

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SALVADOR NOLASCO ROMERO,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

**APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI**



UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA

vs.

Salvador Nolasco Romero
Defendant.

Case Number: 22-cr-00120-ABJ-1

Margaret Botkins
Clerk of Court

ARRAIGNMENT/CHANGE OF PLEA MINUTE SHEET

Date January 12, 2023 Time 2:37-3:52/4:18-5:06pm

Arraignment Change of Plea Before the Honorable Alan B. Johnson

Interpreter: Humberto Orive Int. Phone: 505-348-2095

Becky Harris	Melanie Sonntag	Kristen Simmer	RMac / Guard
Clerk	Court Reporter	Probation Officer	U.S. Marshal

APPEARANCES Government: Margaret Vierbuchen

Defendant: Ryan Wright

FPD PANEL-CJA RETAINED WAIVED

- Defendant Waives Indictment
- Information filed by Government
- Superseding Indictment/Information filed by Government

DEFENDANT ENTERS A PLEA OF

- Not Guilty to Count(s) _____ of an Indictment
- Guilty to Count(s) _____ of an Indictment
- Nolo Contendere*

NOT GUILTY PLEA

- Court accepts *Nolo Contendere* Plea
- Court orders discovery per Rule 16 FRCrP
- Court orders access to Grand Jury Transcripts
- Motions to be filed in _____ days or on/before _____
- Trial date set for _____ at _____ in _____
- Speedy trial expires on _____
- Other The Court will not accept the defendant's plea based upon his factual basis.

GUILTY PLEA

- Court is satisfied there is factual basis for plea of guilty
- Defendant referred to probation for presentence investigation
- Defendant advised on consequences of a plea of guilty
- Plea agreement filed
- Sentencing set for _____ at _____ in _____
- Plea conditionally accepted
- Count(s) _____ to be dismissed at time of sentencing

BOND IS

 Defendant is detained Set at _____ Cash or Surety Unsecured Continued on the same terms and conditions Continued on bond with the following conditions: Released on bond with the following conditions:

<input type="checkbox"/> 3 rd party custody of _____	<input type="checkbox"/> Seek/Maintain employment
<input type="checkbox"/> Report to Pretrial Services as directed	<input type="checkbox"/> Travel restricted to _____
<input type="checkbox"/> Maintain current residence	<input type="checkbox"/> Abide by the following curfew _____
<input type="checkbox"/> Not use or possess firearms/ammunition/explosives	<input type="checkbox"/> Not use or possess controlled substances/drugs
<input type="checkbox"/> Not use or possess alcohol	<input type="checkbox"/> Not use alcohol to excess
<input type="checkbox"/> Submit to drug/alcohol testing	<input type="checkbox"/> Avoid all contact with _____
<input type="checkbox"/> Surrender passport to _____	<input type="checkbox"/> Post property or sum of money _____
<input type="checkbox"/> Obey all laws. Federal, State and Local	<input type="checkbox"/> Do not obtain passport
<input type="checkbox"/> Undergo Medical/Psychiatric treatment/exam	

Other Counsel to confer and inform the Court of an agreed upon new trial date of 1/30/23, 2/21/23 or 2/27/23

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	DOCKET NO. 22-CR-00120-ABJ
Plaintiff,	(Pages 1 through 59)
vs.	
SALVADOR NOLASCO ROMERO,	Cheyenne, Wyoming
Defendant.	Thursday, January 12, 2023 2:37 p.m.

TRANSCRIPT OF ATTEMPTED CHANGE OF PLEA PROCEEDINGS

BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MARGARET VIERBUCHEN
ASSISTANT UNITED STATES ATTORNEY
DISTRICT OF WYOMING
2120 Capitol Avenue, Fourth Floor
Cheyenne, WY 82001

For the Defendant: RYAN WRIGHT
WRIGHT LAW FIRM
513 East 17th Street
Cheyenne, WY 82001

*MELANIE L. HUMPHREY-SONNTAG, RDR, CRR, CRC
Federal Official Court Reporter
2120 Capitol Avenue, Room 2228, Cheyenne, WY 82001
307.433.2169 * MelanieSonntagCRR@gmail.com*

*Proceedings reported with realtime stenography;
transcript produced with computer-aided transcription.*

1 (Proceedings commenced 2:37 p.m., January 12, 2023.)

2 THE COURTROOM DEPUTY: Court is now in session.

3 THE COURT: Thank you. Please be seated.

4 The matter before the Court at this time is a matter
5 that comes before the Court on a plea agreement in the case of
6 the United States of America, plaintiff, against Salvador
7 Nolasco Romero under Criminal Docket 22-CR-00120.

8 As I understand it, we are using the services of a
9 Spanish-language interpreter today, and I believe that
10 individual's name is Humberto Orive.

11 THE INTERPRETER: That is correct, Your Honor,
12 Humberto Orive, Federally certified Spanish interpreter on
13 staff with the US District Court for the District of
14 New Mexico.

15 THE COURT: I haven't spoken to you for quite a
16 while, Humberto. We're pleased to have you with us here in
17 Wyoming today by telephone.

18 Would you --

19 THE INTERPRETER: It's good to be here, Your Honor.

20 THE COURT: -- please raise your right hand and be
21 sworn.

22 (Interpreter Humberto Orive sworn.)

23 THE COURT: Thank you.

24 Representing the Government in this case is Margaret
25 M. Vierbuchen. She is the Assistant United States Attorney

1 for the District of Wyoming, and Mr. Nolasco comes here with
2 his counsel, Mr. Ryan L. Wright, today. We're pleased to have
3 Mr. Wright with us in this matter.

4 Ms. Vierbuchen, would you approach the rostrum and
5 introduce this case for the Court.

6 MS. VIERBUCHEN: Certainly, Your Honor.

7 Your Honor, we're here today for a change of plea in
8 this matter pursuant to a plea agreement that was filed with
9 the Court.

10 I don't have my -- my docket in front of me, but
11 I think the Court has the plea in front of the Court. I don't
12 know the docket number.

13 But it's my understanding that Mr. Nolasco Romero is
14 going to be entering a plea to Count One of the indictment,
15 charging conspiracy to distribute fentanyl. It's my
16 understanding that he has agreed to the plea agreement in this
17 case, which will result in the waiver of very important
18 constitutional and civil rights for Mr. Nolasco Romero.

19 Additionally for the Court -- I do want to flag for
20 the Court that Mr. Nolasco Romero is not a US citizen. And as
21 outlined in the plea agreement, I just want to be very clear
22 that, as a result of not being a US citizen, that a conviction
23 in this matter may and may very well likely result in his
24 deportation.

25 Additionally, Your Honor, as part of the plea

1 agreement, the United States has agreed to recommend a
2 sentence at the low end of the guidelines. The United States
3 has tentatively calculated those guidelines at 120 to
4 135 months. That's based on a minimum mandatory if it
5 applies.

6 As the Court will see from the plea agreement, the
7 defendant is possibly safety valve eligible if he satisfies
8 all five elements. He's satisfied four of the requirements
9 but not the fifth requirement, to provide a complete and
10 truthful confession, basically, or accounting of his criminal
11 activity.

12 I believe those are the more salient provisions of
13 the plea agreement, and I would ask the Court just to
14 confirm -- because we do have an interpreter here but the plea
15 agreement is in English and -- just to be clear that
16 Mr. Nolasco Romero agrees that that plea agreement has been
17 read to him in a language that he understands.

18 Thank you, sir.

19 THE COURT: Very well.

20 Mr. Wright, if you would come forward with your
21 client.

22 MR. WRIGHT: Good afternoon, Your Honor.

23 THE COURT: Good afternoon.

24 MR. WRIGHT: The case -- the criminal number is

25 22-CR-120-J.

1 Just a correction: I think it was misspoken by
2 Ms. Vierbuchen. This does not have anything to do with
3 fentanyl, this has to do with methamphetamine, so just to
4 correct that on the record.

5 Also, just to give the Court a heads-up, my client
6 has been having some health issues. They just switched his
7 medication. He has high blood pressure, and then also he's
8 just on a diuretic; they just started giving him that today,
9 and he's having some side effects from that.

10 I've asked him if he understands everything that's
11 going on, if he's able to go forward and -- and recite
12 everything in an intelligent manner. He confirms with me that
13 he has but, also, I just wanted to give the Court some
14 heads-up in case he needs to sit down or something else goes
15 on. So just to let everybody know.

16 THE COURT: Very well. We'll try to accommodate it.

17 I would ask the defendant to please raise his right
18 hand and be sworn.

19 (Defendant sworn through the Interpreter.)

20 THE COURT: You have taken an oath to speak
21 truthfully to the Court. If you answer my questions falsely,
22 your answers may be later used against you in another
23 prosecution for perjury or false swearing.

24 Do you understand?

25 THE DEFENDANT: Yes, I understand.

1 THE COURT: If you have any questions or don't
2 understand me as we go through this today, feel free to
3 interrupt and ask the questions. If you need to speak to your
4 attorney at any time during this proceedings, again, interrupt
5 me and you may step aside and speak to him privately. Is that
6 agreeable to you?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Very well. There will come a time today
9 when I'll be asking questions, and your answers, in effect,
10 will convict you or cause you to be convicted of the charges
11 against you.

12 Are you prepared to discuss your conduct with the
13 Court?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: We'll proceed, then.

16 Please state your full name.

17 THE DEFENDANT: Salvador Nolasco Romero.

18 THE COURT: And where were you born?

19 THE DEFENDANT: In El Salvador.

20 THE COURT: And how old are you presently?

21 THE DEFENDANT: I just turned 38 years old.

22 THE COURT: And did you attend school?

23 THE DEFENDANT: Not in the United States, Your Honor.

24 THE COURT: And how far did you go in your home of
25 residence?

1 THE DEFENDANT: Ninth grade.

2 THE COURT: Are you able to read, write, and
3 understand the Spanish language?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: And, as I understand it, you can read and
6 write -- read and understand the English language to some
7 extent. Is that true?

8 THE DEFENDANT: I can read some and I also can speak
9 a little bit of English.

10 THE COURT: Very well.

11 Have you been treated recently for any mental illness
12 or addiction to narcotic drugs of any kind?

13 THE DEFENDANT: I'm currently receiving treatment for
14 high blood pressure.

15 THE COURT: Very well. Are you under the influence
16 of any drug, medication, or alcoholic beverage of any kind?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: You are receiving drugs for your high
19 blood pressure; is that correct?

20 THE DEFENDANT: Yes. I am not quite sure what type
21 of medication it is, but I am taking medication for high blood
22 pressure.

23 THE COURT: Is the medication interfering with your
24 understanding of what is happening here today?

25 THE DEFENDANT: No, Your Honor.

1 THE COURT: Have you ever been diagnosed with any
2 mental problems?

3 THE DEFENDANT: No, Your Honor.

4 THE COURT: What kind of work have you done in the
5 United States of North America?

6 THE DEFENDANT: Does Your Honor want to know about
7 all I've done since I arrived in the United States? Or just
8 referred to my -- to my most recent job?

9 THE COURT: Most recent job.

10 THE DEFENDANT: I have been recently helping my wife.
11 She has a business. She supplies materials for doing
12 fingernails.

13 THE COURT: Thank you.

14 Have you received a copy of the indictment containing
15 the charge against you or charges?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Have you fully discussed those charges
18 and your case in general with Mr. Wright, your attorney?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: And are you fully satisfied with his
21 representation of you?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: I have in front of me a -- a plea
24 agreement that appears to have been written in the English
25 language and signed by you on the last page and, also, by your

1 attorney.

2 And, Mr. Wright, how were you able to convey the
3 information contained in the plea agreement to your client?

4 MR. WRIGHT: In a lot of my conversations, Your
5 Honor, I have obtained a translator, and then, also, if there
6 was any difficulties, I meet with my client in person and we
7 go over it line by line. And we've done, I believe, both in
8 this case on the plea agreement.

9 THE COURT: Very well.

10 Has the plea agreement been read to you in the
11 Spanish language?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: And has your attorney discussed the plea
14 agreement with you?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And did you have an opportunity to read
17 and discuss the plea agreement with your attorney?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: And so far as you know, does this plea
20 agreement represent in its entirety your understanding that
21 you have with the United States?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: And do you understand the terms and
24 conditions that are set forth in this plea agreement?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Has anyone made any promises or
2 assurances to you that are not contained in the plea
3 agreement?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: Has anyone threatened you or coerced you
6 or forced you in any way to persuade you to accept the plea
7 agreement?

8 THE DEFENDANT: May I discuss this in private with my
9 attorney?

10 THE COURT: You may.

11 You can step aside -- feel free to step aside.

12 (Discussion held at the podium.)

13 MR. WRIGHT: And, Your Honor, I think I can do a
14 clarification here and then the translator can translate this
15 into Spanish and then Mr. Romero can add anything in.

16 Mr. Romero is -- was wanting a better plea agreement,
17 obviously, and this is kind of one of the -- the contentions
18 in this matter, that I believe that the Government and -- we
19 agree that he's eligible for the safety valve criteria, but
20 there is a disagreement on whether he provided truthful
21 information or did not know any relevant or useful
22 information.

23 So this would be under Section 5. So during the
24 sentencing portion of this, there will be an argument
25 regarding those specific facts, regarding what he has done or

1 what he has not done.

2 Mr. Romero is not happy with the Government,
3 obviously, and the plea agreement, per se, that's been
4 offered. He's been trying to negotiate a -- a better one, but
5 that's -- I think that the true question that the Court is
6 getting to is is he being forced or coerced to sign this, but
7 it may be coming across that the Government's presented this,
8 he wants -- he's trying to negotiate a better deal. That's
9 not possible at this time.

10 And so, therefore, he might feel that, you know, he
11 has no other options versus going to trial under -- or this
12 deal, which is not the greatest in the world, obviously, as
13 the Court can see, but that there is also an argument portion
14 for the safety valve at the sentencing hearing.

15 And at the end it's for the Court to determine. That
16 is going to be a question of fact, that the Court will have to
17 make a determination whether he's eligible or not and then
18 determine the sentence to -- that the Court deems proper.

