No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Juan Daniel Sierra-Jimenez,
Petitioner,
v.
United States of America,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question is presented as follows:

Whether a Circuit Split exists related to how lower courts examine Defendants' compliance with the third prong of the plain error rule (prejudice prong) in cases involving unpreserved breach of plea agreement claims and whether this Court should address the same providing guidance as to the correct legal standard that should be applied in such review.

STATEMENT OF RELATED PROCEEDINGS

This case commenced with the filing of an indictment in *United States v.Sierra-Jiménez*, 21-096. At the same time revocation proceeding were commenced in 13-796. The proceedings were consolidated for purposes of sentencing. A consolidated appeal followed in *United States v.Sierra-Jiménez*, 21-1915 and 21-1916.

PARTIES TO THE PROCEEDING

Juan Daniel Sierra-Jimenez, petitioner on review, was the movant/appellant below.

The United States of America, respondent on review was the respondent/appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Juan Daniel Sierra-Jiménez respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit, which denied his direct appeal of judgment imposed by the United States District Court for the District of Puerto Rico.

JUDGMENT BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming the conviction and sentence of the Petitioner was handed down on February 23, 2024. The opinion can be found at *United States v. Juan Daniel Sierra-Jiménez*, 93 F.4th 565 (1st. Cir. 2024). The Opinion is attached as **Appendix A**. Mr. Sierra-Jiménez moved the Court for a rehearing and the same was denied by Order of the Court issued on July 16, 2024. The Order of the Court is unpublished. The same is attached as **Appendix B.**

JURISDICTION

The Petitioner requests review of the Judgment of the United States Court of Appeals for the First Circuit entered on February 23, 2024 and the denial of the petition for panel rehearing issued

by Order of the Court on July 16, 2024. The 90 days to file this Petition would have elapsed on October 14, 2024, but that day is a legal holiday and the time to file is extended to the next day. Accordingly, the Petition is timely filed within 90 days as required by Rule 13, Rules of the Supreme Court.

This Court has statutory jurisdiction under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This Petition concerns the interpretation of plain error review pursuant to Rule 52(b) Fed. R. Crim. P. Rule 52 reads in its relevant part: "A plain error that affects substantial rights may be considered even though it was not brought to the Court's attention."

STATEMENT OF THE CASE

Plain error related to a breach of a plea agreement is treated as any unpreserved error under the Plain Error Doctrine as established by this Court in *Puckett v. United* States, 556 U.S. 129 (2009), citing *United States v. Olano*, 507 U.S. 725 (1993).

The framework for determining plain error, however, is

fraught with the danger of resulting in an unfair result when used in the context of an unpreserved objection that the Government breached its plea agreement obligations. This is particularly evident when the breach by the Government is caused by its failure to argue for a particular agreed lesser sentencing recommendation.

When the Government fails to make an argument for a particular sentence and the Defendant does not object to such failure the record is usually silent as the sentencing court never addresses the recommendation nor explains why it would or would not follow the same.

Lower courts have grappled in how to properly address this type of unpreserved challenges to breach of plea agreement claims.

In the instant case, the First Circuit ruled that Mr. Sierra-Jimenez failed to satisfy this third prong of the plain error standard as it found nothing in the record to suggest that the District Court would in fact have imposed the recommended sentence had the Government affirmatively made the recommendation it agreed to make in the plea agreement with Mr. Sierra-Jiménez. *Sierra-Jiménez* at 571.

Worse, the First Circuit stressed that it was "unpersuaded by Sierra's speculation that the district court would have imposed a concurrent sentence if the Government had uttered the recommendation. *Id*.

At the center of this petition is this Honorable Court's standard for satisfying the third prong of the plain error standard. This High Court in *United States v. Marcus*, 560 U.S. 258, 262 (2010) stated "that to satisfy the third criteria of Rule 52(b), a defendant must "normally" demonstrate that the alleged error was not "harmless"". In *Marcus*, this Court explained that "[i]n the ordinary case, to meet this standard an error must be "prejudicial", which means that there must be reasonable probability that the error affected the outcome of the trial."

The aforementioned would seems to be a straightforward test. In reality, the "reasonable probability" evaluation has created a multitude of different results based on the many times speculative assertion of a potential foreseen result that is fraught with speculation. Speculation is central to it as there no way an appellate court can correctly anticipate a 100% of the time what a

trial court will do when it is faced with fluid sentencing determinations.

This is more evident when the breach of the plea agreement involves the Government's failure to make a specific sentencing recommendation. When this happens, and the error is unpreserved, the record is mostly silent, and the appellate courts are left to speculate what would have happened had the prosecutor provided the agreed recommendation.

