. McELROY: Okay.

18 THE COURT: Okay. Questioning from the government?

19 MS. McELROY: Nothing further.

20 EXAMINATION

21 BY MS. PINKHAM:

22 Q. Bridgette, have you and I ever talked about any specific
23 number of levels I'm going to ask the judge to move or anything
24 like that?

25 A. No.

1 Q. Obviously, it's fair to say that, like any criminal
2 defendant, your goal is to get as little time as possible; is
3 that correct?

4 A. Yes.

5 Q. Do you have any idea what that is at this point in time?

6 A. No.

7 Q. Have you and I ever talked about the possibility of
8 probation?

9 A. No.

10 Q. Is it your understanding that you are likely to go to
11 prison for some period of time?

12 A. Yes.

13 MS. PINKHAM: No questions, Your Honor.

14 THE COURT: Okay. Ms. Gardeazabel, I will ask
15 questions now for the Court.

16 EXAMINATION

17 BY THE COURT:

18 Q. And so I have before me a copy of your plea agreement and
19 plea agreement supplement. Just for the record purposes, the
20 plea agreement is Document 91. This is for purposes of only
21 this hearing and this offer of proof.

22 Do you recall, in signing this document, without
23 divulging anything that your attorney may have told you, that
24 in paragraph 5 of the plea agreement, it states: The Court's
25 sentencing discretion and role of the guidelines. The

1 defendant understands that the sentence in this case will be
2 imposed by the Court after consideration of the United States
3 Sentencing Guidelines. The guidelines are not binding on the
4 Court, but are advisory only. The defendant has reviewed the
5 guidelines with Defendant's attorney but understands no one can
6 predict with certainty the outcome of the Court's consideration
7 of the guidelines in this case. The defendant will not be
8 allowed to withdraw the defendant's plea if the defendant's
9 sentence is higher than expected. The defendant fully
10 understands that the actual sentence imposed, so long as it's
11 within the statutory maximum, is solely within the discretion
12 of the Court.

13 And did you review that paragraph and understand
14 that before signing the plea agreement?

15 **A.** Yes.

16 **Q.** Okay. And page 5 of that same document, paragraph 10
17 states that: This plea of guilty is freely and voluntarily
18 made, and it's not the result of force or threats or of
19 promises, apart from those set forth in this plea agreement.
20 There have been no guarantees or promises from anyone as to
21 what sentence the Court will impose.

22 Did you read and review and understand that
23 paragraph before signing this plea agreement?

24 **A.** Yes.

25 **Q.** And is it your testimony to this Court today that nobody

1 has promised or guaranteed anything regarding sentencing?

2 **A.** Yes.

3 **Q.** And there's no promise from either the government or your
4 attorney that you will receive probation from this Court, who
5 does sentencing?

6 **A.** Yes, Your Honor.

7 **Q.** Okay. And your plea agreement supplement, which is
8 Document Number 92, this was referenced by both defense counsel
9 and the government. Paragraph 2 says: If, in its sole
10 discretion, the government determines that the defendant has
11 provided substantial assistance in the investigation or
12 prosecution of others, it will file a motion urging sentencing
13 consideration for that assistance. Whatever and to what extent
14 to grant the motion are matters solely within the Court's
15 discretion.

16 When you reviewed and signed that document, do you
17 understand that there are no promises reflected in this
18 agreement that such motions will be filed as an absolute
19 matter?

20 **A.** Yes, Your Honor.

21 **Q.** Okay. And at all times, were you advised, both by your
22 attorney and by the government counsel, that you should tell
23 the truth today?

24 **A.** Yes, Your Honor.

25 **Q.** Okay.

1 THE COURT: At this point, are there any additional
2 findings or line of questioning from the government?

3 MS. PINKHAM: No, Your Honor.

4 THE COURT: Anything additional from the defense?

5 MS. McELROY: Your Honor, based on the testimony
6 that the Court has heard, we would ask the judge to reconsider
7 his motion in limine ruling and allow us to go in, before the
8 jury, the full ranges, so that the jury could appreciate the
9 full amount of motivation or bias, as you were, that this
10 particular individual is bringing to this Court and to her
11 testimony as well, Your Honor. We think that the jury ought to
12 be able to hear that.