19 And Mr. Romero can fill in any other details
20 regarding that, but I think that that's how the question that
21 the Court just posed to him is coming across in the
22 translation. And so I think there's a little bit of a -- an
23 issue there.

24 I know what the Court's asking, but I don't think
25 sometimes that the translation comes through a hundred percent

1 accurate on the other end. And Mr. Romero can fill in
2 anything that I missed.

3 THE DEFENDANT (in English): Yeah.

4 MR. WRIGHT: Is that accurate, Mr. Romero?

5 THE DEFENDANT (in English): Yeah -- yes.

6 MR. WRIGHT: Is the Interpreter still on?

7 THE COURT: Yes, he is.

8 MR. WRIGHT: Can you still hear him?

9 THE DEFENDANT (in English): No. He's not here.

10 THE COURT: Humberto, are you still on the line?

11 (No response.)

12 THE COURT: He is not.

13 MS. VIERBUCHEN: Just our luck.

14 THE COURTRoom DEPUTY: I have a message in to the
15 Interpreter.

16 MR. WRIGHT: Is there any water?

17 Thank you.

18 THE DEFENDANT (in English): Thank you.

19 THE COURTRoom DEPUTY: I'm not sure what happened.

20 I've been communicating with him through Teams, and he's not
21 seen my message.

22 THE COURT: Hm-m.

23 THE COURTRoom DEPUTY: And I just tried calling his
24 number and he's not answering.

25 THE COURT: This has been an afternoon that is

1 doomed, technological problems.

2 MS. VIERBUCHEN: Your Honor, our office is also
3 experiencing significant problems with that.

4 (An off-the-record discussion was held.)

5 MS. VIERBUCHEN: Clearly not as bad as the FAA
6 yesterday.

7 (An off-the-record discussion was held.)

8 THE COURTROOM DEPUTY: He had technical problems on
9 his end. All of his phones shut down.

10 MS. VIERBUCHEN: Wow.

11 (An off-the-record discussion was held.)

12 THE INTERPRETER: I am so sorry. Something happened
13 on my end. The system completely crashed.

14 THE COURTROOM DEPUTY: That is all right. I think
15 when you call the Spanish line you're going to go directly to
16 the defendant.

17 THE INTERPRETER: Wonderful. I'm trying it now.

18 (An off-the-record discussion was held.)

19 THE INTERPRETER: Becky, this is the Interpreter,
20 Humberto.

21 Are you there?

22 THE COURTROOM DEPUTY: Yes.

23 THE INTERPRETER: All right. I have connected with
24 the defendant. He can hear me fine and I can hear him --
25 I can hear him clearly. So we are ready to go.

1 THE COURT: Thank you very much, Humberto.

2 When we suffered the loss of communication, I had
3 inquired of the defendant whether anyone caused him to accept
4 the plea agreement by threat or coercion.

5 At that time the defendant spoke out of hearing of
6 the Court to his attorney and his attorney discussed with the
7 Court and revealed to the Court, with the defendant's
8 agreement, that there is an element of the plea agreement that
9 remains open, and that is the question of whether or not he
10 has met the final qualification in Title 18, United States
11 Code, Section 3553(f) for application of the benefits of a
12 first-time offender status.

13 And -- in this case. And, apparently, the Government
14 has not conceded that he is entitled to that at this point,
15 and, nevertheless, he has decided to proceed with -- proceed
16 with the plea agreement that has been tendered in hopes that
17 the Court will give him the benefit of that statutory
18 provision and allow for a sentence that might be below the
19 mandatory minimum sentence provided by law.

20 Have I stated that correctly, Mr. Nolasco?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: I want you to understand that the terms
23 of the plea agreement are recommendations that come to me from
24 your side of the case and from the Government's side; however,
25 the Court can reject -- may reject or can reject the

1 recommendations without permitting you to withdraw your plea
2 of guilty.

3 What that means is -- is if the sentence is different
4 or greater than what you expect, the Court -- you may be stuck
5 with your plea of guilty and the Court would go ahead and
6 impose the sentence that it feels is appropriate in your case
7 based upon the information and evidence that is provided to
8 the Court.

9 Do you understand that?

10 THE DEFENDANT: Yes, Your Honor, I understand that,
11 but in this case I truly don't have another choice but to
12 accept the agreement that they are offering because they're
13 not willing to offer any other agreement.

14 THE COURT: That -- I'm assuming that is true.

15 Ms. Vierbuchen, is that true?

16 MS. VIERBUCHEN: Oh, I'm sorry, Judge.

17 Yes, that is true.

18 THE COURT: Very well.

19 MS. VIERBUCHEN: But just to be clear, he does have a
20 choice and he can certainly go to trial. He does not have to
21 accept this offer.

22 THE COURT: Do you understand that you could go to
23 trial if you wished?

24 THE DEFENDANT: Yes, Your Honor, I understand.

25 THE COURT: Has anyone attempted in any way to force

1 you to plead guilty or otherwise threatened you in this case?

2 THE DEFENDANT: You mean after I was in custody or
3 before I was in custody?

4 THE COURT: Either one.

5 THE DEFENDANT: No, Your Honor. Ever since I am in
6 custody, I am aware that my attorney has been trying to do
7 everything within his power in my best interests. But, no, no
8 threats.

9 THE COURT: Very well. Has anyone made any promises
10 or assurances of any kind to get you to plead guilty other
11 than what is stated in the plea agreement?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: My concern is if there is some hidden
14 agreement that I don't know about. That would be a concern.
15 I don't want you to be bound to provide anything to the
16 Government other than what's stated in the agreement in this
17 matter.

18 Do you understand?

19 THE DEFENDANT: I understand just fine, Your Honor.

20 THE COURT: Will you be pleading guilty today of your
21 own free will and because you are guilty?

22 THE DEFENDANT: Um-m. Yes, Your Honor.

23 THE COURT: Have you discussed with your attorney the
24 possible immigration consequences of your guilty plea?

25 THE DEFENDANT: Yes, Your Honor. My attorney has

1 explained in detail everything that is going to happen, and
2 I am willing to accept it.

3 Even though this is not the preliminary, the initial
4 offer that was extended to me when I was first put in custody
5 back in Las Vegas, but I am willing to accept the
6 consequences.

7 THE COURT: You do understand that you are not a
8 citizen of the United States of North America? In addition to
9 the possible prison sentence you're facing, a plea of guilty
10 may subject you to deportation or exclusion or voluntary
11 departure and prevent you from obtaining citizenship in the
12 United States of America. Do you understand?

13 THE DEFENDANT: Yes, Your Honor, I understand.

14 THE COURT: In addition to a -- a prison sentence --
15 and I'll be explaining the maximum sentence in just a
16 moment -- this Court will likely result -- or impose
17 restrictions that may affect where you could live or where you
18 could work, with whom you may associate. That's called
19 supervised release, and we'll be discussing that at this time.

20 If the Court does impose a term of supervised
21 release, if you violated the conditions of supervision for
22 some reason, you could be brought back into court and an
23 additional term of imprisonment could be imposed.

24 Do you understand?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Normally, that would occur if, for
2 example, for some reason you were not deported, you served
3 your sentence, then you'd be under the supervised release for
4 a period of -- of years, and it would be important that you
5 not be involved in any use or distribution of drugs or other
6 violations of the law.

7 Do you understand that?

8 THE DEFENDANT: Yes, I understand, Your Honor.

9 But as soon as I am done with my sentence, I am
10 willing to return back to my home country.

11 THE COURT: Very well. Understood.

12 And that home country is?

13 THE DEFENDANT: El Salvador.

14 THE COURT: Looking at the maximum sentence here, for
15 Count One the maximum sentence is up to life imprisonment, a
16 fine of up to \$10 million, a term of supervised release of
17 five years, up to life of supervision, and there is a \$100
18 special assessment. That \$100 is money that would be
19 collected from you that would go to a victims compensation
20 fund of money that is managed by the United States and was
21 passed out -- and will be passed out to people who are victims
22 of crime.

23 In addition, the charge against you contains a
24 minimum mandatory sentence, which means that Congress has
25 taken away from the Judge the power to impose a sentence less

1 than 10 years.

2 So it's a minimum mandatory sentence that the Court
3 would otherwise be bound to impose unless you qualified for
4 the so-called safety valve, which we have just discussed,
5 which is a provision of the law that allows you, in special
6 cases -- where no gun has been involved, where you've not been
7 a leader in the crime, where you have fully disclosed to the
8 Government your involvement in the offense, and where you have
9 not been involved in other serious crimes -- among those
10 things, if you comply, you would be -- and may be eligible for
11 the so-called safety valve, which would allow the Court to
12 impose a sentence less than the 10-year minimum mandatory
13 sentence.

14 And I believe that's what you're hoping will happen.
15 Is that true?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Very well.

18 You understand that if you violate the conditions of
19 any supervised release that the Court might impose in your
20 case that you could be given additional time in prison?

21 THE DEFENDANT: Yes, Your Honor, I understand.

22 THE COURT: Have you and your attorney talked about
23 how the advisory sentencing guidelines might apply in your
24 case?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: The guidelines are contained in this --
2 this book. And once the guidelines have been calculated, we
3 go to this chart, which gives us a range that is expressed
4 in -- in terms of months of sentence that may be imposed.

5 I want to tell you that I talked to the -- I didn't
6 talk to him, but I received an email from the probation
7 officer this morning who will be writing the presentence
8 report in your case if you plead guilty. His name is Kenny
9 Ainsworth, he is stationed in Casper, Wyoming, and he'll be
10 communicating with you by telephone, and your attorney,
11 Mr. Wright, will probably be on the phone with you to assist
12 you during that interview.

13 Do you understand so far?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: All right.

16 He has looked at the prosecutor's statement that was
17 filed in this matter by Ms. Vierbuchen and noted a base
18 offense level of 34 under Guideline 2D1.1(3), three levels for
19 acceptance of responsibility, resulting in a total offense
20 level of 31.

21 Your estimated Criminal History Category would be
22 Category I -- we don't know for sure but that's what the
23 Government has indicated -- and an advisory guideline range of
24 120 to 135 months. That's without considering whether or not
25 you might be eligible for the so-called safety valve.

1 The worst-case scenario in your case or the worst-
2 case situation in your case, according to Mr. Ainsworth, would
3 be a base offense level of 34 based upon your responsibility
4 for 12 pounds in the transaction involving Ms. Ortega and --
5 although there is some information that there are previous
6 trips, which could increase that number.

7 Secondly, there may be a consideration since these
8 drugs likely came directly from Mexico. That would be a
9 two-level enhancement. I want to indicate, though, that
10 virtually all the drugs we see come from Mexico, and the Court
11 typically has not been imposing that two-level enhancement.
12 But, certainly, Mr. Ainsworth may apply it.

13 Three levels for acceptance of responsibility,
14 leaving a total offense level of 33. The advisory guideline
15 range there is 135 to 168 months. That would be the worst
16 situation.

17 And the plea agreement in this matter provides for a
18 sentence at the low end of the guideline. Do you understand?

19 THE DEFENDANT: Yes, I understand, Your Honor.

20 THE COURT: I want you to understand that I'm not
21 able to determine the advisory guideline range for your case
22 until after the presentence report has been completed by
23 Mr. Ainsworth and both you and the Government have had an
24 opportunity to challenge or object to the reported facts as
25 well as the application of the guidelines that are recommended

1 by Mr. Ainsworth, the probation officer, in your case;
2 therefore, the sentence I ultimately impose may be different
3 from any estimate that Mr. Wright has given to you. He has
4 done his best job to try to advise you and give you accurate
5 information as to how he feels the guideline will apply;
6 however, that responsibility of making the ultimate decision
7 will be my decision.

8 Do you understand that?

9 THE DEFENDANT: Yes, Your Honor, I understand.

10 THE COURT: And after -- I want you to understand,
11 also, that after your initial advisory guideline range has
12 been determined, the Court has the authority in some
13 circumstances to depart upwards -- make a greater sentence --
14 or downwards from that range if the law permits a departure,
15 and the Court will also be able to examine other statutory
16 sentencing factors -- that is, factors under the law -- under
17 the law it's Title 18, United States Code, Section 3553(a) --
18 that may result in the imposition of a sentence that is either
19 greater or lesser than the advisory guideline sentence.

20 Of course, significant here is the so-called safety
21 valve, which is under Title 18, United States Code,
22 Section 3553(f).

23 Do you understand?

24 THE DEFENDANT: Yes, I do understand that,
25 Your Honor.

1 And, Your Honor, one question: May I have a seat?
2 Because my feet are feeling numb.

3 THE COURT: Yes. Of course.

4 THE DEFENDANT: Thank you, Your Honor.

5 THE COURT: I want to advise you, also, that once you
6 are sentenced by the Court, if you are sentenced to a term of
7 imprisonment, you will go into the custody of the Bureau of
8 Prisons once your place of imprisonment has been determined,
9 and they will have control over you. There is no parole board
10 that will consider your case, and you will serve the sentence
11 imposed by the Court; however, you can earn good time of up to
12 54 days for each year that you spend in prison. That good
13 time is awarded by the Bureau of Prisons if you progress
14 satisfactorily within the institution.

15 Do you understand that you can earn good time?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Very well.

18 Now, I want to point out in the plea agreement in
19 this matter -- I believe it's paragraph 18 -- there has been a
20 waiver of the right to appeal as well as to collaterally
21 attack any sentence that I might impose. I will remind you at
22 the time you are sentenced that these waivers are generally
23 applied by the Appellate Court, the Court of Appeals, to most
24 cases.

25 It doesn't prevent you from starting an appeal or

1 filing a notice of appeal if you feel that the sentence
2 imposed is unlawful for some reason, and that would be done by
3 filing a notice of appeal with this Court. That notice of
4 appeal must be filed within 14 days following the entry of
5 judgment and sentence of your case, and I will remind you of
6 that 14-day period at the time that you are sentenced. It's
7 something that you would discuss, of course, with your
8 attorney at the time that you are sentenced and make a
9 decision at that time, seeking his help and his advice.