In Sierra Jimenez the First Circuit held that it was "unpersuaded by Sierra's speculation that the district court would have imposed a concurrent sentence if the Government had uttered such recommendation". *Sierra-Jiménez*, supra. The Fifth Circuit however uses a different standard when evaluating similar claims.

The Fifth Circuit rule, which employs a more favorable to the Defendant norm, establishes that any "Government's breach of its promise to recommend a lesser sentence affects a defendant's substantial rights unless the record indicates that the district court would have imposed the same sentence regardless of the Government's breach. *United States v. Kirkland*, 851 F.3d 499, 503

(5th Cir. 2016), citing *United States v. Williams*, 821 F.3d 656, 657-658 (5th Cir. 2016).

As we will discuss in a moment, while the standards employed by many courts and the Fifth Circuit to determine whether a Defendant complied with the prejudice prong of the plain error standard looks at first glance to be very similar, in fact they are quite different allowing different results in very similar sentencing scenarios.

Fairness in plea bargaining and sentencing requires the Government to uphold in a strict manner their contractual obligations. Failure to do so should carry consequences. The state of the law at this time provides too many incentives for the Government to fail to carry its contractual obligation under the plea agreement by failing to provide an agreed to recommendation as the silence would almost never cause a remand for resentencing.

This Court should revisit its opinion in *Puccket* and evaluate whether a better bright-line test exists that eliminates or greatly reduces the deductive game that circuits courts are required to engage in when evaluating unpreserved breach of plea agreement

claims.

This Court should grant certiorari and reverse.

1. On March 22, 2021, Mr. Sierra-Jiménez was arrested in possession of a Glock Pistol that was modified to fire in fully automatic mode. Mr. Sierra-Jiménez was charged with the illegal possession of a machine gun, in violation of 18 U.S.C. §922(o) and with being a felon in possession, in violation of 18 U.S.C. §922(g)(1). (App. 35-36). As Mr. Sierra-Jimenez was under supervised release when he was arrested, the Government filed a request for revocation of his supervised release.

On July 12, 2021, Mr. Sierra-Jiménez and the Government executed a plea agreement that included the particular agreement that the Government would recommend a sentence within the lower end of the applicable guideline and will <u>also</u> recommend that the sentence in the main case be served concurrent to the revocation sentence imposed in the revocation case. (Ap. 45).

After the district court-imposed sentence as to case 21-096, the judge proceeded to the revocation hearing during which Mr. Sierra-Jiménez did not contest the allegations for his revocation

and requested that an 18-month concurrent sentence be imposed. (Sentencing Hearing Transcript "ST" page 26, Ap. 123).

No further arguments were made by Mr. Sierra-Jiménez or by the Government. In fact, before pronouncing sentence the trial court specifically inquired as to whether the Government wanted to make any statement before it issued the revocation sentence to which counsel for the Government responded in the negative. (ST page 28, Ap. 125).

Without the benefit of any recommendation by the Government, the trial court sentenced Mr. Sierra-Jiménez to 18 months of additional imprisonment, consecutive to the sentence it had just imposed in 21-096. The result of the revocation hearing was that Mr. Sierra-Jiménez was sentenced to serve a total of 74 months of imprisonment.1 Mr. Sierra-Jimenez timely appealed the judgment.

2. The United States Court for the First Circuit confirmed.

1 The parties had agreed in the plea agreement to recommend a sentence of 37 months, followed by a concurrent term of 18 months for the supervised release revocation. (ST page 15-16, Ap. 112-113).

United States v. Juan Daniel Sierra-Jiménez, supra.

The Court of Appeals held that "there is nothing in the record to suggest that the district court would in fact have imposed the recommended sentence had the Government affirmatively made the recommendation." *Id.* at 570.

The Court of Appeals found that as "the district court was made aware of the parties' joint concurrency recommendation via the plea agreement, the PSR and by Sierra himself during the revocation hearing… 2 ….the district court chose to reject the recommended concurrent sentence given Sierra's conduct. *Id.* at 571.

The Court of Appeals concludes holding that they "are unpersuaded by Sierra's speculation that the district court would have imposed a concurrent sentence if the Government had uttered

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2 While Mr. Sierra-Jiménez did ask for a concurrent revocation sentence he did not specifically advise the Court at sentencing that his recommendation was with the Government's consent. His attorney in fact stated: "we request that the Court follows the agreement of 37 months of imprisonment as to the concurrent case, concurrent to 18 months of imprisonment as to the revocation…" (ST page 15, Ap. 112).

such a recommendation." *Id*.