13 THE COURT: Okay. So I believe you used the term
14 "full ranges." Is this a reference to guideline ranges that
15 would apply or are anticipated for both Count 1 and Count 2?
16 Guidelines ranges?

17 MS. McELROY: No, Your Honor. Statutory ranges.

18 THE COURT: So statutory minimum?

19 MS. McELROY: Yes, sir.

20 THE COURT: Per count? Okay.

21 A response from the government?

22 MS. PINKHAM: Your Honor, this is the same argument
23 that was placed before the Court on Thursday of last week. I
24 don't think anything has changed. I don't think any
25 circumstances have changed today, Your Honor. I think the

1 defendant was able to get out of Ms. Gardeazabel her agreement
2 in the plea agreement, plea agreement supplement, as well as
3 the proffer agreement before the jury. I think they have
4 appropriately established the level of her bias and motive to
5 testify here today. I don't think anything has--

6 THE COURT: Okay. I'll just--we'll treat this as a
7 hearing on that motion. So the Court is considering it. What
8 additional evidence was elicited? I know we had her trial
9 testimony and then this hearing on your proposed motion to
10 reconsider, and then also the offer of proof. What is
11 different that would change this Court's ruling in the order
12 marked Document 138?

13 MS. McELROY: Your Honor, I think that we have--
14 Ms. Gardeazabel has a sincere--I know the government would term
15 it as a wish, but I think that she has a sincere belief that
16 there is probation as a real possibility. And I think that
17 that makes a huge difference when we talk about taking away the
18 10-year mandatory minimum charge and then supplanting that with
19 the zero to 20 charge.

20 I'm not implying the government has promised her
21 that. But I am concerned and I believe the jury should know
22 that this particular individual, I think, is highly motivated
23 by the possibility of receiving probation, Your Honor. And
24 that, in my opinion, would be what would be new.

25 MS. PINKHAM: May I respond, Your Honor?

1 THE COURT: Okay. It's my recollection, during her
2 direct testimony, or maybe it was on cross or recross, she did
3 reference that she wanted probation. Am I correct that that
4 was elicited during trial testimony?

5 MS. PINKHAM: In the offer of proof only, Your
6 Honor.

7 THE COURT: Only in the offer of proof?

8 MS. PINKHAM: Yes, Your Honor.

9 MS. McELROY: Yes, Your Honor.

10 THE COURT: Okay. So that's what we're down to
11 here. You have the Court's order on the reasons why discussing
12 certain statutory minimums that might correlate to dismissal of
13 counts would effect an invitation to jury nullification. The
14 order is clear. That begins at Section V of the Court's order
15 in limine.

16 I'll allow the government to respond with any
17 additional legal arguments, and then I'll rule on the pending
18 motion to reconsider.

19 MS. PINKHAM: Just now, Ms. McElroy said to the
20 Court that she--Ms. McElroy believes that Bridgette believes
21 that probation is a likely possibility. I think that is
22 completely speculative, Your Honor. As well, in the offer of
23 proof testimony, when Ms. McElroy asked her about probation,
24 obviously Bridgette said yes, I would like to get probation,
25 just like every other criminal defendant. However, on

1 cross-examination in the offer of proof, I asked Bridgette if
2 she understood that she was likely to go to prison, and she
3 said yes.

4 Additionally, Your Honor, if we're going to talk
5 about probation, I believe what's going to happen in the PSR is
6 that the guideline sentence--it will say that the guidelines do
7 not recommend a sentence, in the sentencing table, of
8 probation, not eligible for probation based on her sentence.
9 So in effect, we are getting into the sentencing table, which
10 is directly what the Court has ordered us not to do.

11 THE COURT: Okay. So at this point, I'll allow--I
12 will grant in part Defendant's motion to this extent. I will
13 allow a question regarding her understanding of statutory
14 minimums that do not apply because there's an anticipated
15 dismissal of the count that would carry that, and you may
16 elicit testimony on, you know, her hopes for leniency, making
17 various motions in support of maximal leniency. And then I'll
18 allow the government to respond with its understanding that
19 none of this is promised under the plea agreement. You can
20 reference the agreement between the parties and that--you can
21 repeat then that you understand that it is likely you will
22 serve time in prison.

