IN THE SUPREME COURT OF THE UNITED STATES

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GERARDO FARIAS-CONTRERAS,
aka, Tomas Gomez,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. GERARDO FARIAS-CONTRERAS, AKA Tomas Gomez, *Defendant-Appellant.*	No. 21-30055 D.C. No. 2:19-cr-00111-WFN-17 OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, District Judge, Presiding

Argued and Submitted En Banc January 24, 2024
Pasadena, California

Filed June 3, 2024

Before: Mary H. Murguia, Chief Judge, and Ronald M. Gould, Johnnie B. Rawlinson, Milan D. Smith, Jr., Morgan Christen, Michelle T. Friedland, Mark J. Bennett, Eric D. Miller, Daniel A. Bress, Patrick J. Bumatay and Roopali H. Desai, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.;
Concurrence by Judge Gould;
Concurrence by Judge Bennett

SUMMARY*

Criminal Law

The en banc court affirmed a sentence in a case in which the defendant argued that the government breached its promise under the plea agreement not to recommend a sentence in excess of the low-end of the sentencing guidelines range when the government implicitly urged the district court to impose a harsher sentence.

Considering the record *in toto*, a majority of the panel found that the government's conduct crossed the line from permissible advocacy to an improper end-run of the plea agreement; the government thus implicitly breached its promise not to recommend a sentence in excess of the low-end of the calculated guideline range.

The majority concluded, however, that the error was not plain because this court's precedent does not make sufficiently clear to what extent the government may respond to a defendant's request for a downward departure without implicitly breaching the plea agreement.

The majority took the opportunity to clarify this court's law on the subject. In cases involving an implicit breach

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

claim, courts must look first to the plain language of the plea agreement. As long as the agreement does not expressly prohibit the government from responding to a defendant's request for a sentence lower than what is recommended by the government, the government has the latitude to respond. But the government's response must be tethered to its obligations under the plea agreement, even when responding to the defendant's specific request for a downward departure or to the court's questions. While a prosecutor need not invoke magic words each time he or she argues against mitigation or answers the court's questions, the government must comply with the letter and spirit of the plea agreement. That is, the government's arguments must be made in good faith and advance the objectives of the plea agreement. This is a fact-specific inquiry based on contract principles. Courts should look at the totality of circumstances and consider, *inter alia*, the sequencing, severity, and purpose of the statements. To the extent this court's precedent can be read to prohibit the government from presenting *any* information that is already known and contained in the presentence report, the majority rejected such a categorical rule. In cases where the government is entitled to respond to arguments by the defense, repeating facts in the presentence report does not constitute a per se breach.

Concurring, Judge Gould, joined by Judges Rawlinson and Desai, joined the majority in full. He wrote separately to add that the conclusion that there was error not only has the fundamental principles of contract law supporting it but also the constitutional protections given to plea bargains.

Concurring in the judgment, Judge Bennett, joined by Judges Miller, Bress, and Bumatay, agreed with the majority that the court should affirm and that no categorical rule

prohibits the government from presenting information already known to the court. He disagreed with the majority's conclusion that the government implicitly breached the plea agreement.

COUNSEL

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OPINION

M. SMITH, Circuit Judge, with whom MURGUIA, Chief Judge, and GOULD, RAWLINSON, CHRISTEN, FRIEDLAND and DESAI, Circuit Judges, join:

Plea agreements are an essential component of the criminal justice system. It is important—for the government, the defendant, and the functioning of the system—that they be enforced. Defendant-Appellant Gerardo Farias-Contreras appeals his 188-month sentence following his guilty plea to conspiracy to distribute controlled substances in violation of 21 U.S.C. §§ 841 and 846. He argues that the government breached its promise under the plea agreement not to recommend a sentence in excess of the low-end of the sentencing guidelines range when the government implicitly urged the district court to impose a harsher sentence. In response, the government contends that it merely articulated to the district court why the government's 151-month recommendation—a significant sentence for an older individual with serious medical conditions—was reasonable under the totality of the circumstances. For the reasons below, we conclude that there was no plain error in the government's conduct, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 28, 2020, Farias-Contreras entered into a plea agreement with the government and pleaded guilty to conspiring to distribute methamphetamine and heroin in violation of 21 U.S.C. §§ 841 and 846. Pursuant to the plea agreement, the government agreed, *inter alia*, to dismiss two other charges and "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the

United States." The plea agreement allowed Farias-Contreras to recommend any legal sentence and, for purposes of sentencing, allowed either party to present facts not included in the plea agreement's stipulated facts if "relevant to the guideline computation or sentencing." The district court accepted the guilty plea.

On January 19, 2021, Farias-Contreras filed his sentencing memorandum. He argued for a six-level reduction in the base offense level resulting in a guidelines range of 108–135 months and urged either a sentence within that range or a variance below it, citing his many physical disabilities. Thereafter, on January 29, 2021, the government filed its sentencing materials. After reducing the base offense level by three levels, the government calculated a guidelines range of 151–188 months and recommended a 151-month term, i.e., the low-end of the guidelines range.

Explaining its recommendation, the government first noted that Farias-Contreras had been "convicted of an unquestionably serious offense" and that "[d]rug trafficking is nothing less than pumping pure poison into our community." The sentencing memorandum proceeded to cite statistics of drug overdose deaths;[1] quote an excerpt

[1] The memorandum stated: "The effects of drug trafficking are massive, and in some respects, incalculable, especially when all the collateral consequences are considered. The damage the drugs this Defendant were peddling cause irreparable harm to the community in general as well as to families whose members are addicted to controlled substances. According to the Center for Disease Control, in 2018 in the United States, 67,367 individuals died from a drug overdose. In 2019, drug overdose deaths climbed to a record high – with a reported 70,980 deaths." (footnotes omitted).

from a book about the families of living drug addicts;[2] and quote a decades-old Fifth Circuit decision that suggests drug dealing is a "grave offense" worse than murder.[3] It concluded by emphasizing that Farias-Contreras was "the top of criminal culpability in this case," that his involvement in drug trafficking appeared to stem back to 1990, that he had not let his physical impairment stop him from engaging in this conduct, and that, ultimately, a significant sentence

[2] The memorandum stated: "Importantly, the damage is not limited to families who have suffered a death. As aptly recorded by Sam Quinones in the book 'Dreamland' about the families of living drug addicts:

> I met with other parents whose children were still alive, but who had shape-shifted into lying, thieving slaves to an unseen molecule. These parents feared each night the call that their child was dead in a McDonald's bathroom. They went broke paying for rehab, and collect calls from jail. They moved to where no one knew their shame. They prayed that the child they'd known would reemerge."

[3] The memorandum stated: "'Measured thus by the harm it inflicts upon the addict, and through him, upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank.' *Terrebonne v. Butler*, 820 F.2d 156, 157 (5th Cir. 1987), *cert. denied*, 484 U.S. 1020 (1989). The Circuit Court continued:

> Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image—others who create others still, across our land and down our generations, sparing not even the unborn.

Terrebonne, 820 F.2d at 157–58. While this opinion was authored over 30 years ago, it continues to ring true today."

was warranted to protect the community from his continued illicit activities.

At the sentencing hearing, Farias-Contreras again requested a sentence as low as 108 months. His request for a lower sentence was based principally on his physical condition: he had been shot multiple times, "still has the colostomy," "still has to have a urethra," "still has to use manual methods in order to relieve himself," and "can't walk" without braces.[4]

In response, the government stated first that it stood by the recommendation in its sentencing memorandum. Then, the government immediately noted that "the number of which that we're recommending was something that was of much discussion," prompting the court to ask, "Much discussion where?" The government clarified, "In our office--of what do we do with this particular defendant? [Farias-Contreras] is at the top of the food chain in terms of criminal culpability, in terms of personally directing and organizing the distribution of a massive, massive amount of drugs." The court commented that Farias-Contreras was willing to distribute thirty pounds of drugs back in 1998, to which the government responded, "That's very correct, very correct. So we have this individual, multiple years, multiple pounds, a massive amount of drugs that he is responsible for."

[4] Farias-Contreras also argued that "[o]ur government has said that for every year of life, there's two years that are taken off his life in longevity while he's in prison, and that's going to be happening. Prison for him is two times. It's twice as hard as it is for anybody else, and he's going to be punished. He's going to be punished for [his physical condition]."

At the end of its exchange with the court, the government reiterated:

> [W]e kept coming back in our discussions--everyone was very sympathetic to the physical condition and what that means for him, but we were unanimous in coming back to this physical condition has not deterred his conduct whatsoever. He continued to be a leader/organizer, and there's nothing that will prevent him in the future to returning to that--that role. . . . [E]veryone was unanimous in that a long period of incarceration is going to be necessary to protect the public from the defendant, to protect society.

"[B]ased on the totality of those circumstances," the government again stated that it was recommending the term of incarceration that it outlined in its sentencing memorandum. The government did not specify at the hearing the number of months that it was recommending.

Citing substantially the facts and argument presented by the government, the district court adopted the government's guidelines range and sentenced Farias-Contreras to 188 months' imprisonment. The district court first acknowledged Farias-Contreras's "serious limitations" and that "incarceration is not going to be easy." The court then explained its concerns about the protection of the public and his lack of respect for the law, referencing the government's brief and oral presentation. In particular, the court noted that Farias-Contreras was "top in the chain," "way up in the distribution"; how deeply involved he was in an organization "responsible for distributing in this geographic area huge

amounts of methamphetamine"; and that "[l]ives are lost. Lives are ruined. Families broken up, jobs lost, health deteriorated. Children become--it becomes available for children. Addicts are fed. So it's serious, very serious." The court rejected the government's recommendation as too low and determined that the high end of the guidelines range was justified.

On appeal, Farias-Contreras argues that the government implicitly breached its obligation in the plea agreement "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." He argues that, although the government technically recommended a low-end sentence of 151 months, statements made by the government in its sentencing memorandum and at the sentencing hearing implicitly urged the district court to impose a longer sentence. A divided three-judge panel vacated Farias-Contreras's sentence and remanded to the district court for reassignment and resentencing. *United States v. Farias-Contreras*, 60 F.4th 534, 548 (9th Cir. 2023). We granted rehearing en banc, *United States v. Farias-Contreras*, 83 F.4th 1161 (9th Cir. 2023), and we now affirm the district court.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 18 U.S.C. § 3742(a). *See United States v. Heredia*, 768 F.3d 1220, 1230 (9th Cir. 2014). Generally, we review a defendant's claim that the government has breached its plea agreement de novo. *United States v. Mondragon*, 228 F.3d 978, 980 (9th Cir. 2000). Because Farias-Contreras failed to raise his objection at sentencing, we review here for plain error. *See United States v. Whitney*, 673 F.3d 965, 970 (9th Cir. 2012). "Relief for plain error is available if there has been (1) error; (2) that

was plain; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Minasyan*, 4 F.4th 770, 778 (9th Cir. 2021) (quoting *United States v. Cannel*, 517 F.3d 1172, 1176 (9th Cir. 2008)).

ANALYSIS

Plea agreements are essentially contracts between the government and a defendant. *United States v. Myers*, 32 F.3d 411, 413 (9th Cir. 1994) (per curiam). As such, they are governed by principles of contract. *See id.* "In construing an agreement, the court must determine what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty." *United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993) (footnotes omitted). We hold the government to "the literal terms of the agreement," *Myers*, 32 F.3d at 413 (quoting *United States v. Escamilla*, 975 F.2d 568, 571 (9th Cir. 1992)), and construe any ambiguities in the defendant's favor, *Heredia*, 768 F.3d at 1230.

At the time of sentencing, the law governing the plea-bargaining process was best summarized in our decisions in *Whitney*, 673 F.3d 965, and *Heredia*, 768 F.3d 1220. In *Whitney*, we explained that the government breaches its agreement by "implicitly arguing for a sentence greater than the terms of the plea agreement specified that the prosecution would recommend." *Whitney*, 673 F.3d at 971. "Although a sentencing recommendation need not be made enthusiastically, when the government obligates itself to make a recommendation at the low end of the guidelines range, it may not introduce information that serves no purpose but to influence the court to give a higher sentence." *Id.* (cleaned up). We explained further that "[t]his

prohibition precludes referring to information that the court already has before it, including statements related to the seriousness of the defendant's prior record, statements indicating a preference for a harsher sentence, or the introduction of evidence that is irrelevant to any matter that the government is permitted to argue." *Id.* (cleaned up). Such statements were recognized as introduced "solely for the purpose of influencing the district court to sentence [the defendant] more harshly." *Id.* (quoting *United States v. Johnson*, 187 F.3d 1129, 1135 (9th Cir. 1999)).

In *Heredia*, we added that "the government breaches its bargain with the defendant if it purports to make the promised recommendation while 'winking' at the district court to impliedly request a different outcome." 768 F.3d at 1231 (internal quotation marks omitted). "An implicit breach of the plea agreement occurs if, for example, the government agrees to recommend a sentence at the low end of the applicable Guidelines range, but then makes inflammatory comments about the defendant's past offenses that do not 'provide the district judge with any new information or correct factual inaccuracies.'" *Id.* (quoting *Whitney*, 673 F.3d at 971).

Farias-Contreras makes a strong argument that the government's conduct breached the plea agreement. Although the government promised "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States," it spent five pages in its sentencing memorandum arguing for why Farias-Contreras should be given a "significant sentence" and reiterated the same at the sentencing hearing. The government also made several inflammatory arguments, including in its sentencing memorandum statistics on drug overdose deaths, an excerpt from the book *Dreamland* about drug users shape-shifting

into "lying, thieving slaves," and a comparison of drug dealers to "the vampire of fable, creat[ing] others in its owner's evil image." Indeed, the government conceded at oral argument in our court that several of these remarks were ill-advised, and all but conceded that this case turns on the plainness prong.[5]

Moreover, the government seemed to invite the district court's skepticism as to its recommendation by noting "much discussion" in the U.S. Attorney's Office on what to "do with this particular defendant." That is, the government seemed to suggest that some prosecutors in the office did not agree with the low-end recommendation in light of Farias-Contreras being "at the top of the food chain in terms of criminal culpability, in terms of personally directing and organizing the distribution of a massive, massive amount of drugs," thereby "'winking' at the district court to impliedly request a different outcome." *See Heredia*, 768 F.3d at 1231 (internal quotation marks omitted). The government's nod to the court also supports the inference that any improper statements by the government were aimed at obtaining a sentence higher than what it recommended, rather than

[5] In response to the government's suggestion that this would be a "much easier case" had the prosecutor "signpost[ed]" her responses, the panel asked: "By making [that] argument, doesn't the government expose itself? If the defense counsel had objected, this would be a very different argument."

