

CASE NO: _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

(Eleventh Circuit Court of Appeals No. 16-10395)
(Southern District of Florida No. 15-CR-20531-UU-1)

STEPHEN TELEMAQUE,

Petitioner,

vs

THE UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

Stephen Telemaque was subjected to egregious but correctable injustices resulting from the Eleventh Circuit dismissing a portion of his appeal, and affirming on the other issues.

Question One

Whether in the exercise of its supervisory jurisdiction over the courts of appeals, this Honorable Court should issue its Great Writ, because it is clear that the Eleventh Circuit reversibly erred when it dismissed his appeal based upon the appeal waiver in his plea agreement where that appeal waiver was invalid and unenforceable, because it was founded upon a mistaken, erroneous premise? Telemaque moved to withdraw his plea when he learned of the mistake. There was no meeting of the minds. The plea agreement was based upon mistaken information as to the ratio to calculate the sentence for an ethylone offense, and thus the plea agreement, including the appeal waiver, was an invalid and unenforceable contract.

Question Two

Whether in the exercise of its supervisory jurisdiction over the courts of appeals, this Honorable Court should issue its Great Writ, where it is clear that the Eleventh Circuit reversibly erred when it affirmed the denial of Telemaque's timely motion to withdraw his guilty plea as soon as Telemaque became aware that the agreement was based upon erroneous, mistaken information about the drug ratio used to calculate the sentence?.

Question Three

Whether in the exercise of its supervisory jurisdiction over the courts of appeals, this Honorable Court should issue its Great Writ, because it is clear that the Eleventh Circuit reversibly erred when it affirmed even though the sentence imposed was unreasonable, excessive, unduly harsh, and illegal because: the sentence imposed was calculated based upon an incorrect ratio for ethylone; imposition of an upward variance to 180 months from the advisory range of 108-135 for injuries to officers was improper double-counting because Telemaque already had received a six level upward adjustment for those same injuries.

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Second Reason

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Third Reason

The sentence was unreasonable, excessive, unduly harsh, and illegal not only because: (1) it was calculated based upon an incorrect, erroneous ratio for the substance ethylone (street name Molly); but also because (2) imposition of an upward variance to 180 months from the advisory range of 108 to 135 for injuries to officers constituted improper double-counting because Telemaque already received a six level upward adjustment for those injuries. To impose an upward variance was unfair and was impermissible double-counting. 29

Part 1

The 180-months sentence imposed in this case should be vacated and the cause remanded for a new sentencing hearing because it was calculated based upon an incorrect, erroneous ratio for the substance ethylone (street name Molly). 30

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT**

Parties to the Proceedings

In the United States District Court for the Southern District of Florida, Case No. 15-CR-20531-UU-1, Stephen Telemaque and one codefendant named Guerra, were the defendants. The United States of America was the prosecution. In the United States Court of Appeals for the Eleventh Circuit, Case No. 16-10395, Stephen Telemaque was the appellant and the United States was the appellee.

Stephen Telemaque hereby respectfully petitions for a writ of certiorari to review the order of October 7, 2016, dismissing his appeal in part, and its opinion

entered on July 11, 2017, affirming his conviction and sentence as to the issue that was litigated on the merits.

The Opinions Below

The judgment of the United States District Court for the Southern District of Florida entered on January 27, 2016, Case No. 15-CR-20531-UU, Docket No. 83, adjudicated Telemaque guilty of conspiracy to possess with intent to distribute a detectable amount of ethylone in violation of 21 U.S.C. §846, and sentenced him to prison for 180 months, three years supervised release, and a \$100 special assessment. Telemaque took a direct appeal to the United States Court of Appeals, Eleventh Circuit.

In October of 2016 the Eleventh Circuit entered an order granting in part, the government's motion to dismiss the appeal based upon the appeal waiver in the plea agreement, dismissing issues 1 and 3. The government's motion to dismiss was denied in part, however, as the second issue challenging the denial of a motion to withdraw the guilty plea, was outside the scope of the waiver. The government was directed to file a brief on that issue. Telemaque's reply brief was specifically limited to that issue. On July 11, 2017, the Eleventh Circuit entered a seven-page decision affirming the denial of the motion to withdraw the guilty plea.