3. Mr. Sierra-Jiménez filed a petition for panel rehearing, which was denied by the Court of Appeals. The Court of Appeals issued an Order of the Court which overruled its precedent in *United States v. Riggs*, 287 F.3d 221 (1st. Cir. 2002) based on the holding in *Puckett v. United States*, supra explaining that "[w]hen the rights acquired by the defendant relates to sentencing, the "outcome" he must show to have been affected is his sentence. (See Order of the Court attached as **Appendix B**).

REASONS FOR GRANTING THE WRIT

This Petition presents the opportunity for the Court to revisit and re-examine the holding of the Court in *Puckett v. United* States, supra and its progeny which has allowed dozens, if not hundreds of Defendants, to receive additional punishment, notwithstanding the Government's breach of its contractual obligations in plea agreement. The Government's breach of a plea agreement is no simple matter. It involves the Government's failure to provide the consideration it agreed to provide in exchange for a citizen's relinquishing of rights when he/she plead guilty.

This Petition allows the Court to evaluate the rule it laid out in *Puckett*, in light of the effect it has had in the criminal justice system, while at the same time allowing the Court to evaluate whether a simpler bright-line solution as the one suggested by Justice Souter, with whom Justice Steven joined dissenting in *Puckett* should be adopted for unpreserved breach of plea agreement errors where the Government fails to advocate a particularly beneficial sentencing recommendation for a Defendant.

I. Lower courts have devised a similar, but different, tests to evaluate Defendants' compliance with the third prong of the plain error rule in cases involving unpreserved breach of plea agreement claims.

This issue has arisen in many jurisdictions in a very frequent manner. Most appellate courts that have addressed the issue have devised a similar test to determine whether a Defendant suffered prejudice as a result of the Government's breach of the plea agreement. Others like, for example, the Fifth Circuit, have implemented a different framework to examine the plain review of unpreserved errors that involve failure of the Government to

make good on a promise to advocate a more beneficial sentence for a defendant.

A. Most courts have implemented a standard that assumes that the plain error prejudice prong is not satisfied on the absence of a significant evidence establishing that absent the breach a different sentencing outcome would have resulted.

The First Circuit, as well as most other appellate courts commonly attempt to apply the often-cited criteria for the prejudice prong of the plain error test by requiring "the defendant to show a reasonable probability that, but for the error, the outcome of the proceeding would have been different". *United States v. Cortés-López*, 101 F.4th 120, 134 (1st. Cir. 2024).

Likewise, the Ninth Circuit has framed the relevant question as to the prejudice prong of the plain error test as requiring that the Defendant establishes a "non-speculative basis to conclude that the Government's breach of the plea agreement affected the district court's sentencing decision". *United States v. Barrogo*, 59 F.4th 440, Note 2 (9th Cir. 2023).

The Eleventh Circuit has also applied a similar rule to unpreserved breach of plea agreement objections. In a recent unpublished opinion of *United States v. Jasper*, Slip Opinion of January 23, 2023 *2, 2023 WL 356031 the Eleventh Circuit citing *United States v. Rodríguez*, 398 F.3d 1291, 1299 (11th Cir. 2005) held that "where the effect of an error on the result in the district court is uncertain or indeterminate – where we would have to speculate – the appellant has not meet its burden."

B. The Fifth Circuit has implemented a different standard that assumes that the plain error prejudice prong is satisfied on the absence of a significant evidence establishing that absent the breach the sentencing outcome would have been the same

The Fifth Circuit, however, has a different more favorable to the Defendant standard. The Fifth Circuit has repeatedly held that "[t]he Government's breach of its promise to recommend a lesser sentence affects a defendant's substantial rights unless the record indicates that the district court would have imposed the same sentence regardless of the Government's breach". *United*

States v. Kirkland, 851 F.3d 499, 503 (5th Cir. 2016), citing *United States v. Williams*, 821 F.3d 656, 657-658 (5th Cir. 2016).

The standard is similar but different. The Fifth Circuit uses a standard which better considers the prejudice caused to the Defendant on account of the failure of the Government to comply with its promises in the plea agreement and requires the appellate court to scrutinize the record in a search for evidence that district court would have imposed the same sentence regardless of the Government's breach. If nothing on the record is found the sentence is reversed.

This is quite different from the majority position that rules that if nothing on the record is found then the sentence and judgment is confirmed based on the conclusion that Defendant's claims of prejudice are speculative.