The government conceded: "I think that's right. I think you're right, Your Honor. I think some of these remarks, I think, are, well I should say, the sentencing memo is—I don't actually think the prosecutor did anything wrong at the hearing. The sentencing memo is close to the line. I would acknowledge that. But I do think the plain error rule serves a really important purpose in this context."

merely asking for a sentence above Farias-Contreras's request for 108 months.

On the other hand, a number of facts weigh against finding a breach. First, the government did, as promised, recommend the low-end of the guidelines both in its sentencing memorandum and at the sentencing hearing, even if only perfunctorily. Second, the plea agreement did not expressly prohibit the government from responding to Farias-Contreras's request for a below-guidelines sentence; to the contrary, the plea agreement allowed either party to present and argue "additional facts which are relevant to the guideline computation or sentencing, unless otherwise prohibited in this Plea Agreement." *See United States v. Maldonado*, 215 F.3d 1046, 1052 (9th Cir. 2000) ("[T]he government has a duty to ensure that the court has complete and accurate information, enabling the court to impose an appropriate sentence."). *But see United States v. Moschella*, 727 F.3d 888, 892 (9th Cir. 2013) (noting that the government expressly "reserved the right to oppose any defense argument for a reduced sentence" in the plea agreement). Finally, the government agreed that Farias-Contreras's physical condition was a mitigating factor for purposes of sentencing, noting that he is someone "who has very significant and undeniable physical limitations and concerns about being potentially vulnerable in the Bureau of Prisons."

Although this case presents a close question, considering the record here *in toto*, a majority of the panel finds that the government's conduct crossed the line from permissible advocacy to an improper end-run of the plea agreement. The prosecutor simply went too far. The government does not have carte blanche to use inflammatory rhetoric and to argue in excess for "a long period of incarceration" whenever a

defendant requests a below-guidelines sentence. To do so, in addition to inviting the court's skepticism as to the government's bona fide position, is to act "solely for the purpose of influencing the district court to sentence [the defendant] more harshly." *Whitney*, 673 F.3d at 971 (quoting *Johnson*, 187 F.3d at 1135). Thus, the government implicitly breached its promise not to recommend a sentence in excess of the low-end of the calculated guideline range.

However, the error was not plain. An error is plain when it is "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). "[T]he second prong of plain-error review . . . will often have some 'bite' in plea-agreement cases. Not all breaches will be clear or obvious." *Id.* at 143.

Here, Farias-Contreras relies principally on our decisions in *Heredia*, *Whitney*, and *Mondragon*. But, as the government argues, none of those precedents is sufficiently instructive so as to signal "clear or obvious" error. For example, in *Heredia*, the parties agreed to recommend that the district court impose a stipulated sentence and that they would not argue "in any way" for an adjustment, departure, or variance in sentence. 768 F.3d at 1228. In *Whitney*, the plea agreement precluded the defendant from requesting a below-guidelines sentence, and he did not do so. 673 F.3d at 972. And in *Mondragon*, the plea agreement provided that the government would not make any recommendation regarding sentencing. 228 F.3d at 980. Unlike in those cases, the thrust of the issue here is that Farias-Contreras retained the right to request "any legal sentence," in fact argued for one as low as 108 months, and now contests the government's response to his request.

Even if we construed those cases to support Farias-Contreras's claim, our decision in *Moschella* creates at least a "reasonable dispute" as to whether the government's sentencing arguments crossed the line. *See Puckett*, 556 U.S. at 135. In *Moschella*, the plea agreement required the government to recommend a sentence no higher than the low-end of the guidelines range, allowed the defendant to argue for a below-guidelines sentence, and reserved the government's right to oppose that argument and to supplement the facts by providing relevant information to the court. *Moschella*, 727 F.3d at 890. At sentencing, the government opposed the defendant's request for a downward variance, arguing that the offense was serious and that the defendant was "motivated by greed, and that he was a danger to society." *Id.* at 891. We held that there was no implicit breach because the government's remarks "highlighting certain aspects of the offense" were "a fair response to [the defendant's] request for a downward variance from the low-end of the advisory Guidelines range." *Id.* at 892.

Because *Moschella* was based on facts substantially analogous to those here, and because our precedent does not make sufficiently clear to what extent the government may respond to a defendant's request for a downward departure without implicitly breaching the plea agreement, we find that the error committed by the government was not plain. We affirm on that basis and need not address the remaining prongs.

We take this opportunity, however, to clarify our law on the subject. In cases involving an implicit breach claim such as this, courts must look first to the plain language of the plea agreement. As long as the agreement does not expressly prohibit the government from responding to a defendant's

request for a sentence lower than what is recommended by the government, the government has the latitude to respond. In other words, as a default rule, the government can respond even if the plea agreement is silent on the issue.

But the government's response must be tethered to its obligations under the plea agreement, even when responding to the defendant's specific request for a downward departure or to the court's questions. While a prosecutor need not invoke magic words—such as reiterating the government's recommendation for a low-end sentence—each time he or she argues against mitigation or answers the court's questions, the government must comply with the letter and spirit of the plea agreement. That is, the government's arguments must be made in good faith and advance the objectives of the plea agreement. *Cf. Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 779 (9th Cir. 2003) (noting that state law implies a covenant of good faith and fair dealing in every contract). This is a fact-specific inquiry based on contract principles. Courts should look at the totality of circumstances and consider, *inter alia*, the sequencing, severity, and purpose of the statements.

Finally, to the extent our precedent can be read to prohibit the government from presenting *any* information that is already known and contained in the presentence report, we reject such a categorical rule. In cases where the government is entitled to respond to arguments by the defense, repeating facts in the presentence report does not constitute a per se breach.

CONCLUSION

Under our rules, as clarified here, the government's conduct in this case constitutes an implied breach of the agreement. But because the law was not clear at the time of

sentencing, we do not find plain error. Accordingly, we affirm Farias-Contreras's sentence.

AFFIRMED.

GOULD, Circuit Judge, concurring, with whom RAWLINSON and DESAI, Circuit Judges, join:

I join the majority opinion in full. I write separately to add that the conclusion that there was error not only has the fundamental principles of contract law supporting it but also the constitutional protections given to plea bargains.

I

Plea agreements are not ordinary contracts. *Puckett v. United States*, 556 U.S. 129, 137 (2009) (although plea bargains are "essentially contracts," "the analogy may not hold in all respects."); *see also United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006). Because a plea agreement involves a criminal defendant, we have said that "[t]he interests at stake and the judicial context in which they are weighed require that something more than contract law be applied." *United States v. Barron*, 172 F.3d 1153, 1158 (9th Cir. 1999). In assessing a plea agreement, we not only engage in contract interpretation, but also ensure the guarantees of a criminal defendant's constitutional rights. *See Santobello v. New York*, 404 U.S. 257, 262 (1971); *see also United States v. Jackson*, 21 F.4th 1205, 1213 (9th Cir. 2022) ("[W]e are mindful of the unique constitutional concerns involved in plea agreements.").

We have held that the government must "strictly comply with its obligations under a plea agreement." *United States v. Mondragon*, 228 F.3d 978, 981 (9th Cir. 2000). Similarly,

our sister circuits have held that the Constitution demands that courts "scrutinize the government's conduct to ensure that it comports with the highest standard of fairness."[1] *United States v. Vaval*, 404 F.3d 144, 152 (2d Cir. 2005) (quoting *United States v. Lawlor*, 168 F.3d 633, 637 (2d Cir. 1999)). The majority's overview of the law, which builds on the principles articulated in *United States v. Whitney*, 673 F.3d 965 (9th Cir. 2012) and *United States v. Heredia*, 768

[1] *See also United States v. Kurkculer*, 918 F.2d 295, 297 (1st Cir. 1990) (requiring "more than good faith by the government in securing through plea bargaining a defendant's waiver of constitutional rights"); *United States v. Cruz*, 95 F.4th 106, 110 (3d Cir. 2024) ("Because defendants give up many constitutional rights by entering plea bargains, courts must carefully scrutinize them to insure that the government has fulfilled its promises." (cleaned up)); *United States v. Warner*, 820 F.3d 678, 683 (4th Cir. 2016) ("[W]e nonetheless give plea agreements greater scrutiny than we would apply to a commercial contract because a defendant's fundamental and constitutional rights are implicated." (cleaned up)); *United States v. Munoz*, 408 F.3d 222, 226 (5th Cir. 2005) ("[T]he Government must strictly adhere to the terms and conditions of its promises in [a plea] agreement."); *United States v. Ligon*, 937 F.3d 714, 718 (6th Cir. 2019) ("Because a defendant obtains a plea agreement only at the expense of his constitutional rights, prosecutors are held to meticulous standards of performance." (cleaned up)); *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) (holding prosecutors to the "most meticulous standards of both promise and performance"); *United States v. Brown*, 5 F.4th 913, 916 (8th Cir. 2021) (requiring of the government "meticulous fidelity to the plea agreement"); *United States v. Villa-Vazquez*, 536 F.3d 1189, 1199 (10th Cir. 2008) (because the enforceability of a plea agreement is to some extent "a matter of constitutional due process," the government has a "heightened responsibility"); *United States v. Hunter*, 835 F.3d 1320, 1330–31 (11th Cir. 2016) (holding prosecutors to the "most meticulous standards of both promise and performance"); *United States v. Moreno-Membache*, 995 F.3d 249, 256 (D.C. Cir. 2021) ("We are loath to assume that a defendant surrendered a panoply of constitutional rights in exchange for a meaningless and valueless promise.").

F.3d 1220 (9th Cir. 2014), clarifies what is required under this exacting standard. Strict compliance with the terms of a plea agreement is essential to ensure fair treatment by the government and to protect the fundamental rights of the criminal defendant entering the plea bargain.

I express two additional points, both of which support the majority opinion's correct conclusion that there was error.

A

First, if a plea agreement is silent on the matter, the default rule established by the court's majority opinion today makes clear that the government can respond to a defendant's request for a lower sentence. This default rule, standing alone, does not convey the full importance and authority of a plea bargain. For a plea agreement to be valid, a defendant must enter into it fully aware of its terms. *Santobello*, 404 U.S. at 261–62. Because the government bears "responsibility for any lack of clarity" in a plea agreement, the government should set a defendant's expectations through clear and express communication. *United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir. 2002) (quoting *United States v. Anderson*, 970 F.2d 602, 607 (9th Cir. 1992)).

Most important in interpreting the terms of a plea agreement entered by a criminal defendant is the perspective of the defendant, not that of the government. We have held that we determine "what the *defendant* reasonably understood to be the terms of the agreement when he pleaded guilty." *United States v. De la Fuente*, 8 F.3d 1333, 1337 & n.7 (9th Cir. 1993) (emphasis added). Any unintended ambiguities in a plea bargain may be interpreted adversely to the government, and so the government is best served by

making the parties' aims clear and express in a plea bargain. This is a sensible application of the basic contract principle of *contra proferentem*. *Transfiguracion,* 442 F.3d at 1228.

But we do not treat a defendant who exchanges his constitutional rights the same as an ordinary, private contracting party. The Fourth Circuit has explained that, while private contracting parties would be equally at fault for mistakes in negotiating a contract, shortcomings of a criminal defense counsel in plea bargaining are less relevant because "the validity of a bargained guilty plea depends finally upon the voluntariness and intelligence with which the defendant—and not his counsel—enters the bargained plea." *United States v. Harvey*, 791 F.2d 294, 301 (4th Cir. 1986). It is the government that bears "primary responsibility for insuring precision in the agreement." *Id.* Because "a defendant's liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made so that the government gets what it bargains for but nothing more." *Transfiguracion,* 442 F.3d at 1228 (cleaned up). The government, rather than the defendant, will more likely bear the consequences for not expressly specifying a plea agreement's terms at the outset.

B

Second, the prosecutor can breach a plea agreement even by arguments made because of the prosecutor's duty to advocate for the highest appropriate sentence on behalf of the government or because of the prosecutor's duty to respond honestly to inquiries made by the sentencing court. *See United States v. Maldonado*, 215 F.3d 1046, 1052 (9th Cir. 2000). Prosecutors must "remain aware of the possibility of conflict" between their various duties, and "may not attempt to use one duty as an instrument for

thwarting" the government's obligations under a plea agreement. *United States v. Saxena*, 229 F.3d 1, 6 (1st Cir. 2000); *accord Munoz*, 408 F.3d at 227; *see e.g.*, *Whitney*, 673 F.3d at 969–72 (holding there was error and that it was plain even though the prosecutor stated at the sentencing hearing that defendant's arguments put her "between a rock and a hard spot"). Even if a prosecutor unintentionally violates a plea agreement's implicit terms, it will still be a breach of the plea agreement. *Heredia*, 768 F.3d at 1232–33.

It is prudent, even if not necessary, for a prosecutor to specify the number of months the government recommends. A prosecutor's argument that does not state the months recommended can more easily be construed as involving "inflammatory comments" or "pejorative editorializing" that "serves no purpose but to influence the court to give a higher sentence." *Heredia*, 768 F.3d at 1231, 1233; *Whitney*, 673 F.3d at 971 (internal quotation marks omitted). Without an anchor in a specific number of months being recommended, such comments are more likely, as here, to constitute a breach of the plea agreement. *Cf. United States v. Moschella*, 727 F.3d 888, 892 (9th Cir. 2013) (noting that "in arguing against a downward variance, the prosecutor affirmatively recommended three times that the district court impose the agreed-upon 33-month sentence"). The prosecutor must provide substantial "justification for the depth and tone of [the prosecutor's] discussion." *Heredia*, 768 F.3d at 1233. A prosecutor's utterance of the months of sentence recommended is not a *per se* fulfillment of the government's duties under a plea agreement. A prosecutor who perfunctorily recommends a specific sentence, but urges inflammatory language that induces a higher sentence, speaks with a forked tongue.