The judgment of the district court, the decision of the Eleventh Circuit, and the order of partial dismissal are included in the Appendix at the end of this petition. Telemaque timely filed a petition for rehearing that was denied by order of August 28, 2017. A copy of that order also is in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 11, 2017. A petition for rehearing was timely filed and was denied by order of August 28, 2017.

Pursuant to Rule 13.1 of the Supreme Court Rules this petition is timely filed within 90 days of the order denying the petition for rehearing. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 and Rules 10.1(a) and (c) and Rule 13 of the Supreme Court Rules. The jurisdiction of the Eleventh Circuit Court of Appeals was invoked under Title 28 of the United States Code, Section 1291.

CONSTITUTIONAL PROVISIONS

Fifth Amendment

**Capital Crimes; double jeopardy; self-incrimination;
due process; just compensation for property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in the cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Introduction

This petition is addressed to an appeal from a conviction and sentence in a case involving ethylone (street name “Molly”). There was a plea agreement with an appeal waiver, but there were highly meritorious issues presented for review including that the waiver was invalid due to mutual mistake, and also that the sentence was unreasonable for three reasons: (1) erroneous calculation of drug ratio; (2) impermissible upward variance; and (3) impermissible double-counting.

Telemaque requested oral argument based upon a question of first impression, specifically a clear conflict within the Southern District of Florida with regard to the correct ratio for ethylone sentencing calculations, resulting in significantly disparate sentences by different judges in the district, with at least three different ratios being applied, 1 to 250, 1 to 380, and 1 to 500. The result is wild sentencing disparity and lack of uniformity. Resolution was and still is necessary to end the confusion and unfairness.

Telemaque argued on appeal, based upon conflict within the district, that he should have been permitted to withdraw his guilty plea when he learned that the recommended sentence in his plea agreement was based upon an incorrect, ***mistaken drug ratio***; and that an upward variance to 180 months, from an advisory range of 108-135 for “bad judgment” resulting in victim injuries, violated his

rights to Fifth and Sixth Amendment fairness, due process, and a reasonable sentence. His offense level already had been ***adjusted upward by six levels for those injuries.***

STATEMENT OF THE CASE AND NECESSARY FACTS

Telemaque was charged by indictment with ethylone offenses. He entered into a written plea agreement and fact statement. He filed objections to the presentence investigation report, letters from family and friends, and a sentencing memorandum. Prior to sentencing his retained attorney moved to withdraw for a possible attorney-client conflict. CJA counsel was appointed and filed a motion to withdraw the guilty plea. The motion was denied. For conspiracy in Count 1, Telemaque was sentenced to 180 months, three years supervised release, and a \$100 assessment. The remaining counts were dismissed.

Telemaque filed a notice of appeal, and a *pro se* motion for reconsideration of the denial of the motion to withdraw guilty plea. The motion was stricken because it was filed *pro se*. CJA counsel moved to withdraw, his motion was granted undersigned was appointed as appellate counsel and the appeal ensued.

The superseding indictment charged Telemaque with possession with intent to distribute "...3,4-methulenedixyethylcathinone, commonly referred to as ethylone, or its analogues, a Schedule I controlled substance, in violation of Title

21, United States Code, Section 841(b)(10)(C).” Additionally there were substantive counts of ethylone possession, forcibly resisting federal agents, and a forfeiture allegation.

Under the terms of the plea agreement Telemaque would plead guilty to the conspiracy in Count 1, the government would dismiss the other counts at sentencing, and the parties agreed to jointly recommend a sentence of 151 months in prison and three years’ supervised release. Telemaque agreed to waive his appellate rights unless (1) the sentence imposed exceeded the maximum permitted by statute, or (2) the government took an appeal.

The factual proffer stated that if the case went to trial the government would prove beyond a reasonable doubt, that a confidential informant told authorities that codefendant Guerra was Telemaque’s source for “Molly” (ethylone). At the direction of law enforcement the CI arranged to purchase 500 grams of Molly from Telemaque and Guerra. There were controlled calls to arrange a meeting. The meeting was recorded. The informant exchanged \$3,000 of law enforcement funds for just under 500 grams of Molly at an auto body shop in North Miami. Guerra and Telemaque were both involved. A lab determined that there were 444.6 grams of ethylone, or Molly, a Schedule I controlled substance.