The difference in results when the different standards are apoplied are also palpable. In both *Kirkland and Williams*, supra the Fifth Circuit reversed the sentence and judgment under its more favorable standard. The application of this more favorable standard is also evident in a recently unpublished decision from

the Fifth Circuit, citing *United States v. Williams*, supra, involving a failure from the Government to file a U.S.S.G. §5K3.1motion or provide notice to defendant of its non-filing in breach of the plea agreement. In this case the appellate court explained that "[b]ecause there is nothing in the record to indicate that the district court would not have granted a motion for departure from the guidelines, there is a reasonable probability that, but for the error, Cabrera would have received a lesser sentence". *United States v. Cabrera*, Slip Opinion of June 29, 2022, *1, 2022 WL 2340561.

C. The split produces divergent outcomes in several recurring circumstances.

This split has important consequences. The application of the more favorable standard used by the Fifth Circuit allows a Defendant to more easily establish prejudice when the Government's breach implicates the failure to request a particular sentence.

In simple words, in the Fifth Circuit, unless there is an actual statement by the sentencing judge that he would have sentenced

the Defendant to a certain particular term of imprisonment, irrespective of the Government or parties' recommendation, then such appellate court understands that the prejudice standard is meet.

Most other appellate courts, however, rule on this issue differently. On the absence of record, such courts would deem Defendant's claim for prejudice to be speculatory and deny the requested relief.

Mr. Sierra-Jimenez's case exemplifies this recurring situation. In his case the trial court sentenced him to a higher than recommended sentence in the main case. In the main case the Government complied with the plea agreement and requested a sentence of 37 months "as contemplated in the agreement." (ST page 16, Ap. 113). No reference was made to the still pending revocation case.

The district court rejected the recommendation, outlined the reasons for the same, in particular the fact that he could justify a sentence in the lower end of the applicable guideline range of 70-87

months of imprisonment3 but then imposed a variant lower than the guideline sentence of 58 months of imprisonment in case 21-096. (ST page 21, Ap. 118).

The sentencing judge then proceeded to the revocation hearing during which Mr. Sierra-Jiménez did not contest the allegations for his revocation and requested that an 18-month concurrent sentence be imposed. (ST page 26, App. 123). No further arguments were made by Mr. Sierra-Jiménez or by the Government.

In fact, before pronouncing sentence the trial court specifically inquired as to whether the Government wanted to make any statement before it issued the revocation sentence to which counsel for the Government responded in the negative. (ST page 28, App. 125).

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3 The sentencing court stated relevant to this issue: "[n]ormally, I would at the plea agreement and the recommendation by the parties and be more open to implement it. In this case, unfortunately, I don't feel that I can, in good conscience, do that. On the other hand, I think 70 months is greater than necessary so you will get a sentence that is in between those two poles." This sentence, however, did not reference the revocation phase. (ST pages 17-18, Ap 114-115).

Without the benefit of any recommendation by the Government, the trial court sentenced Mr. Sierra-Jiménez to 18 months of additional imprisonment, consecutive to the sentence it had just imposed in 21-096.

In the Fifth Circuit the sentencing judge inclination to provide a lower than the guideline sentence on account of the higher than expected guideline, coupled with his statement that he would normally follow the plea and recommendation of the parties, would most probably moved the Fifth Circuit to remand the case to give the sentencing judge the opportunity to evaluate a concurrent sentence for the revocation term with a proper recommendation made by the Government.

In the First and other circuits the Government's silence, coupled with the lack of a timely objection by the Defense, is sufficient to negate the value of the sentencing judge's statement. These divergence occurs as in these other circuits, silence of the record is not equal to a "reasonably possibility" of obtaining a different sentencing result if such silence would not have occurred.

If this case had arisen in the Fifth Circuit it is more probable than not that the appellate court would have found that he complied with what it deems to be a reasonable possibility of obtaining a lesser sentence, but for the Government's silence. On the contrary, and sadly for Mr. Sierra-Jiménez the First Circuit deems such silence to be insufficient speculation that does not establish prejudice. The standards while similar are contrary to each other and create multiple divergent outcomes in recurring circumstances.

The same divergence would have occurred in the Ninth Circuit. There as the case of *González-Aguilar*, supra illustrates, prejudice is impossible to prove for a Defendant with an unpreserved breach of plea agreement claim for failure to advocate a lesser sentence in the absence of some pronouncement by the lower court. In *González-Aguilar*, supra at 1187 the Ninth Circuit ruled that Defendant's argument was unavailing as his claim that if the Government had presented a united front with the defense in its sentencing memorandum, then it is probable

that the court would have accepted the plea agreement was a "speculative assertion" not supported by the record.

In this case this High Court has a unique opportunity to revisit *Puckett*, supra and provide a brightline solution to the problem described above. The appellate courts' application of *Puckett* is not only divergent but unfair.