For the government to honor a plea agreement in good faith, proportionality is important. In a properly-implemented plea bargain, a defendant loses the right to defend against a criminal charge, while gaining the benefit of knowing what sentence will be recommended by the government to the court. And the government gains the certainty of a criminal conviction rather than the uncertainty of a trial where guilt needs to be proved beyond a reasonable doubt. Honoring a plea bargain in words and deed presents a "united front" to the sentencing court that gains "the added persuasiveness of the government's support" for a recommended sentence. *United States v. Camarillo-Tello*, 236 F.3d 1024, 1028 (9th Cir. 2001).

While no categorical rule prohibits the government from presenting information already in the presentence report, the government should temper recitation of a defendant's criminal history with support for the agreed upon sentencing recommendation. *Cf. Heredia*, 768 F.3d at 1224 (stating that the prosecutor's recommendation of a six-month prison term "rang hollow" because the prosecutor unnecessarily reiterated the defendant's criminal history). A prosecutor's duty to urge an appropriate sentence is not a license to use any means in responding to a defendant's request for a lower sentence. A deal is a deal, and the government must abide by the terms of its plea agreement. Some response to a request for a lower sentence than recommended by the government is appropriate and may be necessary for the ends of justice to be met. But excess in response defeats the purposes of and contradicts the terms of the plea agreement.

II

In cases involving an alleged *implicit*, as opposed to explicit, breach of a plea agreement, the court must be

particularly mindful of holding the government to a high standard of fairness.

BENNETT, Circuit Judge, with whom Circuit Judges MILLER, BRESS, and BUMATAY join, concurring in the judgment:

I agree with the majority that we should affirm. I also agree with the majority that no categorical rule prohibits the government from presenting information already known to the court. I respectfully disagree, however, with the majority's conclusion that the government implicitly breached the plea agreement.[1]

The government agreed "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." It fulfilled that promise. It repeated—multiple times—that the court should give a sentence at the bottom of the guideline range it calculated. Also, as permitted by the *express* terms of the plea agreement, the government introduced "additional facts . . . relevant to the guideline computation or sentencing." Those added facts served a manifestly valid purpose: to respond to Farias-Contreras's arguments for a much lower sentence than the one recommended by the government and to justify the government's own recommendation of 151 months. Thus, no matter the test for determining whether the government

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[1] The government argued in its supplemental brief to the en banc court that there was no implicit breach. Contrary to the majority's suggestion, the government maintained that position at oral argument: "We are asking the court to hold at prong one [of the plain error test] that there was no error, but at a minimum that the error was not plain and not prejudicial."

implicitly breached a plea agreement, there was no implicit breach here.

I

Farias-Contreras was charged with conspiracy to distribute 500 grams or more of methamphetamine or to distribute heroin, and possession with intent to distribute 500 grams or more of methamphetamine. He entered into a plea agreement with the government in which he pleaded guilty to the conspiracy charge. The plea agreement contained a lengthy statement of stipulated facts showing that Farias-Contreras had supplied multi-pound quantities of heroin and methamphetamine to many individuals over many years. The presentence report ("PSR") stated that Farias-Contreras was responsible for a total converted drug weight of at least 186,181 kilograms, which is *more than 200 tons*. The PSR also noted:

> Mr. Farias-Contreras utilized drug runners/couriers. The drug runners/couriers would travel from and to the Eastern District of Washington to the greater Los Angeles area, to retrieve large quantities of controlled substances from various locations at the direction of Mr. Farias-Contreras. The drug runners/couriers would then bring the controlled substances to the Eastern District of Washington and distribute the substances to customers as directed by Mr. Farias-Contreras.

The plea agreement expressly allowed the parties to supplement the facts: "This statement of facts does not preclude either party from presenting and arguing, for

sentencing purposes, additional facts which are relevant to the guideline computation or sentencing, unless otherwise prohibited in this Plea Agreement." The government agreed "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." The agreement permitted Farias-Contreras to "recommend any legal sentence."

The PSR calculated a guideline range of 235 to 293 months. Farias-Contreras objected, noting that in his view the correct guideline range was 210 to 262 months. Farias-Contreras's sentencing memorandum argued that the court should depart significantly downward to a range of 108 to 135 months—more than 50% lower than the PSR-calculated guideline range—for various reasons, including because of his significant medical conditions.

The government then filed its sentencing memorandum, seeking a sentence of 151 months.[2] And as it promised, the government did not recommend a sentence above the low end of the guideline range it calculated; it affirmatively recommended "a term of incarceration of 151 months"—the low end of its calculated guideline range. In other words, the government started its path toward the supposed breach with a low-end guideline calculation that was *35% less* than the PSR's, and *28% less* than Farias-Contreras's own calculation (before his recommended departure).

The government's memorandum then argued that despite his physical limitations, Farias-Contreras was at "the top of criminal culpability . . . as a multi-pound-level source of supply to multiple individuals, spanning over the course

[2] Farias-Contreras has never claimed that the government breached the plea agreement by recommending a sentence of 151 months.

of multiple years." The memorandum highlighted facts from the PSR that supported the government's recommendation. The memorandum also included supplemental information about the harm that drug trafficking causes to the community, including drug-overdose statistics, an excerpt from a book about families living with drug addicts,[3] and a Fifth Circuit case[4] discussing drug-dealing offenses.[5] *See* Maj. 6–7. The majority takes issue with this supplemental information. Maj. 6–7, 12–13. But all of it was relevant to sentencing, as it concerned the "seriousness of [Farias-Contreras's] offense." 18 U.S.C. § 3553(a)(2)(A). Thus, the express terms of the plea agreement allowed the government to introduce such information. And again, Farias-Contreras was asking for a possible sentence of 108 months—30% less than the government's low-end recommendation of 151 months (and 54% less than the PSR's low-end calculation).

At sentencing, Farias-Contreras's counsel told the court that the prosecutor had been "straightforward and level and frank," "honest," and "fair"—seemingly the opposite of a prosecutor who had supposedly breached the plea agreement. Farias-Contreras's counsel again argued that the court should impose a sentence as low as 108 months—a

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[3] At sentencing, Farias-Contreras's counsel mentioned the book that the government quoted: "The memorandum that the United States wrote with the quote from the book explaining that about—discouraged that this problem is with methamphetamines and stuff, he [Farias-Contreras] gets that."

[4] I cannot conceive of a situation in which citing a decision by a sister circuit could constitute an implicit breach of a plea agreement. But even if such a circumstance *could* exist, there would still be no implicit breach here given the circumstances.

[5] For simplicity, I refer to this information as the "supplemental information."

sentence far below the government's low-end recommendation of 151 months—because of his undisputed severe physical impairments.

The government, consistent with its obligation under the plea agreement, explicitly told the court *twice* during the sentencing hearing that it stood by the recommendation in its memorandum—the low-end guideline sentence of 151 months. The government stated that it was "standing by the recommendation . . . in [its] sentencing memo," and again that it was "recommending the term of incarceration . . . outlined in [its] sentencing memo."

The district court determined that the government's recommendation was "too low" and imposed a sentence of 188 months (the high end of the court's calculated guideline range, but still 20% below the low end of the PSR's guideline range). The district court imposed this sentence mainly because Farias-Contreras was a leader of a large drug-trafficking organization and had trafficked drugs for a long time. At the outset of the sentencing hearing, the court noted its concern that Farias-Contreras's "entire adult life . . . ha[d] been dedicated to dealing drugs" and that he lacked "respect for the law." The court then turned to the PSR, highlighting information that showed Farias-Contreras had distributed large amounts of heroin and methamphetamine to multiple purchasers and had been dealing drugs for a long time. For example, he employed a courier who regularly transported *20 to 25 pounds* of methamphetamine to Washington every few weeks and returned to California with $30,000 to $40,000 each time. In 1998, Farias-Conteras was convicted of possession of a controlled substance for sale and sentenced to two years' imprisonment. In connection with that conviction, the PSR noted that Farias-Contreras told a confidential informant that

he would sell the informant *30 pounds* of methamphetamine. In 2008, he was dealing drugs in pound quantities.

The district court concluded sentencing with: "I think the high end is justified for the reasons that I've stated. In brief summary, a huge organization over a long period of time, [Farias-Contreras was] one of the top dogs in it, and so the 188 months, I think, is a fairly low sentence."

II

"Plea agreements are contractual in nature and are measured by contract law standards." *United States v. Keller*, 902 F.2d 1391, 1393 (9th Cir. 1990). Thus, "[w]e enforce their literal terms." *United States v. Heredia*, 768 F.3d 1220, 1230 (9th Cir. 2014). "In determining whether a plea agreement has been broken, [we] look to what was reasonably understood by the defendant when he entered his plea of guilty." *United States v. Travis*, 735 F.2d 1129, 1132 (9th Cir. 1984) (cleaned up) (quoting *United States v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979)), *overruled on other grounds by United States v. Medina-Luna*, 98 F.4th 976, 980 (9th Cir. 2024). When the government promises to recommend a particular sentence, it commits an implicit breach if it "superficially abide[s] by its promise to recommend a particular sentence while also making statements that serve no practical purpose but to advocate for a harsher one." *Heredia*, 768 F.3d at 1231.

There can be no implicit breach when, as here, the government's acts conformed to "what was reasonably understood by the defendant when he entered his plea of guilty." *Travis*, 735 F.2d at 1132 (cleaned up) (quoting *Arnett*, 628 F.2d at 1164); *see also Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) ("[A]n act will not be found to violate the duty [of good faith and fair

dealing] (which is implicit in the contract) if such a finding would be at odds with the terms of the original bargain, whether by altering the contract's discernible allocation of risks and benefits or by conflicting with a contract provision.").

While the plea agreement required the government to recommend the low end of its calculated guideline range—a promise that the government fulfilled—it did not prohibit the government from responding to Farias-Contreras's request for a sentence lower than the government's recommendation. In addition, the plea agreement expressly permitted the government to present any "additional facts . . . relevant to the guideline computation or sentencing." Thus, as a whole, the plea agreement made clear that, if Farias-Contreras requested a sentence lower than the government's recommendation, the government could respond with any additional relevant facts. That defense counsel told the court at sentencing that the prosecutor had been "straightforward and level and frank," "honest," and "fair" shows that the government's acts aligned with Farias-Contreras's reasonable expectations. That should be the end of the inquiry.

But even were we to go further, there was still no implicit breach because the government provided the supplemental information for a legitimate reason. *See United States v. Moschella*, 727 F.3d 888, 892 (9th Cir. 2013) (finding no implicit breach when the plea agreement permitted the parties to supplement the facts and the government's arguments were made in response to the defendant's request for a lower sentence). The majority concludes otherwise because it believes that the government's challenged statements were made "solely for the purpose of influencing the district court to sentence [the defendant] more harshly."

Maj. 15 (alterations in original) (quoting *United States v. Whitney*, 673 F.3d 965, 971 (9th Cir. 2012)). The majority's belief is belied by the record.

The government introduced its supplemental information *after* Farias-Contreras argued for a sentence well below the government's recommendation and the PSR's calculated guideline range. As the majority notes, Farias-Contreras's memorandum emphasized his severe physical impairments. Faced with Farias-Contreras's memorandum—and without knowing how much weight the judge would give to his sympathetic medical circumstances—it was at least reasonable for the government to provide supplemental information to rebut Farias-Contreras's position and to justify a 151-month sentence.[6] The majority faults the government for advocating a "significant sentence" and "a long period of incarceration." Maj. 12, 14. But the 151-month sentence that the government was permitted to seek was just that: a significant sentence and a long period of incarceration. Such a sentence requires a significant justification, and the government was entitled to present one.

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[6] The Supreme Court famously said, almost ninety years ago:

> *But, while [the United States Attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*

Berger v. United States, 295 U.S. 78, 88 (1935).

The prosecutor here struck no foul blows but instead used legitimate means to bring about a just sentence for a defendant who had devoted his entire adult life to dealing drugs and who was responsible for the distribution of more than *200 tons* of converted drug weight.

This is not a case in which the government's supplemental information "served no practical purpose but to argue implicitly for a harsher punishment than the government had agreed to recommend." *Heredia*, 768 F.3d at 1237. Instead, the information had the purpose of arguing, contrary to Farias-Contreras's position, that a sentence of 151 months was "not greater than necessary" to achieve the purposes of federal sentencing. 18 U.S.C. § 3553(a). Again, that defense counsel described the government's actions as "straightforward and level and frank," "honest," and "fair" all but confirms that the government's actions were a fair response to Farias-Contreras's position.

In short, there was no implicit breach because the government's actions were expressly permitted by the plea agreement. Were there a need to go beyond that, there was still no implicit breach because the record shows that the government's supplemental information served a valid purpose other than to implicitly argue for a sentence higher than 151 months' imprisonment.

III

Because there was no implicit breach under contract-law standards, I see no reason for the majority to provide a new "totality of [the] circumstances" test. Maj. 17. In any event, this new test adds uncertainty to an area where there should be none. If expressly permitted by the plea agreement, how much supplemental information is *too much*? Does it depend on the numerical difference between the government's recommended sentence and the defendant's requested sentence? Should the government refrain from citing any authority—even decisions of a United States Court of Appeals—that might contain "inflammatory rhetoric"? There are no clear answers, as it depends on the

"circumstances." To alleviate this uncertainty, the government may seek to protect itself in ways that harm defendants. For example, it could refuse to agree to recommend a particular "low-end" sentence, load the plea agreement with the most damaging possible facts, and/or expressly reserve the right to make any argument for its recommended sentence. None of those outcomes would be desirable for defendants.

But even were I to agree with the majority's new test, the government still did not commit an implicit breach. The government provided the supplemental information *after* Farias-Contreras advocated for a much lower sentence. The supplemental information therefore furthered a valid purpose: to rebut Farias-Contreras's arguments. Indeed, the prosecutor's statements at the sentencing hearing, which the majority highlights, tied the government's arguments to Farias-Contreras's physical conditions: "[E]veryone was very sympathetic to [his] physical condition and what that means for him, but . . . everyone was unanimous in that a long period of incarceration is going to be necessary to protect the public from the defendant . . . ." Maj. 9.

While some of the supplemental information was frank in discussing the harms caused by drug trafficking, the defendant's serious misconduct justified the government making these arguments. The government had to show why a sentence of 151 months, rather than Farias-Contreras's much lower proposed sentence, was warranted. It was therefore reasonable for the government to provide truthful substantial aggravating arguments in rebuttal.[7]

[7] Because the majority applies a totality-of-the-circumstances test, the prosecutor's passing comment that the government's recommendation

* * *

For the reasons above, I respectfully disagree with the majority's opinion that the government implicitly breached the plea agreement.