10 Do you understand?

11 THE DEFENDANT: Yes, I understand, Your Honor.

12 THE COURT: I'm going to move on now and discuss
13 those rights and procedures that we have in our law in the
14 United States, but I want to first ask you whether you have
15 any questions that you would like to ask.

16 THE DEFENDANT: No, Your Honor.

17 THE COURT: Very well.

18 You have a right to plead not guilty to any and all
19 offenses that may be charged against you and to continue with
20 those pleas of not guilty.

21 You would then have the right to a trial before a
22 jury, composed of 12 adult residents of the District of
23 Wyoming, who would be selected and seated here in the jury box
24 in this courtroom and who would hear the evidence and serve as
25 judges of the facts in your case.

1 At trial I would instruct the jury that you are
2 presumed to be innocent, and the Government would have to
3 prove your guilt through its witnesses and its evidence beyond
4 a reasonable doubt.

5 That's a high level of proof. So the jury would
6 know, at the beginning of the trial and throughout the trial
7 that you are presumed innocent and you have no responsibility
8 to explain yourself, to testify, or present evidence. The
9 Government has to prove its case beyond a reasonable doubt.

10 Do you understand so far?

11 THE DEFENDANT: Yes, I understand, Your Honor.

12 THE COURT: Throughout the trial you would have the
13 right to have Mr. Wright's assistance for you, for your
14 defense, appointed by the Court if necessary. He would be
15 with you at trial and every other stage of the proceeding.

16 You would have the right to be present, to hear and
17 see all of the witnesses and to have them cross-examined or
18 questioned by Mr. Wright in your defense.

19 You would further have the right on your own part not
20 to testify under oath from the witness stand over here. You
21 could decline to testify unless you voluntarily elected to do
22 so, to testify in your own defense, and you would have the
23 right to compel the attendance of witnesses to testify in your
24 defense if there are witnesses who could provide helpful
25 information or evidence in your case.

1 I might mention that Mr. Wright, your attorney, could
2 request the attorney -- request the Court to issue
3 subpoenas -- those are orders of the Court compelling a
4 witness to come to court and bring their evidence with them --
5 and those subpoenas would be furnished at public expense.

6 Do you understand these things so far?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: And do you understand that, should you
9 decide at trial not to testify or put on any evidence, the
10 fact of your silence, the fact that you didn't put on
11 evidence, cannot be used against you in any way?

12 The Government has to prove its case against you if
13 it can; you don't have to prove your innocence.

14 Do you understand that?

15 THE DEFENDANT: Um-m, I was not aware of that,
16 Your Honor.

17 THE COURT: That is -- that is the law. The
18 Government could not argue that you're guilty because you
19 didn't explain yourself. That would be wrong. The jury could
20 not discuss your silence when they go to deliberate on the
21 case or draw any inference against you or any thought that you
22 were guilty because you did not present any evidence or make a
23 statement. That would be wrong if they try to do that.

24 Do you understand that?

25 THE DEFENDANT: Yes, Your Honor, I understand.

1 THE COURT: I want you to further understand that, by
2 entering a plea of guilty, if that plea is accepted by the
3 Court, there will be no trial. You'll be considered by the
4 Court to have waived or given up your right to a trial as well
5 as those other rights associated with trial that I have just
6 described.

7 Do you understand?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Very well. I'm going to go ahead now and
10 talk to you about the charge contained in Count One of the
11 indictment in this case.

12 Count One is a charge of conspiracy to distribute
13 methamphetamine. The count reads that from on or about
14 March 29, 2022, through and including on or about April 2nd,
15 2022, in the District of Wyoming and elsewhere, that you,
16 Salvador Nolasco Romero, did knowingly, intentionally, and
17 unlawfully combine, conspire, confederate, and agree with
18 other persons known and unknown to the grand jury to
19 distribute 500 grams or more of a mixture or substance
20 containing a detectable amount of methamphetamine, a
21 Schedule II controlled substance, in violation of Title 21,
22 United States Code, Sections 846 and 841(a)(1) and
23 subparagraph (b)(1)(A).

24 In order to prove its case against you, the
25 Government would have to prove each of these things beyond a

1 reasonable doubt: First, that the crime occurred on or about
2 April 2nd, 2022. The Government doesn't have to prove an
3 exact minute or hour but a day reasonably near April 2nd,
4 2022.

5 Secondly, that the crime occurred in the District of
6 Wyoming and elsewhere. Looking at the prosecutor's statement
7 in this matter, I believe that "elsewhere" may be Nevada, for
8 example.

9 Third, that you and others known and unknown to the
10 grand jury; fourth, agreed to violate the drug trafficking
11 laws of the United States; that is, to possess with intent to
12 distribute and distribute -- cause to be delivered or --
13 500 grams or more of a mixture or substance containing a
14 detectable amount of -- of methamphetamine, a Schedule II
15 controlled substance. I would instruct the jury that
16 methamphetamine is a Schedule II controlled substance.

17 Fifth, that you knew the essential objectives of the
18 conspiracy; namely, to possess with intent to distribute and
19 to distribute methamphetamine.

20 Number six, that you acted knowingly and voluntarily
21 in joining the conspiracy, becoming a part of it. And
22 finally, number seven, that the coconspirators were
23 interdependent. And by that I mean, they acted for their
24 mutual benefit in some way.

25 And often what we're talking about there is -- and

1 I don't know if it was the case in your case. Sometimes we
2 see it where part of the mutual benefit is to obtain drugs for
3 themselves if they have a drug habit. It may be to make
4 money.

5 There may be other reasons. I saw -- there was a
6 mutual benefit in this matter of bringing a person into this
7 country, possibly.

8 Do you understand the nature of the charge?

9 THE DEFENDANT: Yes, Your Honor, I understand.

10 THE COURT: Mr. Nolasco, are you prepared to enter
11 your plea in this matter?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Very well.

14 Salvador Nolasco Romero, to the charge contained in
15 Count One of the indictment, charging that from on or about
16 March 29, 2022, through and including on or about April 2nd,
17 2022, in the District of Wyoming and elsewhere, that you did
18 knowingly, intentionally, and unlawfully agree with other
19 persons known and unknown to the grand jury to distribute
20 500 grams or more of a mixture or substance containing a
21 detectable amount of methamphetamine, how do you plead, guilty
22 or not guilty?

23 THE DEFENDANT: Guilty, Your Honor.

24 THE COURT: Are you entering this plea voluntarily
25 and of your own free will?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Other than what we've discussed here
3 today -- and your hope that the Court will give you the
4 benefit of the safety valve, which the Court is not in a
5 position to promise today -- have you been threatened or
6 coerced or has violence been offered against you to cause you
7 to plead guilty?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: Has anyone promised you any special
10 favors, benefit, or leniency to cause you to plead guilty?

11 THE DEFENDANT: No, Your Honor.

12 THE COURT: And are you pleading guilty because you
13 are, in fact, guilty?

14 THE DEFENDANT: In part, yes, I am guilty,
15 Your Honor.

16 THE COURT: Very well.

17 Mr. Wright, do you have a -- how would you like the
18 factual basis to be handled?

19 MR. WRIGHT: I would like to voir dire the witness --
20 Mr. Romero -- on this and go over this. It might be a little
21 bit easier that way.

22 THE COURT: Very well.

23 MS. VIERBUCHEN: And before we do that, could I ask
24 the Court to inquire for a clarification as to what the
25 defendant means by "in part I am guilty"?

1 THE COURT: We will follow through with that.

2 MS. VIERBUCHEN: Okay.

3 THE COURT: You may proceed.

4 MR. WRIGHT: Mr. Romero, around or about late
5 March of 2022 and April 2nd of '22, were you in Las Vegas at
6 that time?

7 THE DEFENDANT: There was -- one of those days, yes,
8 it occurred that I went to California.

9 MR. WRIGHT: All right. And during that time frame
10 were you also in contact with a Ms. Bianca Ortega?

11 THE DEFENDANT: Yes.

12 MR. WRIGHT: And at that time was Ms. Ortega driving
13 a vehicle that you had rented?

14 THE DEFENDANT: Um-m, yes.

15 MR. WRIGHT: And had you been in communication about
16 that time with Ms. Ortega regarding her driving from Las Vegas
17 to Minnesota?

18 THE DEFENDANT: May I consult with my attorney?

19 THE COURT: You may.

20 (Discussion held at the podium.)

21 MR. WRIGHT: On -- on or about April 2nd of 2022,
22 were you in contact with Ms. Bianca Ortega while she was
23 driving a vehicle?

24 THE DEFENDANT: Yes.

25 MR. WRIGHT: And were you texting her regarding

1 directions during this time?

2 THE DEFENDANT: In the beginning, when this was --
3 the onset of this happening, my understanding was that she was
4 driving to Utah, not Minnesota.

5 MR. WRIGHT: And at some point did she end up in
6 Wyoming?

7 THE DEFENDANT: When I learned that she was in
8 Wyoming, that -- that's at the time when she was using my
9 credit cards. And it was at that time that I learned that she
10 was going to Minnesota.

11 MR. WRIGHT: And you had given her those credit
12 cards; correct?

13 THE DEFENDANT: The credit cards, I had left them
14 behind. I had forgot them in the car that I had rented for
15 her.

16 MR. WRIGHT: And in the car that you rented
17 Ms. Bianca -- or Ms. Ortega was transporting approximately
18 12 pounds of methamphetamine; correct?

19 THE DEFENDANT: Correct.

20 MR. WRIGHT: And she was transporting that from
21 somewhere around Nevada through somewhere else, but she ended
22 up in Wyoming at some point; correct?

23 THE DEFENDANT: Correct.

24 MR. WRIGHT: And you knew the methamphetamine that
25 was in the vehicle?

1 THE DEFENDANT: Yes, I knew.

2 MR. WRIGHT: I believe that meets the factual
3 elements, Your Honor.

4 THE COURT: Ms. Vierbuchen.

5 MS. VIERBUCHEN: The Court's indulgence for one
6 moment.

7 If I may inquire.

8 THE COURT: You may.

9 MS. VIERBUCHEN: I have a few questions for you,
10 Mr. Nolasco Romero.

11 In the time frame at the end of March 2022, you were
12 living in Las Vegas, Nevada; correct?

13 THE DEFENDANT: Correct.

14 MS. VIERBUCHEN: And you -- sorry.

15 And you received a phone call from somebody in Mexico
16 asking you to provide methamphetamine to Bianca Ortega;
17 correct?

18 THE DEFENDANT: I did receive a phone call from
19 Mexico instructing me to go and pick up this methamphetamine
20 because she was not going to be able to pick it up.

21 There is a number of things that the agents agreed to
22 give me when I was cooperating with them, and they failed to
23 put it down in writing. I -- I -- things happened in a rather
24 different way than what is said here.

25 It is true that I accept that I did pick up the

1 methamphetamine, but I did it under threat.

2 MS. VIERBUCHEN: So you agreed to pick up
3 methamphetamine? You actually specifically drove to
4 California from Las Vegas to pick up 12 pounds of
5 methamphetamine; is that true?

6 THE DEFENDANT: I was already in California when that
7 happened.

8 MS. VIERBUCHEN: Did you pick up the methamphetamine
9 in California?

10 THE DEFENDANT: Yes.

11 MS. VIERBUCHEN: And did you then, in turn, drive
12 from California to Las Vegas, Nevada, with that
13 methamphetamine?

14 THE DEFENDANT: I did drive from -- from California
15 to Las Vegas with a bag.

16 At that time I didn't know whether it was
17 methamphetamine that was in that bag or some other substance
18 because I never opened that bag.

19 And it was not until my attorney brought the
20 discovery evidence to me and he showed me pictures. And the
21 picture of the bag shown in those pictures is not the same bag
22 where the drugs were when I saw them before.

23 I did this under threats because, at the time, these
24 agents had told me that they had with them the -- the daughter
25 of my sister-in-law, and they were threatening me, and

1 I thought that I was never going to be able to see her again
2 unless I did it.

3 That's the reason that I -- that's the reason that
4 I accepted to pick up the drugs that they told me to go and
5 pick up, to bring them to her.

6 I never saw the drugs, like I said before. I just
7 saw the bag, but I never looked at what was inside it. And as
8 I received it, I took it from these people and then I brought
9 it to her, and I never saw what was in it.

10 THE COURT: It sounds to me like there's a defense
11 that's being asserted in this case of compelled violation of
12 the law.

13 I will not accept your plea, Mr. Nolasco, in this
14 case.

15 THE DEFENDANT: I explained all that to the officers
16 in Las Vegas, Your Honor.

17 THE COURT: Well, the law requires that you knowingly
18 and willfully intended to transport drugs and participate in
19 the conspiracy and joined with others to do it. And what I'm
20 hearing here is you were forced to do that under threat.

21 And that is not a voluntary situation, and,
22 certainly, I don't want to force you to plead guilty when
23 everything you're telling me indicates that you are innocent
24 of this -- this crime.

25 And we'll set this matter for trial. Do we have a

1 trial date at this point?

2 MS. VIERBUCHEN: We had a trial date of January 23rd.
3 I'm not sure if that's still -- if it was removed, Judge, or
4 not.

5 THE COURT: I don't think that day has been removed,
6 although I have another trial ahead of it. Don't I?

7 THE COURTROOM DEPUTY: Yes.

8 THE COURT: Which is -- is going to go one day.
9 Mr. Elmore is the prosecutor in that case.

10 THE COURTROOM DEPUTY: Possibly two days, it says, so
11 we could reset to Wednesday, the 25th of January.

12 MS. VIERBUCHEN: When does speedy trial run, if
13 I could inquire? I don't have my complete file here today.

14 MR. WRIGHT: And, Your Honor, may I have a recess to
15 talk to my client.

16 THE COURT: Certainly. What would you like,
17 15 minutes?

18 MR. WRIGHT: That sounds appropriate.

19 THE COURT: Very well. We'll stand in recess for
20 15 minutes.

21 THE COURTROOM DEPUTY: All rise.

22 (A recess was taken from 3:52 p.m. to 4:18 p.m.)