As it stands now, except in the Fifth Circuit, the Government has been handed the proverbial *carte blanche* to breach plea agreements by failing to properly ask and advocate for a lesser agreed sentence, without suffering any consequences or at the very least significantly diminishing the possibility of a particular Defendant being able to obtain specific performance of plea agreement obligations from the Government.

With the way the majority of appellate courts have been applying *Puckett* the Government may breach a plea either by action or inaction but it is the Defendant who has the heavy weight to establish prejudice, which is particularly difficult when the Government fails to ask and advocate for a lesser sentence.

Worse, as a result of the above, appeal courts have to engage in what Justice Steven described, in his dissent in *United States v. Marcus* 560 U.S. 258, 270-271 (2010) as "an analytic maze that, I have increasingly come to believe, is more liable to frustrate than to facilitate sound decisionmaking." Such analytic maze is way worse when the breach is a failure by the Government to present or argue for a recommended sentence.

But that is exactly what appeals court need to do in the face of an unpreserved objection to a breach of plea agreement caused by the failure of the Government to properly request and advocate a lesser sentence for the Defendant.

The Court has multiple ways of addressing this situation. For example, it can choose to apply the Fifth Circuit's more flexible and fairer standard. It, however, can go and should go further. Mr. Sierra-Jiménez respectfully asks the Court to revisit *Puckett* and consider the reasoned dissent of Justice Souter, with whom Justice Stevens joined, dissenting in said case in crafting a solution to this problem.

Justice Souter's in his dissent in *Puckett* elegantly outlined the interest at issue stating: "[i]t is hard to imagine anything less fair than branding someone a criminal not because he was tried and convicted, but because he entered a plea of guilty induced by an agreement the Government refuses to honor." *Puckett*, supra, Souter, dissenting at page 146.

Justice Souter then outlined a solution to the problem the majority sought to address: "If the judiciary is worried about gamesmanship and extra proceedings, all it needs to do is minimize the likelihood by making it plain that it will require the Government to keep its word or seek rescission of the plea agreement if it has caused to do so." *Id*.

Lastly, Justice Souter provides the norm that will have the least effect on Defendant's rights and will ensure a fair outcome: "I would find that a defendant's substantial rights have been violated whenever the Government breaches the plea agreement, unless the defendant got just what he bargained for anyway from the sentencing court". *Id*.

The suggested solution proposed by Justice Souter is a simple and direct correction to the complex and divergently unfair review process that the Court devised in *Puckett*. This Court can correct not only the miscarriage of justice for Mr. Sierra-Jimenez but in one stroke can create a more level and fair playing field in the sentencing arena. A playing field where the Government is required to be bound and strictly comply with its agreements or else face the consequences of its breach.

Accordingly, it is respectfully requested that the Certiorari Petition be granted, and the judgment issued by the United States Court of Appeals for the First Circuit Court be reversed, with Judgment issued directing the United States District Court for the District of Puerto Rico to resentence Mr. Sierra-Jiménez after the Government fulfills its contractual obligations as they draw from its agreement with him.

CONCLUSION

For the reasons expressed above, this Court should grant this Petition for Certiorari and provide the relief herein requested.

Respectfully submitted,

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Counsel of Record for Petitioner Sierra-Jimenez

Date: October 15, 2024

CERTIFICATE OF SERVICE

I, Raúl S. Mariani Franco, certify that on October 15, 2024, copies of the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI were served to each party to the above proceeding or to that party's counsel, and on every other person required to be served, pursuant to Supreme Court Rules 29.3 and 29.4, by depositing an envelope containing the above documents in the United States mail, properly addressed to them with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

In San Juan, Puerto Rico today October 15, 2024.

S/Raúl S. Mariani Franco
RAUL S. MARIANI FRANCO

CERTIFICATION OF WORD COUNT AND FONT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 4,026 words, in Century Schoolbook font, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 2024.

S/Raul S. Mariani Franco
RAUL S. MARIANI FRANCO

APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 21-1915
21-1917

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN DANIEL SIERRA-JIMÉNEZ,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Raúl M. Arias-Marxuach, U.S. District Judge]

Before

Gelpí, Montecalvo, and Rikelman,
Circuit Judges.

Raúl S. Mariani Franco on brief for appellant.
W. Stephen Muldrow, United States Attorney, Mariana E. Bauzá-Almonte, Assistant United States Attorney, and Julia M. Meconiates, Assistant United States Attorney, on brief for appellee.