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was "of much discussion" in the U.S. Attorney's Office cannot outweigh all the other considerations suggesting that the government's supplemental information was not aimed at obtaining a sentence higher than what it recommended.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GERARDO FARIAS-CONTRERAS, AKA Tomas Gomez, *Defendant-Appellant.*	No. 21-30055 D.C. No. 2:19-cr-00111-WFN-17 OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, District Judge, Presiding

Argued and Submitted May 18, 2022
Seattle, Washington

Filed February 15, 2023

Before: Kim McLane Wardlaw, Ronald M. Gould, and Mark J. Bennett, Circuit Judges.

Opinion by Judge Wardlaw;
Dissent by Judge Bennett

SUMMARY*

Criminal Law

The panel vacated a sentence and remanded for resentencing before a different judge in a case in which the defendant contended that the government failed to meaningfully abide by its promise in the plea agreement not to recommend a sentence in excess of the low-end of the guidelines range.

The panel held that the government implicitly breached the plea agreement, a breach that amounted to plain error. The panel wrote that, at sentencing, the government never once stated affirmatively that it recommended a 151-month sentence or a sentence at the low-end of the calculated guidelines range. Far from presenting a "united front" to the judge that would have given the defendant the benefit of his bargain, government counsel informed the judge about splintered considerations within the U.S. Attorney's Office. Moreover, government counsel dwelled on information—including the defendant's prior criminal contacts—already before the district court, making an argument concerning the defendant's drug dealing "lifestyle" that was inflammatory and could serve no other purpose but to influence the court to give a higher sentence. The panel rejected the government's contention that references to damage and danger to society, the community and its families, the defendant's prior criminal contacts, his high level of culpability, citation to a 30-year-

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

old decision approving life without parole for a minor drug transaction, introduction of the dissension in the U.S. Attorney's Office over the low-end sentence, or its emphasis on the distribution of "massive, massive drug quantities over multiple, multiple years" were made to *support* the low-end guideline sentence for which the government promised to advocate.

Given that the prosecution's inflammatory arguments became the court's stated reasons for the sentence imposed, the panel held that there is a reasonable probability that the sentence was influenced by those arguments, and the defendant's substantial rights were thus affected. Given that the government did not strictly comply with its obligation not to recommend a sentence in excess of the low-end of the guideline range, the panel concluded that this implicit breach amounted to a serious violation of the integrity of the plea bargain process and the judicial system.

Dissenting, Judge Bennett wrote that the defendant cannot establish any error, much less plain error. He wrote that the government exceeded its obligation by affirmatively recommending a low-end guideline sentence several times. It also introduced supplemental facts, which the agreement expressly allowed it to do. But even if the government somehow implicitly breached the plea agreement by providing accurate supplemental facts, any breach was not obvious under this court's precedent. Judge Bennett wrote that the record also fails to show a reasonable probability that any implicit breach affected the sentencing. Judge Bennett wrote that on a more practical level, the majority's precedential decision, unless rejected en banc or by the Supreme Court, will materially and unnecessarily harm future defendants in plea negotiations.

COUNSEL

Stephen R. Hormel (argued), Hormel Law Office LLC, Spokane Valley, Washington, for Defendant-Appellant.

Caitlin A. Baunsgard (argued) and Brian M. Donovan, Assistant United States Attorneys; James A. Goeke; Vanessa R. Waldref, United States Attorney; Department of Justice United States Attorney's Office, Spokane, Washington; for Plaintiff-Appellee.

OPINION

WARDLAW, Circuit Judge:

Gerardo Farias-Contreras appeals his 188-month sentence imposed after he pleaded guilty to a one-count indictment for violation of 21 U.S.C. §§ 841 and 846 pursuant to a plea agreement. He contends that the U.S. Attorney implicitly breached the plea agreement by providing the court, both in its sentencing memorandum and its argument at sentencing, with inflammatory argument and information not relevant to the sentencing determination that could have had but one effect—to increase his sentence beyond the low-end of the U.S. Sentencing Guidelines range. Farias-Contreras argues that, by doing so, the government failed to meaningfully abide by its promise in the plea agreement not to recommend a sentence in excess of the low-end of the guidelines range. We agree. The government's arguments implicitly breached the plea agreement, and amounted to plain error that affected Farias-Contreras's substantial rights and undermined the integrity

of the judiciary. We therefore vacate Farias-Contreras's sentence and remand for resentencing before a different judge.

I.

In a superseding indictment dated November 5, 2019, the United States charged Gerardo Farias-Contreras with conspiracy to distribute 500 grams or more of methamphetamine or heroin in violation of 21 U.S.C. §§ 841 and 846 (Count One), and with possession with the intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count Eighteen).

A. The Plea Agreement

On October 28, 2020, the parties entered into a plea agreement in which Farias-Contreras agreed to plead guilty to Count One of the superseding indictment, and the government agreed to dismiss Count Eighteen. In the "Statement of Facts," the parties agreed to facts constituting an "adequate factual basis" for the plea. However, the "statement of facts [did] not preclude either party from presenting and arguing, for sentencing purposes, additional facts which are relevant to the guideline computation or sentencing, unless otherwise prohibited in this Plea Agreement."

In exchange for Farias-Contreras's waiver of his constitutional rights attendant to a jury trial, the government agreed not to file any new charges based on facts then known, to dismiss Count Eighteen from the indictment, and to dismiss a second indictment charging illegal reentry in violation of 8 U.S.C. § 1326. The parties made other agreements related to sentencing, including as to specific offense characteristics, role adjustment, acceptance of

responsibility, and criminal history. Most importantly to Farias-Contreras, as to the length of incarceration, the "United States agree[d] not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." The government also agreed that Farias-Contreras was permitted to "recommend any legal sentence."

Farias-Contreras pleaded guilty pursuant to this plea agreement the same day. The district court accepted the guilty plea and ordered a presentence report (PSR) prepared. Ultimately, after reduction of the offense level, the government calculated the adjusted advisory guideline range for Farias-Contreras's term of incarceration as 151–188 months.

B. The Government's Sentencing Memorandum

In its sentencing memorandum, the government recommended a 151-month term of incarceration and indicated that such a sentence would satisfy 18 U.S.C. § 3553(a). It did so in two sentences of its six-page memorandum. The remainder of the memorandum focused on the social, communal and familial impact of drug trafficking generally, Farias-Contreras's prior contacts with law enforcement, and information already contained in the PSR. The government's memorandum argued:

> Drug trafficking is nothing less than pumping pure poison into our community. The effects of drug trafficking are massive, and in some respects, incalculable, especially when all the collateral consequences are considered. The damage the drugs this Defendant were [sic] peddling cause irreparable harm to the

> community in general as well as to families whose members are addicted to controlled substances.

The government included nationwide statistics on drug-related deaths, writing "[a]ccording to the Center for Disease Control, in 2018 in the United States, 67,367 individuals died from a drug overdose. In 2019, drug overdose deaths climbed to a record high – with a reported 70,980 deaths." And it emphasized that drug-related deaths were a problem "in this community."

The government then elaborated on the harm suffered by families of drug addicts, noting, "[a]s aptly recorded by Sam Quinones in the book 'Dreamland' about the families of living drug addicts:

> I met with other parents whose children were still alive, but who had shape-shifted into lying, thieving slaves to an unseen molecule. These parents feared each night the call that their child was dead in a McDonald's bathroom. They went broke paying for rehab, and collect calls from jail. They moved to where no one knew their shame. They prayed that the child they'd known would reemerge.

The government then discussed punishment, citing a decades-old out-of-circuit decision that invoked the then-developing Supreme Court Eighth Amendment disproportionality jurisprudence. *Terrebonne v. Butler*, 820 F.2d 156, 157 (5th Cir. 1987), *cert. denied*, 489 U.S. 1020 (1989). In *Terrebonne*, the Fifth Circuit upheld a life

sentence without parole imposed on a small-time drug dealer, concluding that the sentence was not disproportionate to his crime and thus was not cruel and unusual punishment. *Terrebonne*, 820 F.2d at 158. The government quoted extensively from the Fifth Circuit's rationale, including these excerpts:

> "Measured thus by the harm it inflicts upon the addict, and through him, upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank." [. . .] The Circuit Court continued:
>
> > Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image – others who create others still, across our land and down our generations, sparing not even the unborn.
>
> *Terrebonne*, 820 F.2d at 157-58.

The government concluded by arguing that "[w]hile this opinion was authored over 30 years ago, it continues to ring true today."

The government next contended that Farias-Contreras was at "the top of criminal culpability in this case," pointing to information already before the district court in the PSR, and characterizing Farias-Contreras's offense conduct as a "dedicated lifestyle."

The government then described a prior interaction Farias-Contreras had with federal agents in 2016, also included in the PSR, where the agents *failed* to locate evidence of controlled substances that two confidential informants had said would be at Farias-Contreras's residence. The government argued that this interaction "did not dissuade or deter the Defendant," writing, "[a]s the evidence in this case shows, the Defendant continued on his illicit endeavor, returning to supplying others with poison."

The government continued, "The Defendant's involvement in drug trafficking appears to stem back the [sic] 1990, as evidenced by his criminal history." A cooperating defendant "places the Defendant's role as a source of supply of multiple pounds of controlled substances dating back to 2008."

The government concluded its argument as to the gravity of Farias-Contreras's role in the offense with the following assertion: "When you contemplate that amount of drugs, over that extended period of time, the effects of his own personal conduct, on society, on communities, on families, are astronomical."

The government next argued that Farias-Contreras's "significant physical limitations"[1] were "evidenc[e of] his dedication to this lifestyle," because he "has not let his physical impairment stop him from engaging in this conduct." The government explained: "He personally

[1] Farias-Contreras was shot multiple times in 2004, resulting in eighteen surgeries to repair damage from the bullets. As a result of the shooting, Farias-Contreras was suffering from a number of ailments including: "a broken spine which causes him to walk with braces and a walker; he has problems with his intestines; he manually extracts his feces; and he utilizes a catheter to urinate."

directed and organized others to engage in this illicit conduct as well as himself, personally, travel to/from California to collect drug proceeds as well as recruit new customers and couriers."

The government's argument culminated with its assertion that "[n]othing this Defendant has encountered in his life thus far has changed his course. He continues to choose to engage in significant drug trafficking. A significant sentence is warrant [sic] to protect the community from his continued illicit activities. The Defendant and others must be deterred."

C. The Sentencing Hearing

At the sentencing hearing, the government reiterated many of these arguments. Defense counsel first offered Farias-Contreras's physical impairments as a reason that the court should impose a sentence below the low-end of the guidelines, arguing:

> This is—this is a man, Judge, who was shot in the chest and in the stomach. And he still has the colostomy. He still has to have a urethra. He still has to use manual methods in order to relieve himself. He can't walk. Yesterday, we had a problem with the braces being in shoes.

Defense counsel argued that given Farias-Contreras's physical condition, his time of incarceration should be decreased because:

> Our government has said that for every year of life, there's two years that are taken off his life in longevity while he's in prison, and

> that's going to be happening. Prison for him is two times. It's twice as hard as it is for anybody else, and he's going to be punished. He's going to be punished for that.
>
> [...]
>
> When he was 35 years old, he was shot. I think it was three times in the chest and the back, severed L – L-2 and L-3. He's paralyzed. He's had 18 surgeries.
>
> Yesterday, he – he can't walk without the braces that are in his shoes. When he was transferred yesterday – just to give you an example as far as mobility, when he was brought back from Ellensburg, the jail wouldn't let him have his shoes but they let him have his braces, but he can't – the shoes form the basis for the braces so he couldn't walk, just not his shoes. So his physical condition is – is serious and is debilitating and makes him susceptible to conditions while in prison . . .

Based on his physical condition and the difficulties Farias-Contreras would face in prison, defense counsel asked for a 108–121 month term of incarceration.

When asked to respond, government counsel stated, "we're standing by the recommendation that we have in our sentencing memo, and as I hope came through in [our] sentencing memo, the number of which that we're recommending was something that was of much

discussion."[2] The district court cut in, asking "Much discussion where?" Government counsel responded:

> In our office—of what do we do with this particular defendant? He is at the top of the food chain in terms of criminal culpability, in terms of personally directing and organizing the distribution of a massive, massive amount of drugs . . . [W]e have this individual, multiple years, multiple pounds, a massive amount of drugs that he is responsible for.

Government counsel again returned to the dissension within the U.S. Attorney's Office as to the appropriate term of incarceration: "But we kept coming back in our discussions – everyone was very sympathetic to the physical condition and what that means for him, but we were unanimous in coming back to this physical condition has not deterred his conduct whatsoever." Government counsel told the district court that Farias-Contreras "continued to be a leader/organizer, and there's nothing that will prevent him in the future to returning to that – that role." She again reiterated information already before the court from the PSR:

> I think he's not a person who was a user of controlled substance and then, you know, as

[2] Contrary to the dissent's suggestion, Diss. Op. 36 n.3, it was plainly the U.S. Attorney who introduced the irrelevant fact that there had been "much discussion" about the recommended sentence, which naturally prompted the court's question, "Much discussion where?" The U.S. Attorney could have answered the court's question with the words "in our office," but instead chose to elaborate on the substance of the discussion within the U.S. Attorney's Office.

> we frequently see, using snowballs into, you know, little distributor, then bigger distributor. That's not how he presents. I think it's safe to conclude that it's more of a lifestyle. It's something that is his primary occupation, his profession. He's been a source of supply for years, and he's actively recruiting others, both as customers and couriers, as outlined in the PSIR.

Government counsel summed up the Office's discussions: "[E]veryone was unanimous in that a long period of incarceration is going to be necessary to protect the public from the defendant, to protect society." She again referenced the recommendation made in the government's sentencing memorandum, but never expressly stated that the government recommended the low-end of the guidelines or a 151-month sentence.

After Farias-Contreras's allocution, the district court began explaining the basis for the sentence about to be pronounced, mentioning Farias-Contreras's physical impairments and another mitigating factor. However, the court then stated, "I am concerned about protection of the public . . . it's fair to say that your entire adult life, apparently, has been dedicated to dealing drugs, and that's a serious concern for the protection of the public. . . . [T]here's been no respect for the law on your part."