23 THE COURTROOM DEPUTY: Court is now in session.

24 THE COURT: Thank you.

25 We are again gathered in the courtroom after a recess

1 in the proceedings, and I believe all of the participants
2 are -- who were here before -- are remaining in the courtroom,
3 including Ms. Vierbuchen, Mr. Wright, and the defendant,
4 Mr. Nolasco Romero.

5 And, also, I hope we still have Humberto on the
6 telephone line.

7 THE INTERPRETER: I am here, Your Honor.

8 THE COURT: Thank you very much.

9 When we left off I'd noted that -- to the
10 defendant -- that, based upon his factual basis that he had
11 provided to the Court, offering a -- that he engaged in this
12 conduct under compulsion from the organization, that I could
13 not accept the guilty plea.

14 Mr. Wright, I'll leave it up to you.

15 MR. WRIGHT: Thank you, Your Honor. Maybe, perhaps,
16 a little background may help this matter, just how this all
17 unfolded. And then some of this is also in the prosecutor's
18 statement. I think the Court's aware of most of this.

19 I think it's kind of important to put it on the
20 record, also, for Mr. Romero, for the Court, and for everyone
21 here, and then we can go into the two elements that the Court
22 inquired on and that caused the Court to not accept the -- the
23 guilty plea.

24 Mr. Romero originally did not become involved with
25 these individuals willfully. Originally -- and this is part

1 of, I believe, the prosecutor's statement -- there were
2 threats; there were coercion. There were notes left on his
3 door, photos of people who had been shot through the head, and
4 it was coerced regarding uncharged conduct outside of the
5 indictment. So this is stuff that's not been indicted.

6 Mr. Romero's not been indicted because there's
7 obvious severe problems and fundamental issues with the --
8 such -- such counts. And that was specifically how the cartel
9 got Mr. Romero to transport money -- not drugs -- the money
10 from proceeds or whatever they were doing.

11 And that --

12 THE COURT: From Minnesota to other locations?

13 MR. WRIGHT: Yes.

14 So that was -- based on the information that I have
15 seen and the information that the Government's provided --
16 appears to be what the story is regarding the initial
17 involvement and how these came about.

18 And I think that's a very important distinction
19 for Mr. Romero for me to make. He did not seek these
20 individuals out; they sought him out. And some of the threats
21 were against his wife.

22 So he did the money transportation against his will.
23 He went to the police apparently; they blew it off and told
24 him that somebody was pranking him or it was a joke. And
25 perhaps in larger jurisdictions -- and I wouldn't doubt in

1 like Vegas or LA or some of the bigger cities -- law
2 enforcement has much greater concerns than that. They're
3 probably strapped trying to investigate the actual crimes that
4 are occurring, so it -- based on my experience, that doesn't
5 seem too farfetched.

6 Now, really, the question becomes this issue -- and,
7 obviously, the Court knows about the prosecutor's statement,
8 the fact that there was -- Mr. Romero's niece, who was in
9 Mexico, and Mr. Romero tried to assist in getting her into the
10 US, and he reached out to these nefarious individuals.

11 I believe there was an offer of payment even. But
12 they didn't want a payment. They wanted a favor. But that
13 wasn't, apparently, until after the matter. And so that's
14 really the crux of this.

15 And then whether the niece got here, whether she
16 didn't get here, where she was, what were her whereabouts --
17 I think perhaps that's in question. There's the prosecutor's
18 statement and there's information that I think that may
19 contradict some of this, and I'm not sure, really, where that
20 all sorts out.

21 Then the favor. And the favor was to transport a bag
22 from California, and this is the bag in question.

23 Now, the Court or I can make an inquiry regarding if
24 Mr. Romero ever knew what was in the contents of the bag. The
25 contents of the bag was in the vehicle that was transported.

1 There's also the rental of the vehicle. There -- the
2 purpose of why it was rented and what Mr. Romero knew at the
3 time, that may or may not be in question. And in dealing just
4 in my past prosecutor life, I will -- I have seen many times
5 that these organizations don't really tell you everything for
6 good reasons.

7 And they normally aren't -- people who are
8 transporting the drugs or whatever they're transporting,
9 they're not the high bosses. But they get individuals -- and
10 we normally call them mules or whatever you want to call
11 them -- and they force them to transport or they pay them some
12 nominal money or whatever they do.

13 So I think there's one issue today, that I can either
14 inquire regarding whether Mr. Romero ever knew what the
15 contents of the bag were, if he knew there was
16 methamphetamine, or if he had no idea, and that's his call to
17 make. And he understands that if his defense is he didn't
18 know, then the Court can't accept his plea; we set it for
19 trial.

20 Mr. Romero also knows that if he is asserting that
21 there is a defense that he was -- he was forced to do this
22 act, not all the other ones that were uncharged -- and maybe
23 that's some of the confusion here today, because I think some
24 of the questions when other people are asking -- I don't know
25 how they translate; I don't know where this goes.

1 But sometimes that's lost in communication. And,
2 also, Mr. Romero understands that this is not sentencing
3 today. And I had to explain that, too, because I'm not
4 sure -- well, I believed he knew that this was just a change
5 of plea and this is just a change of plea to the plea
6 agreement.

7 But he also understands that if he is going to say
8 that he was forced to do this -- which is his right; he has
9 the ability to do that or he can say that he did this
10 willingly and knowingly and it was a favor -- that one path
11 leads to the plea agreement and the Court potentially
12 accepting the plea and the other path leads to trial and
13 potentially a much harsher sentence. And perhaps two counts.

14 So I think that there's a little bit of disconnect on
15 some of these things. I think I've straightened out some of
16 it. And if there's anything else I've missed, Mr. Romero can
17 ask me or inquire on the Court. But, really, this is his call
18 on this matter.

19 And there needs to be a distinction -- and,
20 hopefully, I've made it -- that there are, obviously, some
21 mitigating factors in this, which is why we're going to be
22 arguing the safety valve eligibility, but that is only
23 eligible if we take advantage of a plea. And that might not
24 be possible -- I don't know -- later on and that this could go
25 much worse for Mr. Romero if we do go to trial. But juries do

1 what juries do, and it is a huge gamble with the rest of
2 Mr. Romero's life.

3 So if there's any specific questions that Mr. Romero
4 has, I -- I'm fine with answering them. If there's any
5 inquiries from the Court to me, I'm fine with answering them.

6 If the Court wants to make inquiries -- but I believe
7 there are two elements remaining: The elements is, did
8 Mr. Romero freely and knowingly enter this? Did he do this on
9 his own will? Or was he forced to do it -- not on all the
10 other times that he was forced to do it but this time
11 specifically and only this time. And, also, at any point did
12 he know that this was methamphetamine? And was that -- that
13 it was being transported.

14 And I'm fine questioning him on that, and we'll see
15 what Mr. Romero answers. But I think that he also needs to
16 know that one answer results in trial, one answer results in a
17 potential plea and taking the benefits of the plea, which is
18 limited in this case but they're still benefits.

19 So I believe that's where we're at, Your Honor.

20 And Mr. Romero knows this is his call. This is all
21 his choice on what he wants to do.

22 THE COURT: It can't be any other way. It must be
23 his decision. I think what happened certainly represents what
24 Ms. Vierbuchen asked in this matter, why he was saying "in
25 part."

1 MR. WRIGHT: I believe that was the "in part."

2 Is that -- when he says "I'm partially guilty," my
3 understanding was that, that there was -- there was so much
4 coercion, apparently, that at one point him and his wife had
5 to move to try to get away from these individuals and they
6 found him anyways again so --

7 THE COURT: To your knowledge, was there some sort of
8 relationship with those individuals?

9 MR. WRIGHT: I'm not sure how they originally found
10 him. And I'm not sure if that was ever provided to me
11 regarding like how this -- like -- how they originally knew --
12 maybe it was through a -- I think -- actually, no. I --
13 I take that back.

14 One of the individuals, I believe, met him through
15 his employment. And I think that that's how it originally
16 started.

17 MS. VIERBUCHEN: Just for a clarification, when we
18 hear things from defense counsel about "That was the
19 information that was provided" or "That was the discovery from
20 the United States," that was the defendant's own self-serving
21 statements. That's what was provided.

22 The United States doesn't concede that these are true
23 representations, but that is the statement the defendant gave
24 to law enforcement about alleged threats after -- as
25 I outlined in the pros memo, after lying on several prior

1 occasions as to what happened, that was the final version the
2 defendant settled on.

3 MR. WRIGHT: And that was the audio recording that
4 I received from the Government from the interview with
5 agents --

6 MS. VIERBUCHEN: Right. So it's certainly --

7 MR. WRIGHT: -- and it's from Mr. Romero.

8 MS. VIERBUCHEN: It's not as if the United States is
9 adopting this. This is the statement the defendant gave to
10 police in -- in a recorded interview.

11 MR. WRIGHT: That is correct. And so that was the
12 information that I was provided from the United States.

13 But I -- the Government can have their own case and
14 their own theory and their chief and their evidence that they
15 believe happened. But I'm just making a clarification; that's
16 how I got the information.

17 But I think that's important to note because of the,
18 "Well, partially I'm guilty" and -- "in part." I think that's
19 where the clarification is.

20 MS. VIERBUCHEN: Well, if I may just address the
21 Court -- and I certainly think it's certainly the Court's
22 decision whether to continue in light of what was already
23 presented.

24 And I would say to the Court that my recollection
25 of -- of a direct question from myself was if he admitted that

1 he was taking the methamphetamine from California back to
2 Las Vegas, in which he provided a largely nonresponsive answer
3 and he stated, to the best of my recollection, that I, quote,
4 "did this under threats because, at the time, these agents had
5 told me they were -- they had them with the -- the daughter of
6 my sister-in-law, and that they were threatening me, and
7 I thought that I was never going to be able to see her again
8 unless -- unless I did it."

9 And that was in response to my question about the
10 12 pounds of methamphetamine in this case. It -- there was no
11 confusion; there wasn't talk about prior incidents.

12 And so I want to be very clear. If Mr. -- that
13 Mr. Nolasco Romero -- it's his decision. And it -- you know,
14 trial -- it's not necessary. I mean, who knows what's going
15 to happen at trial? And I just want to be very clear the
16 decision is his and nobody else's.

17 And, certainly, this Court's -- whether the Court
18 wants to take it in light of the defendant's responses to very
19 clear questions.

20 THE COURT: Well, we try cases. That's what we do.

21 MS. VIERBUCHEN: Yep.

22 THE COURT: The Court's here for that.

23 MR. WRIGHT: So, Your Honor -- I mean, Your Honor,
24 I can ask regarding those two issues; the Court can inquire if
25 the Court deems appropriate. But I think that -- at this

1 point I think that Mr. Romero needs to be offered the
2 opportunity today. We're here. I think we have two more
3 elements regarding this alleged offense.

4 And if he wants to take advantage of the plea
5 agreement, he can, but I believe that he needs to be -- this
6 has been explained to him. I think he has a better
7 understanding of this at this point. But it should be offered
8 to him, and perhaps we can get through it this time.

9 And if not, that's fine. Then we can have a trial
10 and Mr. Romero can have his trial and -- his jury trial and
11 his day in court and see what happens. That's his call.

12 But I think that, in fairness to Mr. Romero, he needs
13 to be offered at least the opportunity to talk about those two
14 last elements that the Court inquired about.

15 THE COURT: Mr. Romero, have you understood what your
16 attorney is saying here?

17 THE DEFENDANT: Yes, I am understanding, Your Honor.

18 THE COURT: It really is up to you entirely whether
19 or not you wish to proceed here today with the plea of guilty
20 or to take your case to trial and to raise the defense of --
21 that you were compelled to do this under threat to a -- your
22 wife's family member.

23 Do you understand that?

24 THE DEFENDANT: Yes, Your Honor. I am understanding
25 what my attorney is saying and, also, what the prosecutor is

1 indicating, as well. And like I said to you before, things
2 didn't happen exactly as they -- they appear.

3 And at -- at any rate, I am willing to accept the
4 responsibility for what does correspond to me and for what
5 I did. I did transport these drugs. And if there is a
6 consequence to my actions, I'm willing to face that
7 consequence.

8 I don't want to go to trial because I am afraid that
9 if I go to trial I might end up spending the rest of my life
10 in prison. And like I said before, I am willing to accept my
11 responsibility and move along.

12 All this evidence of -- of what happened -- I am
13 accepting that I did send information to her, but that's what
14 they were telling me to do or what they were instructing me to
15 do, and all of this seems to point against me.

16 MR. WRIGHT: I think that the Court would need to
17 inquire about the vehicle and the credit cards that Ms. Ortega
18 had in her possession and that belonged to Mr. Romero.

19 It -- it -- I -- as Mr. Romero has just indicated, he
20 wants to take advantage of the plea agreement. But in the
21 same sense, he also wants the Court to understand his role in
22 this, which he believes has mitigating and minimizing factors.
23 And I think some of this is, obviously, sentencing
24 arguments -- is what I've indicated before -- and not so much
25 of a change of plea, and some of it is the actual change of

1 plea and the plea and meeting the elements.

2 But it sounds like, from what Mr. Romero just said,
3 he wants to take responsibility for the drugs and, also, his
4 role in transportation of those and, also, the plea agreement,
5 which, in my experience, many defendants -- which is not
6 unlike Mr. Romero -- they want to take advantage of a plea.

7 While there's always an explanation behind the
8 actions, it's not so clear-cut as the charges sometimes
9 appear.

10 THE COURT: Well, the Court can't engage in plea
11 negotiations and is not going to. All I can do is ask
12 Mr. Romero from the beginning.

13 Did you reach out to the cartel to seek their
14 assistance in this matter in smuggling or bringing your wife's
15 relative into the United States?

16 And those are people in Mexico?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: And they -- in essence, they said they
19 would help you if you handled this drug transaction in the
20 United States; is that correct?