23 MS. PINKHAM: Your Honor, I'm sorry to disagree and
24 to ask the Court a question. If the defense is allowed to ask
25 Ms. Gardeazabel about Charge 1, which is what the Court has

1 ordered us to call it, Charge 1, and the mandatory minimums
2 that are addressed in Charge 1, I believe that will then lead
3 the jury to understand what the defendant is facing, 10 years
4 to life, which--

5 THE COURT: That was the concern. That's the whole
6 basis for the order in limine. But if we allow defense counsel
7 to ask the question, you understand if counts are dismissed,
8 that you are not facing statutory minimums that may have
9 applied-- Now, we don't have to go into actual numbers.

10 MS. PINKHAM: Okay.

11 THE COURT: So if we expand, out of leniency and
12 out of an abundance of appellate caution, that testimony to
13 maximums, minimums, but no numbers, then we don't run afoul of
14 a body of uninterrupted case law. In every admonishment that
15 this Court gives to the jury about sentencing being, you know,
16 something that is reserved to the judge, within the judge's
17 purview, if we start getting into sentencing tables,
18 calculations, math--you are going to get this, he's going to
19 get this, you were advised, you're told this is your range--it
20 would run afoul of boilerplate Fifth Circuit patterns on
21 sentencing as the province of the judge and something that the
22 jury should not consider.

23 But if we acknowledge, as a basis for her plea
24 agreement, that there are both statutory maximums and minimums
25 that now may not apply if that count is dismissed--we'll use

1 the terminology of maximum, minimum. That way, Defendant can
2 get to that bias point that there is both a potential ceiling
3 and floor that does not apply. But we are not going to get
4 into discussion of numbers and invite nullification, because
5 now I have a jury considering the sentencing and doing
6 independent calculations of what might apply were they to reach
7 guilty verdicts on counts.

8 MS. PINKHAM: Understood. Thank you, Your Honor.

9 THE COURT: Okay.

10 MS. McELROY: For clarity, Your Honor?

11 THE COURT: I prefer clarity.

12 MS. McELROY: Well, so do I, but sometimes it--I'm
13 struggling here.

14 THE COURT: Okay. If you're taking notes from
15 Mr. Wright, he needs to move from beyond the gallery into your
16 team. So if he's going to do that any further, then he needs
17 to move and be a part of your team. The note-passing is too
18 much.

19 MS. McELROY: I'm sorry, Your Honor. He was
20 endeavoring to help me to clarify. Is it the Court's ruling
21 that I may say years in prison?

22 THE COURT: No. I'm simply saying that there are
23 now statutory minimums that also do not apply if that Count 1
24 is dismissed.

25 MS. McELROY: Okay.

1 THE COURT: We have discussed, and consistent with
2 the Court's order, and acknowledge that there are statutory
3 maximums that may not apply, but also, you understand if the
4 Court moves and this Court grants dismissal of a count, there
5 are also statutory minimums that no longer apply, without
6 getting into 10 years.

7 MS. McELROY: Okay. So can I say a number of years
8 in prison as mandated, as opposed to not having a mandate--

9 THE COURT: Don't reference the number. Just say--

10 MS. McELROY: A number--

11 THE COURT: --there are statutory maximums that
12 carry a number of years in prison. There are statutory
13 minimums that dictate numbers in prison. Those would not apply
14 if Count 1 is dismissed; is that your understanding.

15 And then the government may reply that it's not
16 promised; the plea agreement doesn't reflect it; we can't make
17 any guarantees about that; and this will be within the sole
18 sentencing discretion of the Court.

19 MS. McELROY: May I also say--as a range, Your
20 Honor, may I say that with the dismissal of Charge 1 and then
21 the reduction of the range from a 20-year maximum down to no
22 maximum, whether or not they would then have a hope of
23 probation? May I say those words?

24 THE COURT: The hope of-- I don't have the PSR
25 before me, but I do not anticipate that a probated term would

1 even be within guidelines range, absent some extraordinary
2 motions practice. This Court always has discretion to vary,
3 but this is precisely why we don't do sentencing math on the
4 trial at the merits. All of this is reserved for a sentencing
5 process, the guidelines, the post-Booker mix of discretion to
6 vary, and all of the work that we do in here Monday through
7 Friday at sentencing. So if you-- I'm not going to allow you
8 to back-door--

9 MS. McELROY: May I say--

10 THE COURT: --invitations to those calculations.
11 The jury shouldn't be considering that.

12 MS. McELROY: Okay. Then can I say, you've been--
13 your charge has then been reduced to a count where there is no
14 mandatory minimum service?