The court observed that government counsel "in her brief and in her oral presentation, indicated that you were top in the chain, which indicates that you were way up in the distribution." The district court then pointed to certain paragraphs of the PSR that supported the government's

characterization of Farias-Contreras. The district court summed up by echoing the government's arguments:

> So we have a big drug organization operating in the central part of our state. I think there are 18 or 19 defendants listed in this case being a member of that conspiracy. The activities are clear, and you were one of the top – top dogs in that conspiracy, and the damage that can be done and was done to the citizens of our community by making available those drugs in our area can't be quantified. It's impossible to tell.
>
> Lives are lost. Lives are ruined. Families broken up, jobs lost, health deteriorated. Children become – it becomes available for children. Addicts are fed. So it's serious, very serious.

The court then imposed a sentence of 188 months, concluding that the high-end of the guidelines was justified for the reasons stated: "a huge organization over a long period of time, you were one of the top dogs in it, and so the 188 months, I think, is a fairly low sentence."

II.

A defendant's claim that the government breached its plea agreement is generally reviewed de novo. *United States v. Mondragon*, 228 F.3d 978, 980 (9th Cir. 2000). In this case, however, defense counsel did not object to the government's statements at sentencing. Because Farias-Contreras forfeited his claim of prosecutorial breach by failing to timely object, we must review that claim for plain

error. *See United States v. Whitney*, 673 F.3d 965, 970 (9th Cir. 2012). Under plain error review, we may grant relief only "if there has been (1) error; (2) that was plain; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (citation omitted).

III.

A.

Farias-Contreras contends that the government implicitly breached its promise "to not recommend a prison sentence in excess of the low-end of the sentencing guideline range," as calculated by the United States. He argues that although the government stated once in its sentencing memorandum that it recommended a 151-month sentence and said twice during sentencing that it was standing by the recommendation made in its sentencing memorandum, the arguments made in both the sentencing memorandum and at the sentencing hearing undercut those representations and could only be understood to militate toward a much longer term of incarceration. We agree.

The law governing the plea-bargaining process has long been well-settled. Deemed both essential to and highly desirable for the criminal justice system, plea-bargaining resulting in the court's acceptance of a guilty plea "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Santobello v. New York*, 404 U.S. 257, 262 (1971). And though the circumstances may vary, the Supreme Court has held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.*

It is also well-settled that plea agreements are contracts between the government and the defendant, and "are measured by contract law standards." *United States v. Franco-Lopez,* 312 F.3d 984, 989 (9th Cir. 2002) (citation omitted). We enforce such contracts by their literal terms but construe any ambiguities in favor of the defendant. *See id.*; *see also United States v. Johnson*, 187 F.3d 1129, 1134 (9th Cir. 1999) ("Plea agreements are contracts, and the government is held to the literal terms of the agreement." (citation omitted)). When we interpret the agreement and craft remedies for any breach, we must "secure the benefits promised [to the defendant] by the government in exchange for surrendering his right to trial," *Franco-Lopez*, 312 F.3d at 989, that is, for surrendering his right to require the government to prove guilt beyond a reasonable doubt.

Here, the government agreed "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." This type of promise can be broken "either explicitly or implicitly." *United States v. Heredia*, 768 F.3d 1220, 1231 (9th Cir. 2014); *see also Whitney*, 673 F.3d at 972 (same). "The government is under no obligation to make an agreed-upon recommendation 'enthusiastically.' However, it may not superficially abide by its promise to recommend a particular sentence while also making statements that serve no practical purpose but to advocate for a harsher one." *Heredia*, 768 F.3d at 1231 (citation omitted). In other words, the government may not purport to make the bargained-for recommendation while "winking at the district court" to impliedly request a different outcome. *United States v. Has No Horses*, 261 F.3d 744, 750 (8th Cir. 2001) (internal quotation marks omitted).

The government implicitly breaches an agreement to recommend a sentence at the low-end of the guideline range

or the functional equivalent—here, not to recommend a sentence in excess of the low-end of the guideline range—if it "then makes inflammatory comments about the defendant's past offenses that do not 'provide the district judge with any new information or correct factual inaccuracies.'" *Heredia*, 768 F.3d at 1231 (quoting *Whitney*, 673 F.3d at 971). "[W]hen the government obligates itself to make a recommendation at the low end of the guidelines range, it may not introduce information that serves no purpose but 'to influence the court to give a higher sentence.'" *Whitney*, 673 F.3d at 971 (quoting *Johnson*, 187 F.3d at 1135). "This prohibition precludes referring to information that the court already has before it, including statements related to the seriousness of the defendant's prior record, statements indicating a preference for a harsher sentence, or the introduction of evidence that is irrelevant to any matter the government is permitted to argue." *Id.* (internal quotation marks and citations omitted). "Such statements are recognized as introduced 'solely for the purpose of influencing the district court to sentence [the defendant] more harshly.'" *Id.* (quoting *Johnson*, 187 F.3d at 1135) (alteration in original).

This type of agreement—that the government will not recommend in excess of the low-end of the guideline range—is of immense importance to the defendant. We have "previously recognized the importance of the government's sentencing recommendation as a bargained-for benefit to the defendant." *Id.* at 973. Indeed, although such a recommendation is not binding on the court, "[w]hat the defendant wants and is entitled to [in entering into a plea agreement] is the added persuasiveness of the government's support regardless of outcome." *United States v. Camarillo-Tello*, 236 F.3d 1024, 1028 (9th Cir. 2001). Where, as here,

the plea agreement allows the defense to argue for a below-guideline sentence, the government's commitment to recommending the low-end guideline sentence operates as a bulwark against imposition of a sentence above that.

1. *Error that was plain*

Given the clear, binding, and longstanding precedent governing a prosecutor's promise not to recommend a sentence exceeding the low-end of the guideline range, the government here implicitly breached the plea agreement, a breach that amounted to plain error. The government broke its promise in numerous ways, both in its sentencing memorandum and at sentencing.

At sentencing, the government never once stated affirmatively that it recommended a 151-month sentence or a sentence at the low-end of the calculated guideline range. The government never offered a reason that supported imposition of a sentence at the low-end of the guideline range. To the contrary, government counsel volunteered to the court that Farias-Contreras's sentence was the subject of much discussion in the U.S. Attorney's Office, which she had hoped came through in her sentencing memorandum. This indicated that there was disagreement among the prosecutors within the U.S. Attorney's Office as to whether the low-end guideline sentence was appropriate. Far from presenting a "united front" to the judge that would have given Farias-Contreras the benefit of his bargain, *see Camarillo-Tello*, 236 F.3d at 1028, government counsel informed the judge about the splintered considerations entertained within the U.S. Attorney's Office. Further retreating from the contractually agreed-upon sentence, government counsel told the judge that the one thing the attorneys were unanimous about was "that a long period of

incarceration is going to be necessary to protect the public from the defendant, to protect society." Not once during the sentencing hearing did the government suggest that a low-end guideline sentence would serve that purpose.

Moreover, government counsel dwelled on information already before the district court. For example, paragraphs 195–204 of the PSR described Farias-Contreras's 1998 law enforcement contact involving a failed sale of thirty pounds of methamphetamine. The government next compared Farias-Contreras's conduct with a co-defendant who was involved only for a "year time frame," but had been sentenced to 240 months of imprisonment. The government argued that Farias-Contreras was involved "since 2008 at a pound-level quantity, multiple pound-level quantities," a statement which can only be understood as advocating for a sentence equal to or above the co-defendant's 240-month sentence. The district court in response pointed to the PSR, stating "[w]ell . . . he was willing to distribute 30 pounds way back in 1998." The government seized the opportunity to double down, reemphasizing, "That's very correct, very correct. So we have this individual, multiple years, multiple pounds, a massive amount of drugs that he is responsible for." Government counsel then pivoted to "previous law enforcement interventions" in 2016 that she acknowledged she had already argued in her sentencing memorandum, when drugs were *not* found in Farias-Contreras's residence and he was *not* charged with any drug-related crime. She summarized the PSR, opined that drug dealing was Farias-Contreras's dedicated "lifestyle," and stated "[h]e's been a source of supply for years, and he's actively recruiting others, both as customers and couriers, as outlined in the PSR."

This argument was inflammatory and provided the district court with no information that had not been presented to it in the sentencing memorandum or the PSR. This information, and that set forth in the sentencing memorandum, could serve no other purpose but to "influence the court to give a higher sentence." *Whitney*, 673 F.3d at 971 (citation omitted); *see also Heredia*, 768 F.3d at 1232 (same); *Mondragon*, 228 F.3d at 980 (same).

The dissent makes much of the fact that the government told the court twice that it stood by "the recommendation . . . in [its] sentencing memo" at the sentencing hearing. Diss. Op. 33, 36. But the government used the 151-month figure only once and only in its sentencing memorandum—government counsel never expressly told the court that the government did not oppose the 151-month sentence. And at the sentencing hearing, government counsel only technically complied with the government's obligation not to argue for a sentence in excess of the low-end of the guideline range. "Although the prosecutor uttered the requisite words by [stating she was abiding by the recommendation in the sentencing memorandum], her additional statements constituted an argument for a higher sentence, breached the government's obligation to recommend a low-end Guideline sentence, and likely had an impact on the [high-end Guideline] sentence imposed." *Whitney*, 673 F.3d at 972. Failing to reiterate the 151-month figure, when paired with the government's inflammatory arguments, further contributed to implicit breach of its agreement.

The government and the dissent argue that the information referenced in its sentencing memorandum and at the sentencing hearing were simply facts that supported the 151-month sentence it advocated for. Diss. Op. 36–38. The dissent relies on *United States v. Moschella*, 727 F.3d

888 (9th Cir. 2013), in which our court found no implicit breach of a plea agreement where "arguments were a fair response to Defendant's request for a downward variance from the low-end of the advisory Guidelines range," and "the government's arguments at sentencing were directed to the specific objective identified in and permitted by the plea agreement." *Id.* at 892; Diss. Op. 37 (quoting *Moschella*, 727 F.3d at 892).

We recognize that the plea agreement allowed either party to "present[] and argu[e] . . . additional facts which are relevant to the guideline computation or sentencing, unless otherwise prohibited in this Plea Agreement." Indeed, it is widely accepted that the government commits no breach in "bringing all relevant facts to the attention of the court." 5 Wayne R. LaFave *et al.*, *Criminal Procedure* § 21.2(d) (4th ed. 2015). However, in its sentencing memorandum and at the sentencing hearing, the government did not limit itself to relevant facts. Instead, government counsel introduced unrelated nationwide drug statistics, opinions about the impact of drugs on the local community, and intra-office discussions on the appropriateness of Farias-Contreras's sentence given his high level of culpability. Government counsel even quoted with approval from a decades-old nonbinding Fifth Circuit decision sanctioning a life-without-parole sentence for a minor drug dealer, and from an opinion-laden book on the poisonous evils of drugs. This information extended far beyond the actual criminal conduct Farias-Contreras pleaded guilty to, and thus was not limited to "relevant facts" as the dissent baldly suggests. Diss. Op. 37–38. Nor was it "directed to the specific objective identified in and permitted by the plea agreement." If anything, this case is an example of where "the Government attorney appearing personally in court at the time of the plea

bargain expressed personal reservations [, both hers and that of her office,] about the agreement to which the Government had committed itself." *United States v. Benchimol*, 471 U.S. 453, 456 (1985). And the government provides us with no persuasive reason to believe the aggravating information it provided to the court was in support of a low-end guideline sentence as opposed to a much higher sentence.

The government argues that the information it provided was necessary to counteract Farias-Contreras's request for a below-guideline sentence. But when the government entered into the plea agreement, it knew Farias-Contreras would ask for a below-guideline sentence. Indeed, the plea agreement expressly allowed him to "recommend any legal sentence." Moreover, the mitigating evidence available to defense counsel was limited primarily to Farias-Contreras's physically impaired condition, and the government minimized even that by arguing that his physical impairments did not impede his criminal conduct. We therefore fail to understand why the government needed to introduce extraneous and irrelevant information in response to defense counsel's argument for a below-guideline sentence, or to reemphasize matters of which the court was well aware.

In sum, we must reject the government's contention that references to damage and danger to society, this community and its families, Farias-Contreras's prior criminal contacts (that did not result in any criminal history points), Farias-Contreras's "top of the criminal chain" role, citation to a thirty-year-old decision approving life without parole for a minor drug transaction, introduction of the dissension in the U.S. Attorney's Office over the low-end sentence and the Office's unanimity as to a "long period of incarceration," or its emphasis on Farias-Contreras's distribution of "massive,

massive drug quantities over multiple, multiple years" were made to *support* the low-end guideline sentence for which the government promised to advocate. The government thus implicitly breached its promise to not recommend a sentence in excess of the low-end of the calculated guideline range.

2. *Substantial Rights*

Farias-Contreras "must additionally show that the government's conduct affected both his substantial rights and the integrity, fairness or public reputation of the judicial proceedings." *Whitney*, 673 F.3d at 972 (citing *United States v. Cannel*, 517 F.3d 1172, 1176 (9th Cir. 2008)). We must determine whether there is a reasonable probability that the government's breach in implicitly arguing for a higher sentence rather than unequivocally recommending the low-end guideline sentence resulted in the 188-month high-end sentence imposed. We have "previously recognized the importance of the government's sentencing recommendation as a bargained-for benefit to the defendant, and held that the persuasive force behind a sentencing recommendation is enhanced when it is urged by the government in addition to the defense." *Id.* at 973. Here, Farias-Contreras was denied the benefit of the government's agreement not to argue for a sentence above the low-end of the guideline range.

There is a reasonable probability that the government's inflammatory argument affected the sentencing judge's high-end guideline determination. Though it is true that the district court independently reviewed the PSR, the reasons the court gave in disregarding the government's wink and nod toward a low-end sentence were the very arguments government counsel made to ostensibly support its 151-month recommendation.