21 THE DEFENDANT: Correct, Your Honor.

22 THE COURT: And as part of that, you went and
23 obtained the methamphetamine -- the 12 pounds of
24 methamphetamine in California; is that correct?

25 THE DEFENDANT: Correct, Your Honor.

1 THE COURT: And you brought the methamphetamine to
2 Nevada?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And how did you meet Ms. Ortega?

5 THE DEFENDANT: Yes, Your Honor. And at the time
6 when this all began, she was in Mexico, and she was with the
7 person that sent it over to -- to do this thing. And then in
8 the beginning, my understanding is she was going -- said that
9 she was going to have to go to Utah to pick up her children,
10 and then she was not going to be able to pick up this in
11 California.

12 At that time I had a trip lined up to go to
13 California to pick up some supplies for my wife's business,
14 and then, later on, on this trip, on -- on the way to
15 Las Vegas, an uncle told me that she was not going to be able
16 to make it.

17 So at this time what I was told is that I had to go
18 and pick up the -- this bag. And I know what these people are
19 involved with, and I really didn't want to end up involved in
20 anything having to do with drugs at all. But these guys told
21 me that I have to pick up this bag if -- he also told me that
22 I did not really have a choice if I ever wanted to see my
23 sister-in-law's daughter brought over here.

24 It was at that time that I was fully involved in
25 this.

1 And it was at this time that I went ahead and rented
2 a car, and I left the credit cards in the car so that she
3 could use them. And then I -- I authorized that she used
4 my -- my credit cards. This is how I ended up fully involved
5 with this matter.

6 And the reason that I sent these text messages is
7 because -- well, they told me to do this because this is where
8 they usually went to do what they called their job. Ever
9 since back then when they used me to transport money to
10 Minnesota, the destination was always the same place, and they
11 used the same means to let me know about that, and then they
12 told me just to convey that information to her, and that's the
13 text messages.

14 And this is the way in which I ended up involved
15 completely in this matter, Your Honor. And like I said
16 before, I am afraid. I don't really want to spend the rest of
17 my life in prison, Your Honor, and that's why I am here to
18 accept my responsibility.

19 Practically, all of these messages are an accusation
20 against me.

21 THE COURT: I still don't have an answer to the
22 question.

23 MR. WRIGHT: My understanding is Mr. Romero wants to
24 take advantage of the -- the plea agreement that was filed
25 with the Court and enter his guilty plea to Count One.

1 That's my understanding. And the Court can inquire
2 again, but that's my understanding of this. He's -- and,
3 again, there's --

4 THE COURT: He's still saying he doesn't know it was
5 drugs.

6 MR. WRIGHT: I believe he said he did. But that's my
7 recollection. And perhaps it's wrong.

8 I think the Court can inquire did he --

9 THE DEFENDANT: I apologize for interrupting,
10 Your Honor.

11 I did know that this involved drugs; I just didn't
12 know the kind of drug that it was.

13 I knew that it was drugs because that's what these
14 people do for a living.

15 THE COURT: These are the people from Mexico?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: And you knew that you were -- these were
18 illegal drugs?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: And you didn't answer my question. Where
21 did you meet the lady, Ortega?

22 THE DEFENDANT: She arrived at my house, Your Honor.
23 I told her to come directly to my home address so that she
24 could leave her car right there.

25 THE COURT: And you furnished your car to her for

1 this escapade; is that correct? For this crime.

2 MR. WRIGHT: It was a rental car, Your Honor.

3 THE DEFENDANT: It was a rental car, Your Honor. And
4 all of the circumstances of that I fully explained to the
5 officers before.

6 They asked me for a very specific type of car so that
7 she could transport the drugs.

8 It was a Nissan Pilot.

9 And I couldn't find a Nissan Pilot, so I had to get
10 the car that she was driving.

11 THE COURT: And you rented the car in your name?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: And you furnished to her for her expenses
14 your debit card, your credit card?

15 THE DEFENDANT: These are the credit cards that were
16 under my name.

17 I -- yes. I left the credit cards in the cup holder
18 compartment in the vehicle for her to be able to use them.

19 And then at some point she did ask me if it was okay
20 for her to use the cards because when she started using them
21 at some point one of them brought up a -- a declined message.

22 And my understanding -- these are credit cards,
23 Your Honor, not debit cards.

24 And then the address must have been on one of the
25 bills because then she was able to use it by also using the

1 zip code in that address.

2 I also gave her the -- my full home address so she
3 had the zip code for my home address, so maybe that is where
4 she got it and she could use it for the credit cards.

5 At some point she did call me because while she was
6 using the credit cards I was keeping an eye on the balances.
7 And I learned that she had been using them in Wyoming and,
8 also, in Utah. And I believe it is possible, because of the
9 use of these credit cards in different states, that the
10 issuing company might have found that suspicion and declined
11 the service at some point.

12 So I -- I spoke with her uncle on the phone
13 because -- he explained to me that they were not able to send
14 her money for her expenses and that she needed to use my
15 credit cards and that I needed to call the issuing company and
16 make sure and unblock them so that she could use them, and
17 that's the reason that I asked her to take a picture of the
18 credit cards and then message me with that so that I could see
19 what could be done about unblocking the credit cards.

20 So all of that appears in the pictures, and these are
21 in the messages that went back and forth and, also, in the
22 quantities and the balances on -- on the credit cards that
23 show what she was using.

24 MR. WRIGHT: And, Your Honor, I think Mr. Romero will
25 continue to talk about all of this. And I think he believes

1 the Court wants him to continue. So if there's specific
2 questions the Court has with -- I think he's trying to give
3 you sufficient evidence on what he's trying to do.

4 That's my understanding just from my interactions
5 with Mr. Romero. I think he's still attempting to give you
6 all the information he believes that you're trying to obtain
7 from him in order to take the plea.

8 So if there's specific questions that the Court has
9 besides the credit cards --

10 THE COURT: Why don't I tell you what my questions
11 are then.

12 MR. WRIGHT: All right.

13 THE COURT: My questions are, did he instruct her to
14 go to Minnesota?

15 THE DEFENDANT: Yes, Your Honor.

16 They contacted me and they instructed me to call her
17 and give her the address where she was supposed to show up.

18 THE COURT: And all this was done because you wanted
19 the help from the people in Mexico to bring your relative --
20 or your wife's relative -- into the United States; correct?

21 THE DEFENDANT: Yes, Your Honor.

22 I practically didn't know at the time whether she was
23 with them or not at the moment.

24 THE COURT: And it was your -- your decision to reach
25 out to the people in Mexico in the first place to secure their

1 help in this regard? To -- to bring your relative to the
2 United States.

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And there was no threat?

5 THE INTERPRETER: Could Your Honor please repeat the
6 question?

7 THE COURT: And there was no threat to you in terms
8 of -- when you sought their help to bring your relative to the
9 United States?

10 THE DEFENDANT: No. When I asked for their help,
11 there weren't any threats at that point.

12 That only -- that only happened about a month back,
13 and this is after I had requested their help.

14 THE COURT: I'm not understanding again.

15 THE INTERPRETER: I'm sorry, Your Honor.

16 THE COURT: I just said I'm not understanding what
17 he's saying.

18 MR. WRIGHT: I -- I think that he's saying that when
19 he reached -- this is my understanding -- when he reached out
20 to the individuals in Mexico, there were no threats against
21 him, his wife, his family. And that's when he was trying to
22 get his wife's niece -- or help her into the country.

23 But I'll let Mr. Romero clarify that.

24 THE DEFENDANT (in English): Yeah.

25 THE DEFENDANT: Yes, Your Honor. At the beginning

1 when I sought their help, there were no threats at that point.
2 The threats came only later, when they started to instruct me
3 to go and pick up the drugs.

4 (Discussion held at the podium.)

5 THE COURT: Maybe you could have him tell me about
6 the threats and what was threatened.

7 THE DEFENDANT: Yes, Your Honor. They -- as I have
8 explained before to Your Honor, I was told by these people
9 that I had to go and pick up a bag. And I didn't want to do
10 anything involved with drugs, but I know what these people do
11 for a living.

12 So I asked them "What kind of bag do you want me to
13 pick up?" and they said "It's just a laundry bag," and
14 I didn't believe that because I know what these people are
15 into.

16 But it was at this point that they told me that I had
17 no choice, that either I did what they demanded or I wouldn't
18 be seeing again my wife's niece.

19 (Discussion held at the podium.)

20 THE COURT: Well, I'm -- I'm terribly sorry that
21 that -- this is where we are in this matter. I know that you
22 wish to plead guilty, but I cannot accept the plea with the
23 idea that you were compelled to commit the crime by these bad
24 people under threat to a family member.

25 And --

1 THE DEFENDANT: Yes, Your Honor, I understand what
2 you're saying. But . . .

3 I understand what you're saying, Your Honor, but
4 I also need you to -- to please understand where I'm coming
5 from. I really don't want to be exposed to spending the rest
6 of my life in prison.

7 THE COURT: I understand that. I wouldn't want to,
8 either.

9 Do we have a date that everybody can be ready? I've
10 looked at my calendar, by the way. And the 24th or the 25th,
11 the 30th. We think the speedy trial runs on the 6th, but
12 I have five -- six trials set on the 6th.

13 MS. VIERBUCHEN: Is that all, Judge?

14 THE COURT: That's just yours.

15 MS. VIERBUCHEN: I will tell the Court that the
16 actual speedy trial -- I spoke to Ms. Harris during the break,
17 and I think we both agreed that speedy trial expires on
18 January 23rd. I don't know with -- if defense counsel is even
19 available in light of -- I think we both cleared our calendar
20 thinking that this was going to be a plea, so it may be that
21 we're going to ask the Court for a speedy trial finding to --
22 to continue it beyond the 23rd.

23 Is that right, Mr. Wright?

24 MR. WRIGHT: That's very possible.

25 I need to -- this was not what I was intending to do.

1 I thought that this would be over a couple hours ago, but,
2 apparently, we are now going to trial. And so I need to take
3 a look at the calendar, take a look at all the deadlines,
4 everything else. I need to talk to my client.

5 And I think there's probably going to be a lot of --
6 a lot of information and a lot of things that we need to do
7 that we were not anticipating to do that -- we actually
8 cleared our calendars because we filed a plea agreement in
9 this matter so --

10 MS. VIERBUCHEN: So, Your Honor, could we -- could we
11 have an opportunity for counsel and I to confer and --
12 I think -- and then maybe propose an order for the Court? Or
13 else come back to court and -- and have the Court -- however
14 the Court prefers. But we probably need a few days for he and
15 I to communicate and --

16 THE COURT: That would be appropriate.

17 MR. WRIGHT: I agree.

18 THE COURT: Let me give you the 30th, the 27th of
19 February, and I think I only have one trial on the 20th.

20 MS. VIERBUCHEN: Of January.

21 MR. WRIGHT: 30th -- sorry.

22 MS. VIERBUCHEN: Of January, Judge? The 30th of
23 January?

24 THE COURT: 30th of January.

25 MR. WRIGHT: And what were the other dates? Or did

1 you provide another date?

2 THE COURT: The 20th of February.

3 MS. VIERBUCHEN: I'm sorry. The 20th or the 27th?

4 MR. WRIGHT: 20th.

5 THE COURT: Both.

6 THE COURTRoom DEPUTY: It would have to be the 21st.

7 THE COURT: 21st. I'm sorry.

8 MS. VIERBUCHEN: Okay. 21st?

9 THE COURT: Yeah. Presidents Day. I'm sorry.

10 And the 27th.

11 And then if it goes beyond that, let me know and we
12 can look at that, as well.

13 MS. VIERBUCHEN: Certainly, Your Honor. We will try
14 to work together on a proposed order for the Court.

15 And if not, maybe just asking for -- I'm sure we can
16 work it out. But if not, we will be asking just to set it in
17 before the 23rd for a hearing if need be.

18 THE COURT: Well, thank you for your patience this
19 afternoon.

20 MS. VIERBUCHEN: Thank you for yours, Your Honor.

21 MR. WRIGHT: Thank you for your time, Your Honor.

22 THE COURT: We'll stand in recess. And the marshal
23 will take custody of the -- of Mr. Nolasco.

24 THE COURTRoom DEPUTY: All rise.

25 (Proceedings adjourned at 5:06 p.m., January 12, 2023.)

C E R T I F I C A T E

1 C E R T I F I C A T E
2
3
4
5 I, MELANIE HUMPHREY-SONNTAG, Federal Official Court
6 Reporter for the United States District Court for the District
7 of Wyoming, a Registered Diplomate Reporter, Certified
8 Realtime Reporter, and Certified Realtime Captioner, do hereby
9 certify that I reported by realtime stenography the foregoing
10 proceedings contained herein on the aforementioned subject on
11 the date herein set forth and that the foregoing pages
12 constitute a full, true, and correct transcript.

14 Dated this 20th day of January, 2023.

/s/ Melanie Humphrey-Sonntag

MELANIE HUMPHREY-SONNTAG
RDR, CRR, CRC
Federal Official Court Reporter



IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

Margaret Botkins
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff,

VS.

SALVADOR NOLASCO ROMERO,

Defendant,

Case No. 22-CR-00120-ABJ

**ORDER GRANTING GOVERNMENT'S OPPOSED MOTION *IN LIMINE* TO
PRECLUDE A JUSTIFICATION DEFENSE**

This matter is before the Court on the *Government's Opposed Motion in Limine to Preclude a Justification Defense*. ECF No. 66. Defendant Salvador Nolasco Romero filed a response to the Government's Motion on May 23, 2023. ECF No. 76. The Court held a motion hearing on May 24, 2023. ECF No. 77. Having reviewed the filings, arguments, and applicable law, the Court hereby **GRANTS** the *Government's Opposed Motion in Limine to Preclude a Justification Defense*. ECF No. 66.

BACKGROUND

On September 21, 2021, the Defendant was indicted with one count of Conspiracy to Distribute Methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A) and one count of Possession with Intent to Distribute Methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 18 U.S.C. § 2. ECF No. 1.