15 THE COURT: Yes, you may say that. You may say
16 that.

17 MS. McELROY: Okay. I'm just trying to get it--

18 THE COURT: I understand. But you also understand
19 the government's concern that it's an invitation to jury
20 nullification, and this jury should not-- Every other
21 instruction in the Fifth Circuit pattern, from the beginning of
22 voir dire to the jury charge itself, admonishes these juries
23 that they are not to consider the sentencing effect. They are
24 here to decide guilt and innocence, and that is their province.
25 They should defer, instead, to the Court to do sentencing. You

1 are inviting math that is not permissible for this jury to
2 consider.

3 So if we get into numbers and ranges and what your
4 attorney said, this is the band; you anticipate you're in
5 Category 4, Level 6; this is the band-- If we get into those
6 type calculations, we're inviting the very thing that this jury
7 may not consider because it is not their responsibility in this
8 trial on the merits.

9 So I will allow you to make references generally to
10 the ceiling and the floor as a maximum or minimum. You have
11 now pled--if that count is dismissed, you now have removed a
12 statutory minimum, and, as a result, that could result in a
13 significant benefit to you.

14 I think, with that, you have done your work in
15 impeaching this witness regarding bias, and I have done my work
16 in ensuring that I don't have amateur USPO officers running
17 guidelines calculations, trying to figure out what this
18 defendant's sentencing exposure is.

19 All of this is my province, and I want to make
20 careful to mind that gap between the two. So I think, with
21 that instruction, this Court has ruled. If there is nothing
22 additional from the parties-- Any additional instruction--

23 MS. PINKHAM: No, Your Honor.

24 THE COURT: --or clarification, as we've called it,
25 from the government?

1 MS. PINKHAM: No, Your Honor.

2 THE COURT: Okay. So let me confer with my law
3 clerks, make sure there's no additional appellate work to be
4 done, and then we'll call the jury back, and I'll allow this
5 brief recross, redirect, and then we'll be done with this
6 witness, unless the government has additional questions.

7 MS. PINKHAM: Your Honor, while the jury is out,
8 may we take five minutes for a restroom break?

9 THE COURT: You may.

10 MS. PINKHAM: Thank you.

11 (RECESS TAKEN)

12 THE COURT: The Court does want to reiterate on the
13 record some of the reasons why there's been so much litigation
14 about this issue.

15 It is true that a co-defendant government witness
16 may be properly cross-examined regarding her motivations for
17 testimony. This is reflected in the Court's order in limine on
18 page 5. The problematic element here is that defendant has a
19 potential sentencing exposure on the exact same charges and
20 counts, and that's why the Court is concerned about inviting
21 the jury to speculate and to do sentencing math on the fly when
22 it is not a proper function of the jury to consider that
23 vis-a-vis the defendant.

24 So to give balance to Defendant's cross-examination
25 rights, and also to protect the jury from sentencing decisions

1 that are beyond their purview, this Court will allow defense
2 counsel to state that Defendant was potentially facing a count
3 with a statutory minimum. That is not the case should this
4 Court dismiss that count pursuant to the plea agreement and the
5 motion of the government. But any discussion of years, either
6 by Arabic numeral or by reference to decades or anything of
7 that sort, would invite inquiry into the sentencing math that
8 this jury may not do.

9 So you were facing a statutory minimum. If this
10 Court grants the motion to dismiss Count 1, that is no longer
11 the case, so you have significantly reduced a potential
12 sentencing exposure if that all works out the way you
13 anticipate.

14 That's how I anticipate the line of questioning to
15 go. We've already allowed at least one reference to the
16 ceiling. I'll allow a reference to the floor. But we are not
17 getting into the numbers and how that math might play out in an
18 absolute algebraic sense--I guess this here would be
19 arithmetic--arithmetic sense. So that's--I think that gives
20 defense counsel an opportunity to make reference to that
21 statutory minimum.

22 Is Matthew Wright still in the courtroom?

23 MS. McELROY: Your Honor, I think he has returned
24 back to the office.

25 THE COURT: I just want to admonish your office.

1 MS. McELROY: Yes, sir.

2 THE COURT: I served in an appellate division. I
3 was part of several trial teams. I understand that there are
4 consultants in your defense work. He was directed by the
5 marshals to move closer to counsel table and did not do so, so
6 he disobeyed an instruction of this Court through the marshals.
7 And I do want you to admonish him--there's no sanction or
8 anything like that--that he needs to follow those instructions
9 in the future.