First, the district court noted its concern for the "protection of the public," and that "it's fair to say that your entire adult life, apparently, has been dedicated to dealing drugs." It was the government that created this characterization, making this "dedicated lifestyle" argument first in its sentencing memorandum, and then again throughout its argument at the sentencing hearing. The district court then explicitly referred to the prosecutor's statements, saying that the prosecutor, "in her brief and in her oral presentation, indicated that you were top in the chain, which indicates that you were way up in the distribution." The court then specifically referenced various paragraphs within the PSR, but returned to the prosecutor's top of the chain argument, as well as the prosecutor's arguments regarding protecting the public, community, and families. The court concluded its reasoning repeating virtually verbatim statements earlier made by the government:

> So we have a big drug organization operating in the central part of our state . . . The activities are clear, and you were one of the top—top dogs in that conspiracy, and the damage that can be done and was done to the citizens of our community by making available those drugs in our area can't be quantified. It's impossible to tell.

Next, adopting the themes emphasized in the government's sentencing memorandum, particularly the excerpts from the novel *Dreamland*, that described the effect of drug trafficking generally, the district court further elaborated on the reason for the sentence it intended to impose:

> Lives are lost. Lives are ruined. Families broken up, jobs lost, health deteriorated. Children become—it becomes available for children. Addicts are fed. So it's serious, very serious.

The court immediately thereafter imposed the 188-month sentence, reasoning that "the high end is justified for the reasons that I've stated." Even if, as the dissent argues, the district court also considered Farias-Contreras's criminal history as part of his sentencing, Diss. Op. 39–41, its reliance on these broader themes makes clear that government counsel's arguments had an impact on the court's final determination.

The government analogizes this case to our previous decision in *United States v. Gonzalez-Aguilar*, 718 F.3d 1185 (9th Cir. 2013). There, the defendant pleaded guilty to one count of being a previously deported noncitizen found in the United States in violation of 8 U.S.C. § 1326. *Id.* at 1186. The defendant entered into a plea agreement, requiring the government to stipulate to recommending a 46-month sentence (the low-end of the applicable guidelines range) and to "not seek, argue, or suggest in any way, either orally or in writing, that any other specific offense characteristics, adjustments, departures, or variances in sentence . . . be imposed, or that the Court impose a sentence other than what has been stipulated to by the parties." *Id.* (alteration in original). There, in its sentencing memorandum, the government advocated for a 46-month prison sentence followed by three years of supervised release, stating that the defendant had fourteen other drug related criminal offenses and that the defendant "continues to flout the law and shows no signs of stopping." *Id.* at

1186–87. Gonzalez-Aguilar ultimately received a 57-month sentence followed by three years of supervised release and appealed, claiming that the government implicitly breached the plea agreement in describing his former convictions and including "inflammatory language." *Id.* at 1187.

Without deciding whether the government's arguments amounted to a breach, we found that Gonzalez-Aguilar's substantial rights were not violated. *Id.* "The record establishe[d] that the district court conducted its own independent evaluation of the propriety of the stipulated sentence." *Id.* In that case, however, the district court recited its *own* independent reasons for imposing a lengthier sentence, namely Gonzalez-Aguilar's other offenses that were laid out in the PSR but not fully addressed by the government's sentencing memorandum. *Id.* at 1187–88. Additionally, Gonzalez-Aguilar was unable to show that the district court would have otherwise been unaware of Gonzalez-Aguilar's criminal history, given that it was already conveyed "in far greater detail" in the PSR. *Id.* at 1188. Thus, Gonzalez-Aguilar's arguments amounted to "only speculation," failing to prove that it was reasonably probable that, absent the government's arguments, the court would have accepted the plea agreement or imposed a more lenient sentence. *Id.* at 1188–89.

Here there is no such speculation. In handing down Farias-Contreras's sentence, the district court reiterated the arguments and themes that the government articulated throughout its sentencing memorandum and its oral argument. Some of this information, including the dissension within the U.S. Attorney's Office over what would have been a more appropriate sentence, would never have been before the district court, but for the government's choice to inform the judge about the internal discussions.

This stands in stark contrast to *Gonzalez-Aguilar* where the PSR included all the court's cited reasons for disregarding the stipulated sentence. And the district court here, instead of engaging in a purely independent evaluation, credited the government's arguments made in both the sentencing memorandum and at the hearing. For example, the court noted that the prosecutor "in her brief and in her oral presentation, indicated that you [referring to Farias-Contreras] were top in the chain, which indicates that you were way up in the distribution." Thus, *Gonzalez-Aguilar* does not control our analysis here.

Given that the prosecution's inflammatory arguments became the court's stated reasons for the sentence imposed, there is a reasonable probability that the sentence was influenced by those arguments. Farias-Contreras's substantial rights were thus affected.

3. *Integrity of the Judiciary*

"The integrity of the criminal justice system depends upon the government's strict compliance with the terms of the plea agreements into which it freely enters." *Heredia*, 768 F.3d at 1230; *see also Mondragon*, 228 F.3d at 981 (same). In *Whitney*, we elaborated on why the government's faithful compliance with its contractually-obligated duty is so strictly required:

> A defendant forfeits many of his constitutional rights when he enters into a plea agreement with the government. In addition to sacrificing these rights, he relieves the government of its burden to prove his guilt beyond a reasonable doubt, and eliminates the need for the government to

> expend its limited time and resources on a full criminal trial. He does so not out of a benevolent concern for the efficient allocation of government resources, but in order to receive the benefits of the bargain into which he has entered. The government's inducement of the defendant's plea, and the consequent forfeiture of his constitutionally-guaranteed rights, requires that "a promise or agreement of the prosecutor . . . must be fulfilled."

Whitney, 673 F.3d at 974 (alteration in original) (quoting *Santobello*, 404 U.S. at 262). Therefore, unless there are "clearly countervailing factors, the government's breach of the parties' plea agreement must be considered a serious violation of the integrity of the plea bargain process and the judicial system." *Id.* To determine whether a clearly countervailing factor exists, we look to situations where "the defendant himself has engaged in conduct that undermined the parties' obligations." *Id.*; *see, e.g., Puckett v. United States*, 556 U.S. 129, 142–43 (2009) (explaining that expecting the government to advocate for a sentencing reduction for acceptance of responsibility contained in a plea agreement would be "ludicrous" when the defendant continued to engage in criminal activity after signing the agreement).

Here, no clearly countervailing factors exist. The government cannot point to a single breach of the plea agreement on Farias-Contreras's part. Even though defense counsel argued for a sentence lower than the guideline range calculated by the government, the plea agreement explicitly permitted him to do so. Given that the government did not

strictly comply with its obligation "not to recommend a sentence in excess of the low-end of the guideline range," this implicit breach amounted to "a serious violation of the integrity of the plea bargain process and the judicial system." *Whitney*, 673 F.3d at 974.[3]

B.

The government agrees that if we determine that the prosecutor breached the plea agreement, remand to a different judge for resentencing is required under our precedent. *Id.* at 968 n.1.

IV.

For the reasons given, we vacate Farias-Contreras's sentence and remand to the district court for the Clerk of the Court to reassign this case for resentencing. We take no position as to the appropriateness of the sentence; we simply conclude there is a reasonable probability that it was the product of the prosecutor's implicit breach of its promise and thus Farias-Contreras was deprived of the benefit of his plea bargain.

SENTENCE VACATED; REMANDED.

[3] Thus, there is no need for the government to be "upset" with this result, Diss. Op. 41, and there is no reason for the government to take this result out on future defendants—the government need only live up to the long-standing contractual principles governing plea agreements, even if it later develops buyer's remorse because the "low-end of the guideline range" turns out to be lower than expected.

BENNETT, Circuit Judge, dissenting:

I respectfully dissent because Gerardo Farias-Contreras cannot establish any error, much less plain error. The government complied with the terms of the plea agreement. As promised, it did not recommend a sentence above the low-end guideline range. In fact, it exceeded its obligation by affirmatively recommending a low-end guideline sentence several times. It also introduced supplemental facts, which the agreement expressly allowed it to do. Quite simply, the government did not breach the plea agreement. But even if the government somehow implicitly breached the plea agreement by providing accurate supplemental facts, any breach was not obvious under our precedent. The record also fails to show a reasonable probability that any implicit breach affected the sentencing. The district court made clear that it imposed a high-end sentence because Farias-Contreras was a leader of a huge drug-trafficking organization and had trafficked enormous quantities of dangerous drugs for more than two decades. These crucial facts were in the presentence report ("PSR"), and thus there is no reasonable probability that the government's supplemental facts affected the sentencing. Finally, on a more practical level, I believe that the majority's precedential decision, unless rejected en banc or by the Supreme Court, will materially and unnecessarily harm future defendants in plea negotiations.

I

Farias-Contreras was charged with conspiracy to distribute 500 grams or more of methamphetamine or heroin, and possession with intent to distribute 500 grams or more of methamphetamine. He entered into a plea agreement with the government in which he pleaded guilty to the conspiracy

charge. The plea agreement contained a lengthy statement of stipulated facts showing that Farias-Contreras had supplied multi-pound quantities of methamphetamine and heroin to many individuals over many years. As just one example, the parties stipulated that a drug runner for Farias-Contreras, on each of multiple occasions, delivered to just one of Farias-Contreras's many customers *five to ten pounds* of methamphetamine and about *two kilograms* of heroin. Farias-Contreras's drug runner received all these drugs directly from Farias-Contreras.

The plea agreement expressly allowed the parties to supplement the facts: "This statement of facts does not preclude either party from presenting and arguing, for sentencing purposes, additional facts which are relevant to the guideline computation or sentencing, unless otherwise prohibited in this Plea Agreement." The government agreed "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." The agreement permitted Farias-Contreras to "recommend any legal sentence."

The PSR calculated a base offense level of 38:

> The guideline for a violation of 21 U.S.C. § 841(a)(1) is USSG §[] 2D1.1. In the plea agreement, the parties stipulated the defendant's relevant conduct involved no less than 90,000 kilograms of converted drug weight resulting in a base offense level of 38 pursuant to USSG §[] 2D1.1(a)(5), (c)(1). The defendant distributed methamphetamine, methamphetamine (actual), and heroin. When an offense involves multiple types of controlled substances, each substance is

> converted to a total converted drug weight to determine the base offense level. At least 90,000 kilograms or more of converted drug weight establishes a base offense level of 38. Here, the defendant is responsible for at least 186,181.40 kilograms.[1] This calculation takes into account the quantities the defendant stipulated to in the plea agreement. This officer believes the parties [sic] stipulation to a base offense level of 38 is reasonable.

Based upon a total offense level of 38 and a Criminal History Category of I, the PSR calculated a guideline imprisonment range of 235 to 293 months and recommended a sentence within that range.

Farias-Contreras filed a sentencing memorandum in which he explained that, under the plea agreement, the government would likely calculate an advisory guideline range of 210–262 months. Farias-Contreras argued that the court should depart significantly downward to a range of 108–135 months for various reasons, including because of his significant physical medical conditions.

About one week later, the government filed its sentencing memorandum. It ultimately sought an advisory guideline range of 151–188 months. As promised, the government did not recommend a sentence above the low-end of the guideline range; it affirmatively recommended "a term of incarceration of 151 months"—the low-end of its calculated guideline range. The government's memorandum

[1] 186,181.40 kilograms equals about 410,000 pounds, more than 200 tons.

argued that despite his physical limitations, Farias-Contreras was at "the top of criminal culpability . . . as a multi-pound-level source of supply to multiple individuals, spanning over the course of multiple years." The memorandum highlighted facts from the PSR that supported its argument. The government's memorandum also included supplemental information about the harm to the community caused by drug trafficking in general.

At sentencing, Farias-Contreras's counsel continued to argue that the court should use an advisory range of 108–121 months—a range well below the government's low-end recommendation of 151 months. The government, consistent with its obligations under the plea agreement, explicitly told the court *two times* during the sentencing hearing that it stood by the recommendation in its memorandum, which was the low-end guideline sentence of 151 months: "we're standing by the recommendation that we have in our sentencing memo," and "we are recommending the term of incarceration that we have outlined in our sentencing memo." The district court determined that the government's recommendation was "too low" and imposed a high-end sentence of 188 months.

The district court imposed a high-end sentence mainly because Farias-Contreras was a leader of a large drug-trafficking organization and had trafficked drugs for a long time. At the outset of sentencing, the court noted its concern that Farias-Contreras's "entire adult life . . . ha[d] been dedicated to dealing drugs" and that he lacked "respect for the law." Then, turning to the PSR, the court stated:

> I went through the presentence report. I spent a lot of time in that presentence report. . . .

> And I'm not going to go through the whole thing, but, Mr. Farias-Contreras, your activity for many, many years, starting in, apparently . . . —that we're aware of that you ran afoul of the law was 1998 in California where you indicated that you were able to sell 30 pounds of methamphetamine, and you got two years in jail; so that goes way back. Now, I'm just going to make reference to some of the paragraphs in the presentence report that I think are *significant* because they're descriptive of how deeply involved you were in this big organization that was responsible for distributing in this geographic area huge amounts of methamphetamine.

(emphasis added).

The PSR paragraphs discussed by the district court established that Farias-Contreras had distributed large amounts of methamphetamine and heroin to multiple purchasers. He personally transported drugs from California to Washington, collected drug proceeds from customers, and took the proceeds back to California. He also dispatched others to bring drugs to Washington. One of his several couriers transported ten to fifteen pounds of drugs about twenty-four times. He employed another courier who regularly transported twenty to twenty-five pounds of methamphetamine to Washington per trip and returned to California with $30,000 to $40,000 each time. These trips happened every few weeks.

Farias-Contreras had been dealing drugs for a long time. In 1993 he was convicted of criminal conspiracy and

sentenced to four years; he served about five months.[2] In 1998, he was convicted of possession of a controlled substance for sale and sentenced to two years. In connection with that conviction, the PSR noted that Farias-Contreras told a confidential informant that he would sell the informant *thirty pounds* of methamphetamine. In 2008, he was dealing drugs in pound quantities.

The district court concluded sentencing with: "I think the high end is justified for the reasons that I've stated. In brief summary, a huge organization over a long period of time, [Farias-Contreras was] one of the top dogs in it, and so the 188 months, I think, is a fairly low sentence."

At no time prior to or during sentencing, did Farias-Contreras claim that the government had breached the plea agreement or done anything improper. Indeed, Farias-Contreras's counsel told the court at sentencing that the prosecutor had been "straightforward and level and frank."