The facts giving rise to the indictment stem from the arrest of Bianca Ortega on April 2, 2022. ECF No. 66 at 2. Ms. Ortega was pulled over in Johnson County, Wyoming, after police received reports of a woman driving erratically. *Id.* This traffic stop resulted in a search of the vehicle, which uncovered approximately 12 pounds of methamphetamine. *Id.* The rental vehicle Ms. Ortega was driving was rented in Las Vegas, Nevada, by Defendant on April 1, 2022. *Id.*

The Government contends that the evidence will demonstrate that Ms. Ortega drove to Defendant's home in Las Vegas, Nevada, where he provided her with a rental car, methamphetamine, and instructions to take the drugs to Bloomington, Minnesota. ECF No. 65 at 3. Allegedly, the Defendant intended to fly to Minnesota, where he would meet Ms. Ortega to coordinate the final distribution of the drugs. *Id.* Defendant provided Ms. Ortega with two credit/debit cards in his name, which Ms. Ortega used prior to her arrest in Wyoming. *Id.* Further, cell phone records indicate numerous contacts between Defendant, Ms. Ortega, and Ms. Ortega's uncle in Mexico. Prior to her arrest Ms. Ortega kept in contact with Defendant updating him as to her progress. *Id.*

On October 12, 2022, the Defendant was arrested on the indictment in this case in Las Vegas, Nevada. *Id.* at 4. During a *Mirandized* interview conducted in English, Defendant allegedly provided several false statements to the agents before eventually admitting to conspiring with Ms. Ortega's uncle in Mexico to distribute the methamphetamine in Minnesota. *Id.* The Defendant informed the agents that he drove to California to pick up the methamphetamine he gave Ms. Ortega to transport to Minnesota. *Id.* at 5. However, Defendant maintained that it was the first time he distributed drugs for

the organization. *Id.* When Agents presented Defendant with evidence of prior drug activity, he admitted to conspiring with Ms. Ortega's uncle in Mexico—admitting to making five prior trips to Minnesota to pick up drug money. *Id.* In the interview, the Defendant maintained that the instant case is the first time he distributed drugs for the organization, but that he only engaged in the prior illegal activity because he felt compelled to do so to protect his wife. *Id.* at 6. However, the Defendant also admitted that after “the organization allegedly released him from having to engage in further illegal conduct, the defendant-initiated contact with the co-conspirator in Mexico to ask for assistance” in bringing his niece into the United States from Guatemala. *Id.*

The trial in this matter was initially scheduled for January 23, 2023. ECF No. 29. However, the Defendant entered into a plea agreement, and a change of plea hearing took place on January 12, 2023. ECF No. 43. At the hearing, the Court was not able to accept the Defendant's plea.¹ *Id.*

APPLICABLE LAW

A justification defense requires Defendant to prove the following elements by a preponderance of the evidence:

- (1) that defendant was under an unlawful and present, imminent, and impending [threat] of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
- (2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct];
- (3) that defendant has no reasonable, legal alternative to violating the law, a chance to both refuse to do the criminal act and also avoid the threatened harm; and

¹ In pertinent sum, the Court rejected Mr. Nolasco's plea as the Defendant asserted that he was forced to violate the law under threat. *See* ECF No. 51.

(4) that a direct causal relationship may be reasonably anticipated between the [criminal] action taken and the avoidance of the [threatened] harm

United States v. Butler, 485 F.3d 569, 572 (10th Cir. 2007). However, the Tenth Circuit has also found that a coercion or duress defense consists of three elements:

- (1) [T]he defendant was under an unlawful and present, imminent and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury to himself [or a family member, or others];
- (2) [T]he defendant had no reasonable, legal alternative to violating the law, that he had no chance both to refuse to do the criminal act and also to avoid the harm; and
- (3) [A] direct causal relationship could have been reasonably anticipated between engaging in the criminal action and avoiding the threatened harm.

United States v. Dixon, 901 F.3d 1170, 1176 (10th Cir. 2018). In this case, Defendant has not filed a Notice of Defense. Instead, the Government informed the Court through its Motion that the Defendant intends to pursue an affirmative defense of “duress.” ECF No. 66 at 1. As such, the Court will analyze this motion under the four-element test articulated by the Government, noting that the elements are substantially similar. Further, as Defendant fails to establish each of the elements of duress provided in *Dixon* by a preponderance of the evidence, the additional element articulated in *Butler* is not dispositive of this matter.

ARGUMENTS

The Government relies on *United States v. Saldivar-Munoz*, where the Tenth Circuit found that the trial court did not abuse its discretion in granting the government’s motion in *limine* prohibiting a duress defense as there was no evidence of an “actually present,

imminent, and impending threat against the defendant.” *United States v. Saldivar-Munoz*, 439 Fed. App’x 730, 735 (10th Cir. 2011). Relatedly, the Government claims that Defendant had an obligation to avoid the criminal act, and as he did not, he is not eligible for the defense. *See Shannon v. United States*, 76 F.2d 490,493 (10th Cir. 1935) (affirming the trial court’s decision not to submit a duress instruction to the jury finding “one who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury”).

Examining the second element, the Government contends that the Defendant “recklessly and negligently placed himself in a situation in which it was probable that he would be forced to choose criminal conduct.” ECF No. 66 at 6. To support this argument, the Government relies in part upon Defendant’s admissions before this Court at the Change of Plea hearing held on January 12, 2023.

As to the third element, the Government asserts that as the Defendant admitted that he intentionally and recklessly created the circumstances that placed his family in danger, he cannot demonstrate that there was no reasonable, legal alternative to violating the law. *Id.* at 7. Finally, as to the fourth element, the Government contends that Defendant can show “no direct causal relationship between the criminal act of continuing drug trafficking and the avoidance of the unspecific and speculative threatened harm.” *Id.*

In response, Defendant provides a proffer² to the Court. ECF No. 75. Defendant outlines how he came to be involved with the Cartel, including that they threatened him

² Notably, Defendant makes no attempt to tie the details outlined in the proffer to specific elements of the affirmative defense. Further, Defendant fails to provide specific dates and times. Instead,

with photos and notes left at his home *Id.* at 2. However, Defendant explained that he did not have these notes as he took them to the Police Department in Los Angeles. *Id.* at 3. Next, says Defendant, he and his wife moved to Las Vegas, where they again received threatening notes from the Cartel. *Id.* Defendant asserts that the situation escalated in Las Vegas as, at one point, his wife was followed while driving and nearly ran off the road. *Id.* at 4. Defendant asserts that testimony from his wife and stepson and the potential production of records³ from the LA and Las Vegas Police departments will be introduced to meet his burden. *Id.* at 5. Finally, Defendant makes no attempt to address the statements he made under oath before this Court at the Change of Plea hearing held on January 23, 2023.

ANALYSIS

Defendant fails to establish the elements of a justification or duress defense by a preponderance of the evidence. First, Defendant has not shown an imminent and impending threat. Defendant's proffer discusses that the Cartel left threatening notes and photos at his home in Las Angeles but fails to identify with any specificity when these threats were received. ECF No. 75 at 2. Additionally, Defendant's proffer explains that in "March or April of 2018," he started to receive threatening notes in Las Vegas but does not identify the frequency or severity of this contact. *Id.* at 4. Further, Defendant asserts that his wife

the proffer consists of vague references to events. The Court also notes that Defendant could have put on testimony at the evidentiary hearing to establish the elements of his defense, but no testimony was offered for the Court's consideration.

³ The LA and Las Vegas Police Departments have been subpoenaed, but no information had been returned at the time of the Motion hearing.

was followed and nearly ran off the road but again fails specifically identify when this threat occurred. Defendant's proffer explains that these "numerous and scary interactions with the Cartel are crucial to his defense." ECF No. 75 at 4. However, he did not identify when the threats occurred. Similarly, he did not demonstrate that this fear was based on more than a subjective belief that harm could occur. Here, the Defendant fails to identify any "actually present, **imminent, and impending threat**" against himself or his family members by a preponderance of the evidence. *See United States v. Saldivar-Munoz*, 439 F.App'x 730, 735 (10th Cir. 2011) (emphasis added).

Second, Defendant has failed to demonstrate that he did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to choose the criminal conduct. In fact, under oath, the Defendant has admitted before this Court that he did place himself in this situation. In pertinent sum, Defendant was "released" from his obligations to the Cartel and reengaged them to bring his family member into the United States. When the Court asked Defendant if "it was [his] decision to reach out to the people in Mexico in the first place to secure their help in this regard? To bring your relative to the United States," Defendant replied, "Yes, Your Honor." ECF No. 51 at 54–55: 24–4. Defendant also confirmed that when he asked for help to bring his wife's niece into the country, he had not received any new threats from the Cartel and that the threats began after he requested their help in this matter. ECF No. 51 at 55:10–24. Defendant made no attempt to contradict or address these statements in his proffer. Additionally, by Defendant's own admission, he knew that the Cartel was dangerous and engaged in criminal conduct. *See Id.* at 56: 7–11 (stating, "I didn't want to do anything involved with

drugs, but I know what these people do for a living"); *see also id.* at 51: 9–19 (explaining that he knew he picked up illegal drugs "because that's what these people do for a living"). The Court finds that by his own admission, Defendant knowingly and willfully placed himself in a situation where it would be "probable that he would be forced to choose criminal conduct." *See Butler*, 485 F.3d at 572.

Third, Defendant has not shown that he had no reasonable legal alternative. Defendant admits that he sought the assistance of the Cartel to provide passage to his family member into the United States. ECF No. 51 at 55:10–24. However, Defendant could have worked to bring his family member to the United States through the proper legal processes.⁴ Additionally, Defendant could have contacted the police and informed them of the Cartel's illegal requests. Although Defendant's proffer seems to imply that he distrusts the police, that subjective distrust is insufficient to establish that he had no reasonable legal alternative. *See Butler*, 485 F.3d at 576. Here, Defendant did not attempt to inform the police of his plan to transport drugs under threat by the Cartel.⁵ Similarly, he did not make any attempt to inform the police after Ms. Ortega left his home in Nevada with the drugs. In fact, even when confronted by Agents after Ms. Ortega's arrest, he initially lied about his involvement in the charged crimes. Therefore, the Defendant fails to establish by a preponderance of the evidence that there was no reasonable legal alternative available.

⁴ Defendant's proffer makes no attempt to address his sworn statements before this Court or his efforts to bring his family member to the United States.

⁵ Defendant's proffer makes references to his attempts to contact the police in the past. However, it does not explain that he contacted the police regarding the Cartel's request and alleged threats related to the instant offense.

Fourth, Defendant has not established a causal link. Defendant fails to identify with any specificity what harm he was avoiding by complying with the Cartel's request or if his compliance with that request would terminate his relationship with the Cartel. Further, Defendant had other legal avenues to avoid compliance with the Cartel's requests and completely failed to avail himself of those opportunities. Therefore, the Court finds that Defendant fails to identify a causal relationship between his criminal act and avoiding some unspecified threatened harm.

CONCLUSION

Defendant must establish⁶ each of the elements by a preponderance of the evidence before he is entitled to present his evidence of duress to the jury and receive a jury instruction. *United States v. Portillo-Vega*, 478 F.3d 1194, 1197–98 (10th Cir. 2007). Defendant has failed to establish each element by a preponderance of the evidence. Accordingly, the *Government's Opposed Motion in Limine to Preclude a Justification Defense* is hereby **GRANTED**. ECF No. 66.

Dated this 25th day of May, 2023.



Alan B. Johnson
United States District Judge

⁶ Recognizing Defendant's burden, the Court views the evidence in the light most favorable to the Defendant. See *Portillio-Vega*, 478 F.3d at 1197–98.

132 F.4th 1208

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.

Salvador Nolasco ROMERO, Defendant - Appellant.

No. 23-8056

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FILED March 26, 2025

Synopsis

Background: After his guilty plea was rejected, defendant was convicted in the United States District Court for the District of Wyoming, Alan B. Johnson, J., of conspiring to distribute methamphetamine and possessing methamphetamine with intent to distribute and was sentenced to 188 months' imprisonment followed by five years' supervised release. Defendant appealed.

Holdings: The Court of Appeals, Hartz, Circuit Judge, held that:

factual basis existed for defendant to plead guilty to charge of conspiring to distribute methamphetamine; but

defendant failed to establish that trial court plainly or obviously erred by not exploring or ruling on merits of defendant's claim of duress at plea hearing, for purposes of plain-error relief;

defendant failed to establish that trial court erred by not exploring or ruling on merits of defendant's claim of duress at plea hearing, for purposes of plain-error relief; and

defendant failed to establish that trial court plainly erred by not realizing it had discretion to accept his guilty plea even if he had affirmative defense, for purposes of plain-error relief.

Affirmed.

Procedural Posture(s): Appellate Review.

***1211 Appeal from the United States District Court for the District of Wyoming (D.C. No. 2:22-CR-00120-ABJ-1)**

Attorneys and Law Firms

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Margaret M. Vierbuchen, Assistant U.S. Attorney, Office of the United States Attorney (Eric J. Heimann, United States Attorney, with her on the brief), Cheyenne, Wyoming, for Plaintiff-Appellee.

Before HARTZ, EBEL, and ROSSMAN, Circuit Judges.

Opinion

HARTZ, Circuit Judge.

Salvador Nolasco Romero (Defendant) was indicted on charges of conspiring to distribute methamphetamine and possessing methamphetamine with intent to distribute. He reached an agreement with the government to plead guilty to the conspiracy charge in return for dismissal of the distribution charge. At the change-of-plea hearing he said that he was only partially guilty and repeatedly stated that he joined the conspiracy only under duress. The district court rejected the guilty plea. Defendant proceeded to trial and was convicted on both charges. On appeal he challenges the district court's rejection of his guilty plea. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A grand jury in the United States District Court for the District of Wyoming indicted Defendant for conspiring to distribute methamphetamine, in violation of 21 U.S.C. §§ 841 and 846, and possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841. Defendant initially pleaded not guilty to both counts. Two weeks before trial was set to begin, however, the parties reached a plea agreement under which Defendant promised to plead guilty to the conspiracy charge.