10 MS. McELROY: Yes, Your Honor.

11 THE COURT: So I will ask you to just relay that
12 admonishment to him. It is nothing further. But I, too, have
13 been in that predicament, and I sat at counsel table, and I
14 cooperated with the trial team. So let's do that in the future
15 so that we don't have too much hustle and bustle. And it also
16 creates an issue for the marshals, who are securing both the
17 gallery and the defendant. So let's not do that again. Just
18 tell him that that will be the rule from this point forward.

19 MS. McELROY: Yes, Your Honor.

20 THE COURT: So do the parties have the rules of the
21 road for this final round of testimony?

22 MS. PINKHAM: Yes, Your Honor.

23 MS. McELROY: Statutory maximum of number of years.

24 THE COURT: Okay. No reference to ten, no
25 reference to any numerals that might invite calculations.

1 Okay?

2 At this point, let's bring in the jury.

3 (THE JURORS ARE SEATED IN THE JURY BOX)

4 THE COURT: Please be seated.

5 And, once again, this is another scenario where I
6 instructed both the government and the defense to approach the
7 bench if they needed an evidentiary ruling or if they needed to
8 make any appellate record for further review by the Court of
9 Appeal. That's all that was. You should not infer anything
10 more or less from that.

11 At this time, we will have one final round of
12 recross and redirect, and I anticipate that will complete the
13 testimony for this witness.

14 And, Ms. McElroy, you may proceed.

15 FURTHER CROSS-EXAMINATION

16 BY MS. McELROY:

17 Q. Ms. Gardeazabel, would it be a true statement that, based
18 on Charge 1 having the possibility of being dismissed as part
19 of your plea bargain, that you no longer face a statutory
20 minimum of a number of years?

21 A. Yes.

22 Q. Would it also be true that being allowed to plead to a
23 statute that does not have any mandatory minimum but sets the
24 maximum statutory maximum at 20 years, you have already
25 received a benefit to be here?

1 **A.** Yes.

2 THE COURT: Any recross by the government?

3 MS. PINKHAM: Yes, Your Honor.

4 FURTHER DIRECT EXAMINATION

5 BY MS. PINKHAM:

6 **Q.** Have any promises been made to you as to what your exact
7 sentence will be?

8 **A.** No.

9 **Q.** Do you understand that any benefit that you should
10 receive comes through a motion from the government to the
11 Court?

12 **A.** Yes.

13 **Q.** And ultimately, it is up to the Court to decide what
14 sentence reduction you may or may not get?

15 **A.** Yes.

16 **Q.** Do you understand, as part of your plea agreement, the
17 things that you sign indicated that that would be the case?

18 **A.** Yes.

19 **Q.** That no promises have been made to you before your plea
20 or before testifying here today?

21 **A.** Yes.

22 MS. PINKHAM: No further questions, Your Honor.

23 THE COURT: Okay. And at this point, does the
24 government agree that this witness may be excused and not
25 subject to re-call?

1 MS. PINKHAM: Yes, Your Honor.

2 THE COURT: And is it defense counsel's
3 understanding that this witness may be excused and not subject
4 to re-call?

5 MS. McELROY: Yes, Your Honor.

6 THE COURT: Okay. At this time, the witness is
7 excused.

8 And, Ms. Pinkham or Ms. Bell, you may begin with
9 your next witness.

10 MS. PINKHAM: The government calls Agent Jose
11 Barron.

12 THE COURT: Deputy Barron, you may take your place
13 in the well. I just ask that you remain standing for
14 administration of the oath. My courtroom deputy will
15 administer that oath.

16 (THE OATH IS ADMINISTERED BY THE COURTROOM DEPUTY)

17 THE COURT: You may be seated. I'll just instruct
18 you to speak clearly into the microphone.

19 JOSE BARRON,
20 GOVERNMENT'S WITNESS, TESTIFIED ON HIS OATH AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MS. PINKHAM:

23 Q. Will you tell us your name, please.

24 A. Jose Barron.

25 Q. Can you spell your last name, please.