II

There is no dispute that our review is for plain error, and that Farias-Contreras bears the burden of satisfying this "difficult" standard. *Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). Farias-Contreras must therefore establish that there was error, the error was plain, there is a reasonable probability that the error affected the outcome, and the error seriously affected "the fairness, integrity, or public reputation" of the sentencing proceedings. *Id.* at 2096–97

[2] The PSR noted that the original charges were "criminal conspiracy and manufacture/controlled substance."

(quoting *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1905 (2018)). Farias-Contreras has not satisfied his burden.

There was no error because the government complied with the plea agreement's terms. The majority incorrectly suggests that the government had an obligation to "expressly t[ell] the court that [it] did not oppose the 151-month sentence." Maj. Op. 20. The plea agreement contained no such obligation. Rather, the government agreed "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." The government did just that by recommending throughout the sentencing proceedings that the court impose the sentence recommended in its sentencing memorandum, which was the low-end sentence of 151 months. That the government included additional information to support its recommendation and rebut Farias-Contreras's request for a lower sentence did not cause an implicit breach because the plea agreement *expressly permitted* the parties to supplement the facts for sentencing purposes. *See United States v. Moschella*, 727 F.3d 888, 892 (9th Cir. 2013) (finding no implicit breach where the plea agreement permitted the parties to supplement the facts).

And the majority is simply wrong that the additional information served no purpose other than to influence the court to impose a higher sentence than the government recommended.[3] The additional information served

[3] I note that some of the information that the majority takes issue with was provided by the prosecutor in direct response to questions and remarks from the court. For example, the prosecutor mentioned in passing that there had been "much discussion" about the government's recommended sentence, but the prosecutor elaborated when the court interrupted and asked, "Much discussion where?"

manifestly valid purposes. First, the government had the absolute right to respond to Farias-Contreras's arguments for a much lower sentence than the sentence the government had recommended (a recommendation in absolute accord with the plea agreement). And second, the government had the right—perhaps even the obligation—to try to justify its recommended sentence. Indeed, in a case involving materially similar circumstances, we found no implicit breach.

In *Moschella*, the government promised to recommend a low-end guideline sentence. 727 F.3d at 890. But the agreement also allowed the defendant to argue for a below-guideline sentence, permitted the government to oppose any defense motion for a below-guideline sentence, and permitted either party to supplement the facts with relevant information. *Id.* at 890, 892. The defense argued for a below-guideline sentence, and the government urged the court to reject such argument—highlighting the seriousness of the offense and stating that the defendant had been "motivated by greed, and that he was a danger to society." *Id.* at 891. We held that there was no implicit breach because the government's "arguments were a fair response to Defendant's request for a downward variance from the low-end of the advisory Guidelines range," and "the government's arguments at sentencing were directed to the specific objective identified in and permitted by the plea agreement." *Id.* at 892.

So too here. Farias-Contreras could and did argue for a sentence well below the government's recommendation. And under the plea agreement, the government could and did supplement the facts with relevant information. Nothing in the plea agreement prohibited the government from opposing Farias-Contreras's request for a lower sentence.

So, as in *Moschella*, the government's supplemental information and related arguments were a fair response to Farias-Contreras's request for a much lower sentence, and there was no implicit breach.

The majority finds that the government had no valid reason for providing the supplemental information because the information was "irrelevant." Maj. Op. 22. According to the majority, the plea agreement limited the government to "relevant facts," meaning information related to Farias-Contreras's "actual criminal conduct." Maj. Op. 21. But the plea agreement was not so limited. The agreement allowed either party to present "additional facts which are relevant to . . . sentencing." All the supplemental information provided by the government was relevant to sentencing. *See* 18 U.S.C. § 3553(a). Thus, the government could present the additional information, and it had a valid reason for doing so: to explain why its recommended sentence, and not the much lower sentence recommended by the defendant, was justified under the circumstances.

Even if there was an implicit breach, it was not plain. To be plain, "the legal error must be clear or obvious, rather than subject to reasonable dispute." *Puckett*, 556 U.S. at 135. The majority mostly relies on three cases to find plain error: *United States v. Heredia*, 768 F.3d 1220 (9th Cir. 2014), *United States v. Whitney*, 673 F.3d 965 (9th Cir. 2012), and *United States v. Mondragon*, 228 F.3d 978 (9th Cir. 2000). Maj. Op. 16–20. But all three cases are materially distinguishable because in each case the facts were such that the government's supplemental information and related arguments served *no purpose* other than to argue improperly for a harsher sentence. *See Heredia*, 768 F.3d at 1234; *Whitney*, 673 F.3d at 971; *Mondragon*, 228 F.3d at 980.

Further, even if the three cases could be construed to support an implicit breach, *Moschella*, at the very least, creates a reasonable dispute as to whether the government implicitly breached the plea agreement. As discussed above, in *Moschella* we found no breach under similar circumstances. Farias-Contreras therefore cannot show any implicit breach was plain. *See Puckett*, 556 U.S. at 135.

Farias-Contreras also cannot show that there is "a reasonable probability that the error affected the [sentencing]." *United States v. Marcus*, 560 U.S. 258, 262 (2010). A "possibility" of a different outcome is not enough. *United States v. Gonzalez-Aguilar*, 718 F.3d 1185, 1189 (9th Cir. 2013). The record shows that the district court imposed a high-end sentence because Farias-Contreras was a leader of a large drug organization and had a long drug-trafficking history. Those were the central facts supporting the district court's high-end sentence. Indeed, the district court highlighted those facts at the start:

> I am concerned about protection of the public, and I'll expand on it in a minute why I say that, but it's fair to say that your entire adult life, apparently, has been dedicated to dealing drugs, and that's a serious concern for the protection of the public. I'm also concerned about the lack—there's been no respect for the law on your part.

The district court then elaborated on several paragraphs of the PSR containing the key facts that Farias-Contreras had been a leader and had a long drug-trafficking history: "[T]he evidence . . . makes it clear the distribution that you were involved included large amounts of drugs—

methamphetamine, heroin—and you were distributing it to many purchasers." An informant said "that he traveled for you, 10 to 15 pounds of meth per trip, maybe as many as 24 trips, and you gave him the instructions and the orders." The PSR "talks about the fact you were a supplier to somebody . . . starting way back in 2008. That's . . . a long time ago. You were dealing pound quantities."

The district court summarized the relevant parts of the PSR:

> So we have a big drug organization operating in the central part of our state. I think there are 18 or 19 defendants listed in this case being a member of that conspiracy. The activities are clear, and you were one of the top—top dogs in that conspiracy, and the damage that can be done and was done to the citizens of our community by making available those drugs in our area can't be quantified. It's impossible to tell.
>
> Lives are lost. Lives are ruined. Families broken up, jobs lost, health deteriorated. Children become—it becomes available for children. Addicts are fed. So it's serious, very serious.

In closing, the district court reiterated that the facts in the PSR were central to its decision: "In brief summary, a huge organization over a long period of time, [Farias-Contreras was] one of the top dogs in it, and so the 188 months, I think, is a fairly low sentence."

Viewing the record as a whole, the district court was deeply influenced by the facts in the PSR showing that Farias-Contreras had been dealing drugs for over two decades and was a leader of a huge organization that trafficked, at minimum, hundreds of pounds of methamphetamine. Given the record, there is no reasonable probability that the government's (entirely appropriate) supplemental information affected the outcome of the proceedings.

* * *

In short, Farias-Contreras fails to show that he is entitled to plain-error relief. The majority errs by holding otherwise. And although the majority's decision helps this defendant, it likely does so at the expense of future defendants. Even though the government recommended a low-end sentence and the plea agreement permitted it to supplement the facts, the majority finds that the government *still* committed an implicit breach. How will the government protect itself in future plea negotiations, when it followed the letter of its agreement? It could refuse to agree to recommend a particular "low-end" sentence. It could load the plea agreement with the most damaging possible facts. It could reserve the right to make any argument at all. None of this would be desirable for defendants.

The government should be understandably upset with this unjust result. The defendant was directly responsible for both ending and ruining many lives. The government agreed to a generous plea bargain. The government did not just adhere to the letter of its bargain—it adhered to the spirit as well. As a result, the government affirmatively recommended a term of 151 months, which was far below the PSR's recommended range of 235 to 293 months. Yet

the majority finds not just that the government breached its agreement, but that the breach was plain.

Reversal under plain error review requires that any error had a "serious effect on the fairness, integrity, or public reputation of judicial proceedings." *Greer*, 141 S. Ct. at 2096–97 (internal quotation marks omitted) (quoting *Rosales-Mireles*, 138 S. Ct. at 1905). Nothing remotely like that occurred here. I respectfully dissent.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERARDO FARIAS-CONTRERAS
(a/k/a "Tomas Gomez"),

Defendant.

2:19-CR-00111-WFN-17

PLEA AGREEMENT

Plaintiff United States of America, by and through William D. Hyslop, United States Attorney for the Eastern District of Washington, and Caitlin Baunsgard, Assistant United States Attorney for the Eastern District of Washington, and Defendant, GERARDO FARIAS-CONTRERAS (aka "Tomas Gomez"), and the Defendant's counsel, Mark Vovos, agree to the following Plea Agreement:

1. Guilty Plea and Maximum Statutory Penalties:

The Defendant, GERARDO FARIAS-CONTRERAS, agrees to enter a plea of guilty to Count 1 of the Superseding Indictment filed on November 6, 2019, charging the Defendant with Conspiracy to Distribute 500 Grams or More of a Mixture or Substance Containing a Detectable Amount of Methamphetamine, in violation of 21

U.S.C. § 841(a)(1), (b)(1)(A)(viii), and a Mixture or Substance Containing Heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), all in violation of 21 U.S.C. § 846.

The Defendant understands that this charge is a Class A felony charge and also understands that the maximum statutory penalty for this offense is not less than 10 years nor more than a life term of incarceration; a fine not to exceed $10,000,000; a term of supervised release of not less than 5 years up to a life term; denial of certain federal benefits; and a $100 special penalty assessment.

The Defendant understands that a violation of a condition of supervised release carries an additional penalty of re-imprisonment for all or part of the term of supervised release, pursuant to 18 U.S.C. § 3583(e)(3), without credit for time previously served on post-release supervision.

2. Effect on Immigration Status:

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 the offenses to which the Defendant is pleading guilty. Removal and other immigration consequences are not before the sentencing court and are the subject of separate proceedings; however, the Defendant understands that while deportation and/or removal from the United States appears to be a virtual certainty, no one, including the his attorney or the district court, can predict with absolute certainty the effect of this 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 automatic removal from the United States is a virtual certainty.

3. Denial of Federal Benefits:

The Defendant understands that by entering this plea of guilty the Defendant is no longer eligible for assistance under any state program funded under part A of title IV of the Social Security Act (concerning Temporary Assistance for Needy Families) or benefits under the food stamp program or any state program carried out under the

Food Stamp Act. 21 U.S.C. § 862a. Further, the Court may deny the Defendant's eligibility to any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States. 21 U.S.C. § 862.

4. The Court is Not a Party to the Plea Agreement:

The Court is not a party to this Plea Agreement and may accept or reject this Plea Agreement. Sentencing is a matter that is solely within the discretion of the Court. The Defendant understands that the Court is under no obligation to accept any recommendations made by the United States and/or by the Defendant; that the Court will obtain an independent report and sentencing recommendation from the U.S. Probation Office; and that the Court may, in its discretion, impose any sentence it deems appropriate up to the statutory maximums stated in this Plea Agreement.

The Defendant acknowledges that no promises of any type have been made to the Defendant with respect to the sentence the Court will impose in this matter. The Defendant understands that the Court is required to consider the applicable sentencing guideline range, but may depart upward or downward in the exercise of its discretion pursuant to United States v. Booker, 543 U.S. 220 (2005).

The Defendant also understands that should the sentencing judge decide not to accept the parties' recommendations, that decision is not a basis for withdrawing from this Plea Agreement or a basis for withdrawing this plea of guilty.

5. Waiver of Constitutional Rights:

The Defendant, GERARDO FARIAS-CONTRERAS, understands that by entering these pleas of guilty the Defendant is knowingly and voluntarily waiving certain constitutional rights, including:

(a). The right to a jury trial;

(b). The right to see, hear and question the witnesses;

(c). The right to remain silent at trial;

(d). The right to testify at trial; and

(e). The right to compel witnesses to testify.

While the Defendant is waiving certain constitutional rights, the Defendant understands the Defendant retains the right to be assisted through the sentencing and any direct appeal of the conviction and sentence by an attorney, who will be appointed at no cost if the Defendant cannot afford to hire an attorney. The Defendant also acknowledges that any pretrial motions currently pending before the Court are waived.

6. Elements of the Offense:

The United States and the Defendant agree that in order to convict the Defendant of Conspiracy to Distribute 500 Grams or More of a Mixture or Substance Containing a Detectable Amount of Methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), and a Mixture or Substance Containing Heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), all in violation of 21 U.S.C. § 846, the United States would have to prove beyond a reasonable doubt the following elements:

> *First*, beginning on a date unknown, but by on or about March 2015 and continuing until on or about July 16, 2019, in the Eastern District of Washington and elsewhere, the Defendant, GERARDO FARIAS-CONTRERAS, entered into an agreement with one or more persons to commit the crime of distribution of 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, or distribution of a mixture or substance containing a detectable amount of heroin, as charged in the Superseding Indictment;
>
> *Second*, the Defendant became a member of the conspiracy knowing of at least one if its objects and intending to help accomplish it; and
>
> *Third*, the agreement was to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, which would be reasonably foreseeable to him as a member of the conspiracy.

7. Statement of Facts:

The United States and the Defendant stipulate and agree that the United States could prove these facts beyond a reasonable doubt at trial, and these facts constitute an adequate factual basis for GERARDO FARIAS-CONTRERAS' guilty plea. This statement of facts does not preclude either party from presenting and arguing, for sentencing purposes, additional facts which are relevant to the guideline computation or sentencing, unless otherwise prohibited in this Plea Agreement. The parties further agree and stipulate that this factual basis is simply a summary to support the plea, it does not contain all facts which could be proven by the United States.

This case involves a long-term investigation conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") and the Drug Enforcement Administration ("DEA") into drug trafficking activities primarily in the greater Grant County, Washington area. The investigation identified the Defendant, GERARDO FARIAS-CONTRERAS, as a source of supply for individuals in the greater Grant County, Washington area and elsewhere.