The district court held a two-hour change-of-plea hearing. The district court asked Defendant, "Are you pleading guilty because you are, in fact, guilty?" R., Vol. I at 71. Defendant responded, "In part, yes, I am guilty." *Id.*

The district court then asked the parties to provide the factual basis for the plea. In response to questions from defense counsel, Defendant stated that he rented a car for a woman

named Bianca Ortega, communicated with her while she drove from Nevada to Minnesota, knew methamphetamine was in her vehicle, and knew that she passed through Wyoming on her trip.

The government asked follow-up questions. Defendant started to shift his story. He now explained that, “under threat,” he picked up a bag in California from people he referred to as “agents.” *Id.* at 74–75. These agents said they had his sister-in-law’s daughter in their custody and threatened to harm her if Defendant did not give the bag to Ms. Ortega. Afraid, Defendant complied. He drove the bag from California to Nevada and gave it to Ms. Ortega. He maintained, however, that he never looked in the bag.

The district court said that it “sounds [to the court] like there’s a defense that’s being asserted in this case of compelled violation of the law,” *id.* at 76, and it announced that it would not accept the plea. It explained that Defendant’s testimony suggested that he was “forced” to help Ms. Ortega “under threat” and, as a ***1212** result, his participation in the conspiracy was “not a voluntary situation.” *Id.* The court said it did not “want to force” Defendant to plead guilty when his testimony suggested he was “innocent.” *Id.* Defense counsel asked for a recess to speak with his client.

After the recess, defense counsel shared a “little background” about how the current case “unfolded.” *Id.* at 78. He said that the cartel had coerced Defendant into transporting money “against his will.” *Id.* at 79. The government knew of this activity, he said, but Defendant had “not been indicted because there[] [were] obvious severe problems and fundamental issues with the—such—such counts.” *Id.* At some point, Defendant “reached out” to the same cartel to help him get his sister-in-law’s daughter into the United States. *Id.* at 80. The cartel agreed to help Defendant if he first “transport[ed] a bag from California.” *Id.*

Defense counsel then said that there was “one issue” before the court. *Id.* at 81. He explained:

[Defendant] understands that if he is going to say that he was forced to do this—which is his right; he has the ability to do that or he can say that he did this willingly and knowingly and it was a favor—that one path leads to the plea agreement and the Court

potentially accepting the plea and the other path leads to trial and potentially a much harsher sentence.

Id. at 82. Counsel continued:

I believe there are two elements remaining: The elements is [sic], did [Defendant] freely and knowingly enter this? Did he do this on his own will? Or was he forced to do it—not on all the other times that he was forced to do it but this time specifically and only this time. And, also, at any point did he know that this was methamphetamine?

Id. at 83. He then offered to question Defendant again, pointing out that Defendant “needs to know that one answer results in trial, one answer results in a potential plea and taking the benefits of the plea, which is limited in this case but they’re still benefits.” *Id.*

After further discussion among the attorneys and the district court, the court questioned Defendant directly. Defendant now stated that he previously transported money for members of a Mexican cartel. He asked them to help him smuggle his sister-in-law’s daughter into the United States. The cartel promised to help Defendant if he first “handled” a drug transaction in the United States. *Id.* at 89. So Defendant travelled to California, picked up a laundry bag containing drugs, delivered it to Ms. Ortega, rented a car for her, instructed her to show up at an address in Minnesota, and gave her credit cards to use during her trip. Members of the cartel continually issued threats after he agreed to pick up the drugs.

The district court again rejected the guilty plea. It explained that it could not “accept the plea with the idea that [Defendant was] compelled to commit the crime by these bad people under threat to a family member.” *Id.* at 97.

Several months later the government offered a second (less attractive) plea agreement to Defendant, but he rejected it. Around the same time, the government moved in limine to preclude Defendant from raising a duress defense at trial. The district court granted this motion because Defendant failed to show that (1) he faced imminent and impending threats

against himself or his family; (2) he did not recklessly or negligently place himself in a situation in which it would be probable that he would be forced to choose criminal conduct; (3) no reasonable legal alternative existed to help his family member migrate *1213 to the United States; and (4) a causal relationship existed between participating in the drug conspiracy and avoiding harm.

After a four-day trial a jury convicted Defendant of both conspiracy and possession with intent to distribute. The district court sentenced Defendant to 188 months' imprisonment followed by five years' supervised release.

II. DISCUSSION

Defendant raises two arguments against the rejection of his guilty plea. First, he argues that his plea colloquy provided a sufficient factual basis to support his guilty plea and failed to establish a duress defense. Second, he argues that even if he had established a duress defense, the district court failed to recognize its discretion to accept guilty pleas accompanied by affirmative defenses, and that it should have accepted his guilty plea. For its part the government argues that Defendant waived and forfeited any claim of error and that the district court did not abuse its discretion in rejecting the plea.

We accept Defendant's uncontested assertion that there was a sufficient factual basis for his guilty plea. But, on plain-error review, we reject his claim that the district court erred in rejecting his plea. We therefore need not address the government's waiver arguments.

Before turning to Defendant's arguments, we address two preliminary matters: (1) the relationship between a duress defense and the elements of conspiracy and (2) the discretion of the district court in deciding whether to accept a guilty plea.

A. The Duress Defense and Elements of the Charged Offense

A court cannot "enter judgment on a guilty plea [without first] determin[ing] that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). "[T]o determine whether a factual basis exists for the defendant's plea, the district court must compare the conduct admitted or conceded with the elements of the charged offense to ensure the admissions are factually sufficient to constitute the charged crime." *United States v.*

Kearn, 90 F.4th 1301, 1307 (10th Cir. 2024) (ellipsis and internal quotation marks omitted).

Drug conspiracy under 21 U.S.C. § 846 has four elements: (1) the defendant and another person must agree to distribute a controlled substance; (2) the defendant must know the essential objectives of the conspiracy and share a common purpose or design with his fellow conspirators; (3) the defendant must knowingly and voluntarily participate in the conspiracy; and (4) the defendant must, through his activities, facilitate the endeavors of other alleged coconspirators or facilitate the venture as a whole (that is, interdependence must exist among the alleged coconspirators). *See United States v. Cushing*, 10 F.4th 1055, 1065–66 (10th Cir. 2021).

Defendant's plea colloquy appears to satisfy these elements. He testified that in late March or early April 2022 he reached out to Mexican cartel members and asked them to help smuggle his sister-in-law's daughter into the United States. The cartel members said they would help him if he first "handled [a] drug transaction in the United States." R., Vol. I at 89. Defendant knew that the cartel members had a history of distributing drugs. He then picked up a laundry bag containing 12 pounds of methamphetamine in California, drove it to Nevada, delivered it to Ms. Ortega, rented a car for her, instructed her to show up at an address in Minnesota, and gave her credit cards to use during her trip. We assume that these statements provide a sufficient factual basis to support a guilty plea for drug conspiracy.

*1214 The fact that Defendant maintained throughout his plea colloquy that he acted only under duress does not necessarily change this conclusion. This follows from the nature of duress as an "affirmative defense." *United States v. Dixon*, 901 F.3d 1170, 1176 (10th Cir. 2018). Traditionally, duress "excuse[s] criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury" and the "threat caused the actor to engage in conduct violating the literal terms of the criminal law." *United States v. Bailey*, 444 U.S. 394, 409, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). To prove duress the defendant must show: "(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm." *United States v. Arias-Quijada*, 926 F.3d 1257, 1260 (10th Cir. 2019) (internal quotation marks omitted). These elements are ordinarily distinct from the elements of the offense itself. *See Dixon v. United States*, 548 U.S. 1, 6, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006) ("[T]he existence of duress" in a

case “normally does not controvert any of the elements of the offense itself.”¹ In other words, rather than *contradicting* the elements necessary to establish guilt, duress *overrides* them and “negates a conclusion of guilt.” *Id.* at 7, 126 S.Ct. 2437 (internal quotation marks omitted).

This point can be expressed in terms of fundamental principles of criminal law. “Criminal liability is normally based on the concurrence of two factors, an evil-meaning mind [*i.e. mens rea*] and an evil-doing hand [*i.e. actus reus*]....” *Bailey*, 444 U.S. at 402, 100 S.Ct. 624 (brackets and internal quotation marks omitted); *see also* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.1 (3d ed. 2018) (W. LaFave) (“It is commonly stated that a crime consists of both a physical part and a mental part; that is, both an act or omission ... and a state of mind.”). Duress assumes that the defendant’s conduct satisfied these components. *See Bailey*, 444 U.S. at 402, 100 S.Ct. 624 (explaining that “coercive conditions” may “negate[] a conclusion of guilt” for the evil-doing hand “even though the necessary *mens rea* was present”). Indeed, the rationale behind the duress defense:

is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Nor is it that the defendant has not engaged in a voluntary act. Rather it is that, even though he has done the act the crime requires and has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is excused because he lacked a fair opportunity to avoid acting unlawfully.

² W. LaFave § 9.7(a) (footnotes and internal quotation marks omitted).

Duress is therefore typically independent of the intent with which the crime is committed; rather, it concerns *why* the crime was committed. *See Rosemond v. United States*, 572 U.S. 65, 86, 88–90, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014) (Alito, J., concurring in part, dissenting in part) (explaining that “except in narrow circumstances, necessity and duress do

not negate the *mens rea* required for conviction” because the defenses speak to a person’s **1215 motives*—not his intent). Although motive is often persuasive regarding the plausibility that an accused committed the offense, it “is not an essential element of a criminal offense.” *United States v. Tolliver*, 730 F.3d 1216, 1223 (10th Cir. 2013) (internal quotation marks omitted); *see also Havens v. James*, 76 F.4th 103, 114 n.12 (2d Cir. 2023) (“It is well established that the ‘motives’ that prompt one’s conduct are not the same as the mental state associated with that conduct. The criminal law distinguishes between motive, on the one hand, and ‘intent (or purpose),’ on the other.”).

Three cases illustrate how these abstract principles play out in practice. In each, the defendant claimed that fear of harm was inconsistent with the *mens rea* required for the offense. In *Dixon v. United States* the defendant was convicted of *knowingly* receiving a firearm while under indictment and *willfully* making false statements in connection with the acquisition of a firearm. *See* 548 U.S. at 3, 126 S.Ct. 2437. The defendant claimed that she committed these charged acts only because her boyfriend threatened to kill her or hurt her daughters if she did not comply with his commands. *See id.* at 4, 126 S.Ct. 2437. Before the Supreme Court she argued that it was improper to place on her the burden of proving duress, because due process places the burden on the government to prove beyond a reasonable doubt all the elements of the offense and the government could not prove the necessary intent without establishing the absence of duress. She contended that she could not *knowingly* receive a firearm or *willfully* make false statements because “she did not freely choose to commit the acts in question.” *Id.* at 6, 126 S.Ct. 2437. The Supreme Court disagreed. It explained that a person can still *know* that she is making false statements and breaking the law by buying a firearm while under indictment even if her “will was overborne by the threats made against her and her daughters.” *Id.* Accordingly, the Court held that “the defense of duress does not negate a defendant’s criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully.” *Id.* at 7, 126 S.Ct. 2437; *see also Bailey*, 444 U.S. at 396 n.1, 408, 415 n.11, 100 S.Ct. 624 (explaining that duress and necessity do not negate the *mens rea* of 18 U.S.C. § 751, which makes it unlawful to *knowingly* escape the custody of a penal institution).

In *Martin v. Ohio*, 480 U.S. 228, 230, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), the Supreme Court considered whether due process permitted the State of Ohio to place the burden of proving self-defense on a defendant charged with aggravated

murder of her husband. Under the Ohio statute, aggravated murder consisted of “purposely causing the death of another with prior calculation or design.” *Id.* at 233, 107 S.Ct. 1098. The defendant argued that she acted in self-defense, which required proof that: (1) she was “not at fault in creating the situation giving rise to the argument” with the victim, (2) she “had an honest belief that she was in imminent danger of death or great bodily harm, and that her only means of escape from such danger was in the use of such force,” and (3) she “did not violate any duty to retreat or avoid danger.” *Id.* at 230, 107 S.Ct. 1098. She argued that “the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former.” *Id.* at 234, 107 S.Ct. 1098. The Supreme Court was not persuaded. It held that Ohio could place the burden of proving self-defense on the defendant because “none of her self-defense evidence raised a reasonable doubt about the State's proof that she purposefully killed with prior calculation and design.” *Id.* at 233, 107 S.Ct. 1098. In so holding, the Court recognized that a defendant ***1216** can *purposefully* kill another even if she has an “honest belief that she [is] in imminent danger of death or great bodily harm” absent prompt action. *Id.*

Finally, in *United States v. Leal-Cruz*, 431 F.3d 667, 668 (9th Cir. 2005), the Ninth Circuit held that a defendant could constitutionally be required to bear the burden of proving duress as a defense to a conviction under 8 U.S.C. § 1326 for attempted illegal reentry into the United States after deportation. The *mens rea* required for conviction was “having the purpose, *i.e.*, conscious desire, to reenter the United States without the express consent of the Attorney General.” *Id.* at 671 (brackets and internal quotation marks omitted). The defendant testified that he entered the United States to escape Mexican police officers who previously “beat him up and left him for dead.” *Id.* at 669. The Ninth Circuit explained that a defendant can have “the ‘conscious desire’ to enter the country, even if the act of crossing the border was done to escape harm,” *id.* at 673, because duress “does not necessarily negate the intent required to commit a specific intent offense,” *id.* at 671.

These cases teach that fear (as with duress) typically does not negate the *mens rea* required for conviction. Ms. Dixon *knowingly* and *willfully* committed her crimes; Ms. Martin *purposely* and *with prior calculation and design* committed hers; and Mr. Leal-Cruz had the *conscious desire* to commit his. These *mentes reae* existed even if all three people acted only to avoid adverse consequences. *See Rosemond*, 572 U.S. at 81 n.10, 134 S.Ct. 1240 (recognizing that “the intent to

undertake some act is perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur” (ellipsis and internal quotation marks omitted)).