February 23, 2024

GELPÍ, Circuit Judge. Defendant Juan Sierra-Jiménez ("Sierra") pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court sentenced him to fifty-eight-months' imprisonment, as well as to a consecutive eighteen-month sentence for his related supervised release violations. In this consolidated sentencing appeal, Sierra challenges the procedural reasonableness of his fifty-eight-month sentence and asserts that the government breached the plea agreement with respect to his eighteen-month sentence. Having discerned no error, we affirm.

I. BACKGROUND

We briefly begin with a review of the relevant facts leading to the indictment for the new criminal conduct. Because this appeal follows a guilty plea, we draw the facts from the plea agreement, the presentence investigation report ("PSR"), the change-of-plea colloquy, and the sentencing transcript. See United States v. Spinks, 63 F.4th 95, 97 (1st Cir. 2023) (quoting United States v. Ubiles-Rosario, 867 F.3d 277, 280 n.2 (1st Cir. 2017)).

While on supervised released for an earlier federal firearm offense, Sierra failed to meet with his probation officer to whom he also lied about where he had been. As a result, on or about March 22, 2021, the probation officer sought and obtained an arrest warrant. Upon his arrest, Sierra was found with a Glock 22

pistol, modified to fire automatically as a machine gun. Agents found the gun loaded with thirteen rounds in a magazine and one round in the chamber, an additional loaded twenty-two-round magazine containing twenty rounds, and approximately five grams of what appeared to be heroin. Sierra was transported to a detention center for processing and admitted thereat that the gun and other items belonged to him. He was subsequentially indicted for possessing a machine gun and being a felon in possession of a firearm. 18 U.S.C. §§ 922(g)(1), 922(o), 924(a)(2). Sierra pled guilty to the latter count by way of plea agreement.

The plea agreement proposed an advisory guideline range calculation consisting of a base offense level of twenty for the firearm count, see U.S.S.G. § 2K2.1(a)(4), and a three-level reduction for acceptance of responsibility, see U.S.S.G. §§ 3E1.1(a)-(b), for a total offense level of seventeen, which in turn provides a sentencing range of thirty-seven to forty-six months, taking into account his criminal history. Both parties agreed to recommend a sentence at the lower end of the advisory guideline range. As for the supervised release violation, the parties agreed to recommend a concurrent sentence. The plea agreement contained a stipulation of facts which provided that during his arrest, Sierra was found with a gun, modified to shoot automatically, loaded with thirteen rounds and an additional round

in the chamber, as well as a twenty-two-round magazine containing twenty rounds. No mention of the purported heroin seized was made.

The Probation Office next filed a PSR with a different advisory guideline calculation. Because Sierra's possession of the firearm in question followed two prior felonies, the base offense level was twenty-six, as per U.S.S.G. § 2K2.1(a)(1)(A)(ii)(B). For his acceptance of responsibility, three levels were reduced. U.S.S.G. § 3E1.1(a). Sierra's two prior convictions and supervision status yielded a criminal history category of IV, which juxtaposed with the total offense level, resulted in a guideline sentencing range of seventy to eighty-seven months. The PSR was more detailed than the plea agreement's stipulation of facts, specifically noting the suspected heroin that was also found during Sierra's arrest. In his sentencing memorandum and during sentencing, Sierra objected to the higher guideline calculation and mention of the suspected heroin.

The sentencing and revocation of supervised release hearings took place back-to-back on October 18, 2021. At sentencing, the district court denied Sierra's objections to the PSR. The district court found encouraging Sierra's expressions during allocution that he strived to be a better father to his children and correct his life's trajectory. However, it rejected the parties' joint sentence recommendation given that this was

Sierra's third machine gun offense.[1] The district court noted that it would normally be inclined to accept sentences jointly recommended by the parties, but here could not "in good conscience" do so. While it adopted the PSR's guideline calculations, the district court nonetheless varied downward from the applicable sentencing range.

In balancing the 18 U.S.C. § 3553(a) factors, the district court discussed Sierra's personal history, his two previous federal convictions for machine gun possession, and his role in the offense. The district court also listed the items found during Sierra's arrest, which included a modified and loaded gun, extra rounds of ammunition, and about five grams of "purported" heroin. Ultimately, the district court sentenced Sierra to fifty-eight-months' imprisonment.

After pronouncing sentence for the new criminal conduct, the district court proceeded to the revocation hearing. Sierra requested an eighteen-month concurrent sentence while the government made no specific recommendation.[2] The district court then imposed the eighteen-month sentence, however choosing that it run consecutively to the fifty-eight-month sentence. The district

[1] Sierra has two prior convictions for illegal possession of a machine gun and one prior supervised release violation.