In summary, through the use of Title III interceptions, location records, tracking data, and surveillance, the investigation showed that FARIAS-CONTRERAS supplied multiple individuals in the Grant County, Washington area with large quantities of methamphetamine and heroin, to include co-defendants Luis Manuel FARIAS-CARDENAS and Patrick PEARSON.

In aid of this venture, FARIAS-CONTRERAS utilized drug runner / couriers. Those individuals would travel from/to the Eastern District of Washington to the greater Los Angeles, California area to retrieve large quantities of controlled substances from various locations in that area at the direction of FARIAS-CONTRERAS. Those individuals would then bring the controlled substances up to the Eastern District of Washington and distribute the substances to customers there, as directed by FARIAS-CONTRERAS.

For example, Luis FARIAS-CARDENAS would order controlled substances from FARIAS-CONTRERAS, who would primarily dispatch a drug runner / courier to deliver the controlled substances to FARIAS-CARDENAS at FARIAS-CARDENAS' residence or associated shop in the Mae Valley area of Moses Lake, Washington. By way of illustration, on June 17, 2019, Luis FARIAS-CARDENAS spoke to FARIAS-CONTRERAS who advised that a new shipment of drugs had arrived, and they agreed that Luis FARIAS-CARDENAS would be supplied with 2 kilograms of methamphetamine from that shipment. Luis FARIAS-CARDENAS was then in contact with co-defendant Jesus VALENCIA-MORFIN, a drug runner /courier for FARIAS-CONTRERAS, to arrange the particulars of the delivery. During the conversation, Luis FARIAS-CARDENAS changed his order from 2 to 3 kilograms of methamphetamine. At approximately the agreed upon time, surveillance observed VALENCIA-MORFIN arrive at Luis FARIAS-CARDENAS' residence and enter with a bag. He then left Luis FARIAS-CARDENAS' residence without a bag, and left the area.

FARIAS-CONTRERAS would also make trips from the Los Angeles, California area to the Eastern District of Washington in furtherance of this conspiracy. FARIAS-CONTRERAS would occasionally bring controlled substances to the Yakima, Washington area, and collect drug proceeds from customers. He would then take those proceeds back to the Los Angeles, California area.

On July 16, 2019, a federal search warrant was executed at the residence of VALENCIA-MORFIN in Yakima, Washington. FARIAS-CONTRERAS was located in the residence. In the bedroom FARIAS-CONTRERAS was occupying, agents located several cell phones as well as a pay / owe ledger documenting drug debts owed. In the bathroom, in a plastic bag secreted in the toilet tank, agents located approximately $13,000 of U.S. Currency. In the truck of VALENCIA-MORFIN's vehicle, agents located about 2,721.55 grams of actual (pure) methamphetamine packaged in four separate bags. A WAC certified K9 was deployed around FARIAS-

CONTRERAS' vehicle, a Cadillac Escalade, and the K9 gave a positive alert for the odor of controlled substances.

During the investigation, several cooperating defendants discussed FARIAS-CONTRERAS' drug trafficking activities. For example, CD4 advised that starting in approximately 2014 and ending in approximately 2016, CD4 was working for FARIAS-CONTRERAS as a drug runner / courier, wherein he/she would bring methamphetamine and heroin up from California and deliver them to FARIAS-CONTRERAS' customers in the Eastern District of Washington. CD4 would then collect drug proceeds from the customers and return the money to FARIAS-CONTRERAS in California. CD4 advised that one downline distributor he/she provided drugs to was Luis FARIAS-CARDENAS. CD4 estimated that CD4 provided Luis FARIAS-CARDENAS with 2-3 pounds of methamphetamine and 1 kilogram of heroin on approximately 6 separate occasions. CD4 delivered the controlled substances to Luis FARIAS-CARDENAS at Luis FARIAS-CARDENAS' shop in Mae Valley. CD4 advised Luis FARIAS-CARDENAS was paying $4,300 per pound of the methamphetamine and $35,000 per kilogram of heroin. CD4 advised the methamphetamine he/she was caught with was from FARIAS-CONTRERAS.

CD5 advised that starting in approximately 2013 or 2014, until approximately mid-2016, CD5 began working as a drug runner for FARIAS-CONTRERAS, wherein he/she would bring drugs up from California and deliver them to FARIAS-CONTRERAS' customers in the Eastern District of Washington. CD5 identified Luis FARIAS-CARDENAS as a steady downline customer of FARIAS-CONTRERAS. CD5 stated that Luis FARIAS-CARDENAS would receive 5-10 pounds of methamphetamine at one time, and would usually receive such an order on each of CD5's trips, estimated to be once every 2 or so weeks. Luis FARIAS-CARDENAS also began receiving heroin from FARIAS-CONTRERAS, and would usually receive about 2 kilograms at a time. CD5 would deliver Luis FARIAS-CARDENAS' order at Luis FARIAS-CARDENAS' shop in the Mae Valley area of Moses Lake,

Washington, and would sometimes pick up drug proceeds from Luis FARIAS-CARDENAS at Luis FARIAS-CARDENAS' residence. CD5 advised the methamphetamine he/she was caught with was from FARIAS-CONTRERAS.

CD12 advised that FARIAS-CONTRERAS was he/her source of supply for methamphetamine from approximately 2008 until his/her arrest in 2019. CD12 stated he/she received multi-pound quantities of methamphetamine from FARIAS-CONTRERAS on a regular basis during that time period. CD12 stated that FARIAS-CONTRERAS primarily utilized runners / couriers to transport and deliver controlled substances from the California area to the Eastern District of Washington.

CD16 advised that in approximately March 2018, he/she was approached by VALENCIA-MORFIN about being supplied with methamphetamine. CD16 agreed and began to be supplied with an ever-increasing amounts of methamphetamine by VALENCIA-MORFIN. Eventually he/she was introduced to "Uncle", identified as FARIAS-CONTRERAS. CD16 was then supplied with pound-quantities of methamphetamine from FARIAS-CONTRERAS. CD16 also stated that eventually, in approximately the September / October 2018 timeframe, FARIAS-CONTRERAS offered him/her a job transporting large quantities of methamphetamine from the Biggs, Oregon area to the Yakima, Washington area. CD16 was told by FARIAS-CONTRERAS the loads would be between 40-60 kilograms and CD16 would be paid approximately $500 per kilogram. CD16 advised he/she was obtaining controlled substances from FARIAS-CONTRERAS until his/her arrest in 2019. CD16 advised the methamphetamine he/she was caught with was from FARIAS-CONTRERAS.

8. The United States Agrees

(a). *Not to File New Charges*:

The United States Attorney's Office for the Eastern District of Washington agrees not to bring any additional charges against the Defendant based upon information in its possession at the time of this Plea Agreement and arising out of

Defendant's conduct involving illegal activity charged in this Indictment, unless the Defendant breaches this Plea Agreement.

(b). *Dismissal of Count 18*

At sentencing, the United States will move the Court to dismiss Count 18 from the Superseding Indictment filed on November 6, 2020, charging the Defendant with Possession with Intent to Distribute 500 Grams or More of a Mixture or Substance Containing Methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii).

(c). *Dismissal of Indictment Number 2:19-CR-132-WFN*:

At sentencing, the United States will move the Court to dismiss the Indictment charging the Defendant with Alien in the United States After Deportation, in violation of 8 U.S.C. § 1326.

9. United States Sentencing Guideline Calculations:

The Defendant understands and acknowledges that the United States Sentencing Guidelines (hereinafter "USSG") are applicable to this case and that the Court will determine the Defendant's applicable sentencing guideline range at the time of sentencing. The Defendant also understands that pursuant to United States v. Booker, 543 U.S. 220 (2005), the Court is required to consider the factors set forth in 18 U.S.C. § 3553(a), and to impose a reasonable sentence.

(a). *Base Offense Level and Relevant Conduct*:

The United States and the Defendant stipulate and agree to recommend to the Court the Base Offense Level is 38 based on the Defendant's relevant conduct, as he personal distributed and facilitated the distribution of at least 90,000 kilograms or more of converted drug weight[1]. *See* USSG §2D1.1(a)(5), (c)(1); USSG §1B1.3(a). The Defendant is free to raise and discuss issues surrounding purity of methamphetamine and its effect on the Base Offense Level.

[1] The parties are recommending the use of the drug conversion table per USSG §2D1.1 cmt. 8.

(b). *Specific Offense Characteristics*:

The United States and the Defendant agree to recommend no specific offense characteristics apply. *See generally* USSG §2D1.1(b).

(c). *Role Adjustments*:

The United States and Defendant agree to recommend a 2-level aggravating role adjustment. *See* USSG §3B1.1. The parties agree to recommend no mitigating role adjustment applies. *See* USSG §3B1.2.

(d). *Acceptance of Responsibility*:

If the Defendant pleads guilty and demonstrates a recognition and an affirmative acceptance of personal responsibility for the criminal conduct; provides complete and accurate information during the sentencing process; does not commit any obstructive conduct; accepts this Agreement; and enters a plea of guilty no later than the next Pre-Trial Conference date; the United States will move for a three (3)-level downward adjustment in the offense level for the Defendant's timely acceptance of responsibility, pursuant to USSG §3E1.1(a) and (b).

The Defendant and the United States agree that the United States may at its option and upon written notice to the Defendant, not recommend a three (3)-level reduction for acceptance of responsibility if, prior to the imposition of sentence, the Defendant is charged or convicted of any criminal offense whatsoever or if the Defendant tests positive for any controlled substance.

(e). *Criminal History*:

The United States and the Defendant have made no agreement and make no representations as to the Defendant's Criminal History Category, which shall be determined by the Court at sentencing after the Presentence Investigation Report is completed.

10. Length of Incarceration:

The United States and the Defendant have no agreement as to the term of incarceration to recommend. The United States agrees not to recommend a sentence

in excess of the low-end of the guideline range, as calculated by the United States. The Defendant may recommend any legal sentence.

11. Criminal Fine:

The United States and the Defendant agree to recommend the Court impose no criminal fine.

12. Supervised Release:

The United States and the Defendant agree to jointly recommend that the Court impose a five (5) year term of supervised release, to include the following special conditions, in addition to the standard conditions of supervised release:

(a). that the Defendant participate and complete such drug testing and drug treatment programs as the Probation Officer directs, but not to exceed six non-treatment drug tests per month during the imposed term of supervised release; and

(b). that the Defendant's person, residence, office, vehicle, and belongings are subject to search at the direction of the Probation Officer.

13. Mandatory Special Penalty Assessment:

The Defendant agrees to pay the $100 mandatory special penalty assessment to the Clerk of Court for the Eastern District of Washington, at or before sentencing, pursuant to 18 U.S.C. § 3013, and shall provide a receipt from the Clerk to the United States before sentencing as proof of this payment.

14. Payments While Incarcerated:

If the Defendant lacks the financial resources to pay the monetary obligations imposed by the Court, the Defendant agrees to earn the money to pay toward these obligations by participating in the Bureau of Prisons' Inmate Financial Responsibility Program if the Court sentences the Defendant to a term of incarceration.

15. Additional Violations of Law Can Void Agreement:

The Defendant and the United States agree that the United States may at its option and upon written notice to the Defendant, withdraw from this Plea Agreement

or modify its recommendation for sentence if, prior to the imposition of sentence, the Defendant is charged or convicted of any criminal offense whatsoever or if the Defendant tests positive for any controlled substance.

16. Waiver of Appeal and Collateral Attack Rights:

In return for the concessions that the United States has made in this Plea Agreement, the Defendant agrees to waive his right to appeal the sentence if the Court sentences the Defendant to a term of incarceration of 180 months or less; and a term of supervised release of not more than 5 years. If the Court sentences the Defendant to a term of incarceration in excess of 180 months and a term of supervised release of more than 5 years, the Defendant may only appeal the reasonableness of his sentence.

The Defendant further expressly waives his right to file any post-conviction motion attacking his conviction and sentencing, including a motion pursuant to 28 U.S.C. § 2255, except one based upon ineffective assistance of counsel based on information not known by the Defendant, and which, in the exercise of due diligence, could not be known by the Defendant by the time the Court imposes sentence.

Should the Defendant successfully move to withdraw from this Plea Agreement or should the Defendant's conviction on Count 1 of the Superseding Indictment be dismissed, set aside, vacated, or reversed, this Plea Agreement shall become null and void; the United States may prosecute the Defendant on all available charges involving or arising from his participation in drug trafficking that the subject of this Superseding Indictment. Nothing in this Plea Agreement shall preclude the United States from opposing any post-conviction motion for a reduction of sentence or other attack of the conviction or sentence, including, but not limited to, proceedings pursuant to 28 U.S.C. § 2255.

17. Integration Clause:

The United States and the Defendant acknowledge that this document constitutes the entire Plea Agreement between the United States and the Defendant, and no other promises, agreements, or conditions exist between the United States and

the Defendant concerning the resolution of the case. This Plea Agreement is binding only upon the United States Attorney's Office for the Eastern District of Washington, and cannot bind other federal, state or local authorities. The United States and the Defendant agree that this agreement cannot be modified except in a writing that is signed by the United States and the Defendant.

Approvals and Signatures

Agreed and submitted on behalf of the United States Attorney's Office for the Eastern District of Washington.

William D. Hyslop
United States Attorney

Caitlin Baunsgard
Assistant U.S. Attorney

10/28/2020
Date

I have read this Plea Agreement and have carefully reviewed and discussed every part of the agreement with my attorney. I understand and voluntarily enter into this. Furthermore, I have consulted with my attorney about my rights, I understand those rights, and I am satisfied with the representation of my attorney in this case. No other promises or inducements have been made to me, other than those contained in this Plea Agreement, and no one has threatened or forced me in any way to enter into this Plea Agreement. I am agreeing to plead guilty because I am guilty.

GERARDO FARIAS-CONTRERAS
Defendant

10/28/20
Date

I have read the Plea Agreement and have discussed the contents of the Plea Agreement with the Defendant. The Plea Agreement accurately and completely sets forth the entirety of the agreement between the parties. I concur in Defendant's decision to plead guilty as set forth in the Plea Agreement. There is no legal reason why the Court should not accept the Defendant's plea of guilty.

Mark Vovos
Attorney for the Defendant

10-28-20
Date

INTERPRETER: Ira Ramos