With this background in mind we hesitate to say that duress negates the *mens rea* or *actus reus* of drug conspiracy. We need not resolve this issue definitively, however, as the government's brief on appeal appears to agree—and certainly does not dispute—that Defendant admitted the elements of conspiracy and that duress does not negate those elements. We therefore proceed from the assumption that there was a sufficient factual basis for the elements of conspiracy.

B. Discretion to Accept or Reject a Guilty Plea

We next address the district court's discretion in accepting or rejecting guilty pleas. Although Fed. R. Crim. P. 11 states that “the court must determine that there is a factual basis for the plea” before it accepts a plea, it says nothing about possible affirmative defenses. In the absence of a mandatory rule, the circuit courts to address the issue have apparently all agreed that a district court has discretion to accept a defendant's guilty plea, even if the proffered facts support an affirmative defense, so long as the elements of the offense are established. *See, e.g., United States v. Ortiz*, 927 F.3d 868, 877–78 (5th Cir. 2019) (allowing district courts to accept guilty pleas accompanied by an “affirmative defense that does not negate any offense element”); *United States v. Smith*, 160 F.3d 117, 123 (2d Cir. 1998) (concluding no error in accepting guilty plea where defendant “allude[s]” to a justification defense that “negates none of the offense elements”); *cf. United States v. Buonocore*, 416 F.3d 1124, 1129 (10th Cir. 2005) (recognizing that “when there is a strong factual basis for the plea, it is not unconstitutional for a court to accept a guilty plea despite the defendant's professed belief in his innocence”). Since we assume that Defendant admitted the elements of conspiracy, the district court could have accepted his guilty plea despite his claim of duress.

By the same token, however, a district court also has discretion to *reject* a ***1217** guilty plea when the defendant claims his innocence. *See United States v. Lucas*, 429 F.3d 1154, 1157–58 (7th Cir. 2005) (holding no error in rejecting guilty plea where defendant equivocated on an element of the offense and testified that she only acted “out of ignorance and duress and stress” (internal quotation marks omitted)); *United States v. Rashad*, 396 F.3d 398, 401 (D.C. Cir. 2005) (“The district court is certainly not required to accept every guilty

plea it is tendered, let alone the guilty plea of every defendant who maintains his innocence; indeed, the district court has considerable discretion to decide whether a guilty plea is appropriate in the circumstances of the particular case.”); *United States v. Gomez-Gomez*, 822 F.2d 1008, 1011 (11th Cir. 1987) (“When a defendant attempts to couple a guilty plea with an assertion of facts that would negate his guilt, a judge may properly treat this assertion as a protestation of innocence. Though a judge may enter a judgment upon a guilty plea offered under these circumstances, he is not required to do so.”); *cf. Buonocore*, 416 F.3d at 1131 (relying on the “broad discretion that Rule 11 affords district courts in rejecting [pleas under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970),] and nolo pleas” to hold that district court can adopt a “general policy against *Alford* or nolo pleas”).²

C. Rejection of Defendant's Guilty Plea

Defendant does not challenge the above understanding of a district court's discretion in handling guilty pleas accompanied by affirmative defenses. Instead, he makes two arguments specific to the rejection of his plea. Neither requires reversal.

First, noting that the district court ultimately (months later) ruled that Defendant could not raise the defense at trial because of lack of factual support, Defendant argues that the flaws in his duress defense were sufficiently apparent during the plea colloquy that the judge should have rejected the duress defense from the outset and accepted his plea. But Defendant did not raise this argument at the plea hearing (nor did the government for that matter). This argument is therefore forfeited, and we review only for plain error. *See United States v. Howard*, 784 F.3d 745, 748 (10th Cir. 2015) (“[B]ecause Defendant failed to object below on the grounds argued here [on appeal], we review only for plain error.”); *United States v. Weeks*, 653 F.3d 1188, 1198 (10th Cir. 2011) (applying plain-error review where defendant never objected in district court that his plea had not been knowing or voluntary but then later argued on appeal that his plea was not knowing and voluntary).³

To obtain a reversal on the grounds of plain error, the objecting party must establish that (1) the lower court committed an error, (2) the error was plain, (3) the error prejudiced that party in that a contrary result would have been likely in the absence of the error, and (4) leaving the error

uncorrected would seriously affect “the fairness, integrity, or ***1218** public reputation of judicial proceedings.” *Howard*, 784 F.3d at 748 (internal quotation marks omitted). “An error is plain if it is clear or obvious under current, well-settled law,” in that “there is precedent directly on point from the Supreme Court or the Tenth Circuit, or there is a consensus in the other circuits.” *United States v. Warrington*, 78 F.4th 1158, 1167 (10th Cir. 2023) (internal quotation marks omitted). Failure to establish any one of these elements precludes reversal. *See id.* at 748–49.

We can easily reject Defendant's argument for failure to satisfy the second requirement; he does not show that the district court *plainly* or *obviously* erred by not exploring or ruling on the merits of Defendant's claim of duress at the plea hearing. To begin with, Defendant does not provide any authority suggesting that a court *must* cross-examine a defendant at the guilty-plea stage about the merits of a potential affirmative defense before rejecting a guilty plea. And there are cases suggesting the contrary. *See Gomez-Gomez*, 822 F.2d at 1011 (“[W]hen a defendant casts doubt upon the validity of his guilty plea by protesting his innocence or by making exculpatory statements, the court may resolve such doubts against the plea.”); *United States v. Tillman*, 504 F. App'x 729, 733 (10th Cir. 2012) (finding no error in rejection of guilty plea where defendant “initially stated he was not guilty,” “disputed many of the facts set forth by the government,” and “changed his story” throughout the plea colloquy); *United States v. Demikh*, 683 F. App'x 533, 535 (8th Cir. 2017) (finding no error in rejecting guilty plea where defendant “equivocated throughout both his plea hearings on whether [an individual] had coerced him into committing armed bank robbery” because “a coercion defense ‘negates a conclusion of guilt’ ”). We recognize that two of these cases are unpublished. But even an unpublished opinion can show that the law is not *clearly* to the contrary. *Cf. Grissom v. Roberts*, 902 F.3d 1162, 1168 (10th Cir. 2018) (“[A]n unpublished opinion can be quite relevant in showing that the law was *not* clearly established.... [W]e would be hard-pressed to say that a proposition of law was clearly established at a time when an unpublished opinion by a panel of this court said the opposite.”).

In any event, we can also reject Defendant's argument for failure to establish the first requirement of plain error —namely, that there be an error. We see no abuse of discretion by the district court in this case. Consider the context. It is apparent that defense counsel did not anticipate that Defendant would assert an affirmative defense at his

plea colloquy. When defense counsel first asked Defendant questions to solicit the factual basis for the guilty plea, Defendant did not offer any story of duress. It was only when the government asked follow-up questions that Defendant first mentioned that he participated in the conspiracy because “agents” in California threatened to harm his sister-in-law’s daughter. R., Vol. I at 75. Later, when Defendant was questioned by the district court, he yet again shifted stories. He explained that he used to work for a Mexican drug cartel and asked the cartel to smuggle his sister-in-law’s daughter into the United States. The cartel agreed to help if Defendant participated in a drug transaction in the United States and then used threats of violence to his relative to ensure that Defendant followed through on the drug transaction.

To be sure, even Defendant’s final account presented a questionable duress defense. But defense counsel clearly thought that the account precluded a guilty plea. And even if further questioning may have made a duress defense unsustainable, we think it would have been inadvisable for *1219 the district court to test such a defense when defense counsel was obviously unprepared. For one thing, there was no reason to think that the matter needed to be resolved on the spot. If defense counsel later researched the facts and the law and determined that Defendant had no duress defense, there was no bar to a second guilty-plea proceeding where the same plea bargain likely would have been available if there had been little delay. Rejecting the plea in the circumstances was the prudent course.

Defendant next contends that the district court did not realize that it had discretion to accept the plea even if Defendant had an affirmative defense, and therefore erred in not exercising that discretion. The problem with that contention is, again, that it was not raised until this appeal. We recognize that Defendant and defense counsel repeatedly urged the district court to accept the guilty plea. But defense counsel did not inform the court that it could accept a guilty plea accompanied by protestations of innocence. After the district court first rejected the guilty plea, defense counsel did not raise any objections but, rather, asked for a recess. After the recess, defense counsel summarized the district court’s ruling. He emphasized that Defendant had two “path[s]” before him. R., Vol. I at 82. Defendant could admit that he “willingly and knowingly” participated in the conspiracy *or* he could continue to insist that he acted only under duress. According to defense counsel, if Defendant chose the latter path, “trial and potentially a much harsher sentence” would follow. *Id.* If defense counsel thought that the district court might change

its mind on accepting the plea if it only knew that it had discretion to do so despite the coercion claim, he kept that thought to himself.

Thus, the district court was not put on notice that it was making an error by assuming it could not accept the plea. If it had been put on notice, we would have had an unambiguous record of whether the court was exercising discretion or thought it had no discretion. And if the court really had thought that it lacked discretion, Defendant might have changed the court’s mind. This is why we require parties to preserve issues in the trial court. When they fail to do so, they forfeit the issue on appeal and we review their arguments only for plain error. *See United States v. Vidal*, 561 F.3d 1113, 1118 (10th Cir. 2009) (applying plain-error review because a “general plea of leniency to the district court judge” is not “an express objection challenging the validity of [a] plea”); *Buonocore*, 416 F.3d at 1127–28 (reviewing new argument for plain error because defendant argued in district court only that the court could not have a policy against *Alford* pleas but argued on appeal that the district court’s error was mischaracterizing defendant’s proffered plea as an *Alford* plea).

Again, Defendant has not established the second element of plain-error review—a *plain* error. His brief on appeal argues that two statements by the district court prove that it did not think it had any discretion to accept the plea: (1) “I cannot accept the plea with the idea you were compelled to commit the crime by these bad people under threat to a family member,” R., Vol. I at 97, and (2) “I could not accept the guilty plea,” *id.* at 78. We are not persuaded.

We “traditionally presume, absent some indication in the record suggesting otherwise, that trial judges … know the law and apply it in making their decisions.” *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1201 (10th Cir. 2007) (Gorsuch, J.) (brackets and internal quotation marks omitted). Accordingly, we will presume *1220 that the district court knew that it had discretion.

That presumption is hardly overcome by the two quoted statements by the district court. To begin with, Defendant omits that before using *cannot* and *could not*, the district court said, “I *will not* accept” the guilty plea. R., Vol. I at 76 (emphasis added). The phrase *will not* suggests the district court was expressing its will—that is, its discretion—to reject the guilty plea, not simply obeying a perceived legal command. Further, the phrases *cannot* and *could not* do not

necessarily imply a speaker thinks it has no discretion in a decision. Such language is often used in ordinary discourse simply to reflect a personal decision. When a homeowner tells a neighbor that “I cannot let you borrow the lawnmower” or a parent tells a child that “I could not let you go to the movies yesterday,” the speakers imply that they considered several options before ultimately choosing one over the other. They do not necessarily imply that they thought themselves barred from choosing an otherwise viable option. So too here. The district court’s statements do not suggest that it saw itself as unable to accept a guilty plea accompanied by protestations of innocence because of a legal bar. *Contrast Rashad*, 396

F.3d at 402 (concluding error where district court stated that a defendant “cannot plead under the law” because he said “he [was] not guilty” and was not “willing to admit guilt”).⁴

III. CONCLUSION

We **AFFIRM** the judgment below.

All Citations

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Footnotes

- 1 We recognize that it is possible that duress could controvert some offense elements. For instance, the Supreme Court has suggested that duress may negate a *mens rea* element requiring a defendant to act *maliciously* because *malice* means “the intent, *without justification or excuse*, to commit a wrongful act.” *Dixon*, 548 U.S. at 6 n.4, 126 S.Ct. 2437 (emphasis added) (brackets and internal quotation marks omitted).
- 2 “A plea of nolo contendere is a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.” *Buonocore*, 416 F.3d at 1127 n.2 (internal quotation marks omitted). An *Alford* plea “is a plea denominated as a guilty plea but accompanied by protestations of innocence.” *Id.* “Courts determining whether to accept *Alford* pleas are to treat them as pleas of nolo contendere.” *Id.*
- 3 Judge Rossman would conclude, under the circumstances, Defendant preserved this argument. But she agrees that Defendant’s argument fails even if preserved.
- 4 In a Rule 28(j) letter Defendant pitches a new argument. He argues that *In re Vasquez-Ramirez*, 443 F.3d 692 (9th Cir. 2006), suggests that the district court actually had *no discretion whatsoever* to reject his guilty plea because the plea satisfied all of Rule 11(b)’s requirements—including having a sufficient factual basis. But “it is well established that we will not consider issues raised for the first time in a Rule 28(j) letter.” *Flores-Molina v. Sessions*, 850 F.3d 1150, 1172 n.16 (10th Cir. 2017) (brackets and internal quotation marks omitted). And even if we did consider *In re Vasquez-Ramirez*, we are not convinced that it helps Defendant. *In re Vasquez-Ramirez* found that a district court erred in rejecting an unconditional guilty plea *unaccompanied* by any protestations of innocence that otherwise satisfied Rule 11(b)’s requirements. See 443 F.3d at 694–95; see also *United States v. Martin*, 528 F.3d 746, 750 (10th Cir. 2008) (citing *In re Vasquez-Ramirez* to express “doubts” on whether a district court can reject a guilty plea simply to “avoid confusing the jury or complicating the evidentiary issues”). But Defendant did not offer an unconditional guilty plea unaccompanied by protestations of innocence. Rather he repeated the same refrain throughout his plea colloquy: he acted only under duress. *In re Vasquez-Ramirez* recognizes that when a defendant “protests his innocence,” as in this case, the “trial court has discretion to ... reject a guilty plea.” 443 F.3d at 700 (internal quotation marks omitted).