[2] The district court inquired whether the government would like to make a statement, to which it responded, "No."

court supported this outcome by noting that Sierra violated the conditions of supervised release by engaging in new criminal conduct and failing to follow the probation officer's instructions, classified as Grade A and Grade C violations, respectively, under U.S.S.G. § 7B1.1. The district court further stated that the violations and new criminal conduct displayed Sierra's "total disregard" for the supervised release process. This timely appeal followed.

II. DISCUSSION

Sierra first argues that that the district court's mention of heroin impacted the procedural reasonableness of his sentence in the new criminal case. Second, he posits that the government breached the plea agreement by failing to recommend a concurrent sentence. We address each contention seriatim.

A. Procedural Reasonableness

Preserved challenges to the procedural reasonableness of a sentence are reviewed under "a multifaceted abuse-of-discretion standard." United States v. Mendoza-Maisonet, 962 F.3d 1, 20 (1st Cir. 2020) (quoting United States v. Arsenault, 833 F.3d 24, 28 (1st Cir. 2016)). The district court's interpretation and application of the guidelines is reviewed de novo, its factfinding for clear error, and its judgment calls for abuse of discretion. Mendoza-Maisonet, 962 F.3d at 20. Procedural errors include a sentence based on clearly erroneous facts particularly when facts

are "based solely on unreliable evidence" and cannot be established by a preponderance of the evidence. United States v. Castillo-Torres, 8 F.4th 68, 71 (1st Cir. 2021); United States v. Díaz-Rivera, 957 F.3d 20, 25 (1st Cir. 2020). The clear-error standard is satisfied where "upon whole-record review, an inquiring court 'form[s] a strong, unyielding belief that a mistake has been made.'" Mendoza-Maisonet, 962 F.3d at 20 (alteration in original) (quoting United States v. Montañez-Quiñones, 911 F.3d 59, 66 (1st Cir. 2018)).

Sierra contends that the district court committed clear error by finding that he possessed heroin during his arrest and using that finding to reach a sentence higher than that recommended by the parties. This argument falls flat because the district court never made a factual finding that Sierra possessed heroin. Review of the record illustrates that, at sentencing, the suspected heroin was only mentioned once by the district court and that was merely when it listed the items that the agents found at the time of arrest. Further, it was only referenced as "purported heroin," demonstrating that the district court did not find that the substance was in fact heroin.

Nor did the district court rely upon the possession of suspected heroin in determining Sierra's sentence for the new criminal conduct. The record here explicitly provides the facts which the district court relied upon to justify Sierra's sentence:

how the new criminal conduct had occurred while he was on supervised release, his criminal history of two prior felony convictions for possession of a machine gun, and the instant case being his third machine gun conviction. These specific factual findings were stressed by the district court more than once while it addressed the 18 U.S.C. § 3553(a) factors, hence demonstrating that the same, rather than the possession of suspected heroin, justified the sentence imposed.

Sierra also contends that the suspected heroin was mentioned by the district court specifically while it was discussing the elements of the offense. The elements of the instant offense do not involve nor consider the possession of any controlled substance. See 18 U.S.C. §§ 922(g)(1), 924(a)(2). Sierra, in fact, did not receive any guideline enhancement for the suspected heroin applied, nor any upward variance based upon said ground. Therefore, the district court's mere iteration of the items found during arrest, especially as here where the suspected heroin was only mentioned once in the entirety of the hearing, does not even come close to clear error. As such, the mention of the suspected heroin does not render Sierra's sentence procedurally unreasonable.

B. Breach of the Plea Agreement

"Ordinarily, whether the government has breached its plea agreement with a defendant is a question of law and our review

is plenary." United States v. Rivera-Ruiz, 43 F.4th 172, 179 (1st Cir. 2022) (quoting United States v. Rivera-Rodríguez, 489 F.3d 48, 57 (1st Cir. 2007)). When a defendant fails to notify the district court of the purported breach and had knowledge to do so, such as here, we review for plain error. Rivera-Ruiz, 43 F.4th at 179 (citing Rivera-Rodríguez, 489 F.3d at 57). Under this standard, "we consider whether: (1) there was error, (2) it was plain, (3) the error affected the defendant's substantial rights, and (4) the error adversely impacted the fairness, integrity, or public reputation of judicial proceedings." Rivera-Ruiz, 43 F.4th at 179 (quoting Rivera-Rodríguez, 489 F.3d at 57).

"[W]hen 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." United States v. Lessard, 35 F.4th 37, 42 (1st Cir. 2022) (alteration in original) (quoting Santobello v. New York, 404 U.S. 257, 262 (1971)). "In addition to entitlement to the government's technical compliance with the agreement, [defendants are] entitled to the 'benefit of the bargain' and the 'good faith' of the prosecutor." United States v. Brown, 31 F.4th 39, 50 (1st Cir. 2022) (quoting Ubiles-Rosario, 867 F.3d at 283). "The critical question is whether the prosecutor's 'overall conduct [is] reasonably consistent with making [the promised] recommendation, rather than the reverse." Lessard, 35 F.4th at 42

(alterations in original) (quoting United States v. Canada, 960 F.2d 263, 269 (1st Cir. 1992)).

Sierra contends that the government breached the plea agreement by failing to specifically make a recommendation during the revocation hearing for a concurrent eighteen-month sentence as agreed upon. We need not address the first and second prongs as we disagree with Sierra as to prejudice. Sierra posits that had the government affirmatively recommended a concurrent sentence, then "the [district] court may have very well agreed to [the] modified sentence." There is nothing in the record to suggest that the district court would in fact have imposed the recommended sentence had the government affirmatively made the recommendation. See United States v. Rijos-Rivera, 53 F.4th 704, 711 (1st Cir. 2022) (citing United States v. Mulero-Vargas, 24 F.4th 754, 759 (1st Cir. 2022)) (stating the "customary rule" that district courts are not bound to the sentencing recommendations made by the parties). Rather, the district court was made aware of the parties' joint concurrency recommendation via the plea agreement, the PSR, and by Sierra himself during the revocation hearing.[3] The

[3] The court notes that, per the plea agreement, the government agreed to "recommend that [the revocation sentence] be served concurrent to the sentence imposed in" the underlying crime. Although we conclude that the government's failure to recommend a concurrent sentence did not impact the court's decision, we express our concern with the government's failure to fulfill this obligation.

district court ultimately chose to reject the recommended concurrent sentence given Sierra's conduct which "clearly demonstrated . . . a total disregard for the supervision process[,] . . . a lack of interest in becoming a prosocial citizen[,] and his inability to live a law abiding lifestyle after his release from imprisonment." Such explicit findings, combined with "the nature and seriousness of the breach of trust" concerning supervised release violations "for criminal conduct related to possession of a machinegun," provide more than ample support for the district court's grounds for imposing the consecutive sentence instead of a concurrent one. Accordingly, we are unpersuaded by Sierra's speculation that the district court would have imposed a concurrent sentence if the government had uttered such recommendation. Therefore, Sierra has not met his burden in proving that the government's failure to orally recommend a concurrent sentence prejudiced him, and hence find that no plain error lies.

III. CONCLUSION

For the foregoing reasons, we **affirm**.

APPENDIX B

United States Court of Appeals
For the First Circuit

Nos. 21-1915
21-1917

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN DANIEL SIERRA-JIMÉNEZ,

Defendant, Appellant.

Before
Gelpí, Montecalvo, and Rikelman,
Circuit Judges.

ORDER OF COURT
Entered: July 16, 2024

The petition for panel rehearing is denied. In his petition, Juan Sierra-Jiménez relied upon United States v. Riggs, 287 F.3d 221 (1st Cir. 2002), reasoning that prejudice flows from the rights given up in exchange for the plea rather than effects on the sentencing outcome. He argues that, therefore, he was not required to show that his sentencing outcome would have been different had the government not failed to recommend a concurrent revocation sentence, as it agreed to do under the plea agreement. However, Puckett v. United States compels us to hold otherwise. 556 U.S. 129 (2009). Riggs does not survive Puckett with respect to the source of prejudice under plain-error review. Although Puckett dealt with the decision of whether to apply plain-error review to forfeited breach-of-plea-agreement claims rather than how to precisely apply the plain-error standard, see id. at 131, 136, Puckett made clear that "the question with regard to prejudice is not whether [the defendant] would have entered the plea had he known about the future violation. When the rights acquired by the defendant relate to sentencing, the '"outcome"' he must show to have been affected is his sentence," id. at 142 n.4 (citation omitted). Puckett controls here, and so Sierra-Jiménez had to show that the government's failure to make the recommendation affected his sentencing outcome.

By the Court:

Maria R. Hamilton, Clerk

cc: Hon. Raul M. Arias-Marxuach, Ada Garcia-Rivera, Clerk, United States District Court for the District of Puerto Rico, Raul S. Mariani-Franco, Julia Meconiates, Mariana E. Bauza Almonte, Teresa S. Zapata-Valladares, Jose A. Ruiz-Santiago, Jose Capo-Iriarte, Elba I. Gorbea Padro, Vanessa Bonano-Rodriguez, Amanda Cristina Soto-Ortega, Juan Daniel Sierra-Jiménez