The proffer continued: Guerra told the CI that the price for a kilogram of Molly was \$6,200. They discussed the price of a half kilogram, which resulted in Guerra and Telemaque agreeing to a half “minus a pinch” for \$3,000. After the sale, Guerra and Telemaque told the CI to contact Telemaque for future deals, and that he would sell Molly only in kilogram quantities.

The CI called Telemaque to buy two kilograms. Telemaque said he had one kilogram and Guerra was getting the second. Agents commenced surveillance at Telemaque’s house. Guerra arrived. He went inside, came out with Telemaque, and they both got into a Nissan registered to Telemaque’s girlfriend. Telemaque drove. Guerra was the passenger. The agents followed the Nissan. Unmarked cars pulled up in front and in back of the Nissan and on both sides, blocking movement in all directions. Officers wearing “POLICE” vests exited their vehicles. One activated flashing blue emergency lights. In an attempt to escape Telemaque drove away, turned, driving against traffic, and hit a civilian vehicle. Law enforcement vehicles were damaged. Telemaque drove fast followed by law enforcement with emergency lights on. He lost control, his car spun, and collided with a concrete sign. He fled on foot and was apprehended a short distance from the crash.

In the wreckage of the Nissan, officers found a bag containing 999.6 grams of ethylone that Guerra possessed during the chase. Guerra and Telemaque both were aware of the contents.

At the change of plea hearing Telemaque said that he signed the plea agreement, discussed it with counsel, and understood it. The court reviewed the terms with Telemaque, that he would plead guilty to Count 1, the parties would jointly recommend a sentence of 151 months, and that there was an appeal waiver. The court also elicited that Telemaque agreed with the proffered facts. Telemaque pled guilty. The court accepted the plea and ordered a presentence investigation report.

In the PSR the “Offense Level Computation” stated that Telemaque was responsible for 1,444.2 grams of ethylone, a substance not specifically referenced in the guidelines; DEA chemists determined that ethylone is similar to MDEA; and one gram of MDEA is equivalent to 500 grams of marijuana, resulting in base offense level 28. The exact language in the PSR states that Telemaque (emphasis added): “. . . DEA chemists have opined that ethylone is substantially similar to MDEA. Pursuant to the Drug Equivalency Tables, one gram of MDEA is equivalent to 500 grams of marijuana. Therefore ***one gram of ethylone is equal to 500 grams of marijuana, and the defendant is responsible for the equivalent of***

722,100 grams or 722.1 kilograms of marijuana. Pursuant to §2D1.1(c)(6), an offense involving at least 700 kilograms but less than 1,000 kilograms of marijuana has a **base offense level of 28.**”

Additionally, the PSR imposed a **six-level victim-related upward adjustment** “[b]ecause the defendant knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom, the offense level is increased by six levels, §3A1.2(c)(1).” The offense level thus was raised to 34 (28+6) and then lowered by 3 for timely acceptance of responsibility, to level 31.

In objections to the PSR, the defense argued that the offense level was incorrect because it was **based on erroneous information**, because the conversion of 1 gram of ethylone to 500 grams of marijuana was wrong. The correct ratio, based upon expert analysis and testimony is 1 to 250, as Honorable Cecilia Altonaga, United States District Judge for the Southern District of Florida, held in a similar case shortly after Telemaque’s guilty plea. Within two weeks of the execution of Telemaque’s plea agreement, in *United States v. Mario Alberto Malespin*, Case No. 15-CR-20350-CMA (DE-55), Judge Cecilia Altonaga found that under U.S.S.G. §2D1.1 n.6, that **1 to 250 was the correct conversion ratio for ethylone**. He asked the court to apply that ratio to calculate base offense level.

A correct guideline calculation must be made before sentence is imposed. Although the parties agreed to recommend 151 months, the term ultimately would be determined by the court after a proper guidelines calculation and careful analysis of 18 U.S.C. §3553 factors. The memorandum cited *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005).

A conversion ratio of 1 to 250 for ethylone would have lowered the guideline calculation by four points resulting in the imposition of a reasonable sentence. The government responded and the defense replied that the government relied on inaccurate facts.

Four days before sentencing, retained counsel filed a motion to withdraw alleging attorney-client irreconcilable differences. Telemaque sent a *pro se* letter-pleading to the court stating that he had a conflict with counsel. The 1 to 500 ratio in the plea agreement was incorrect, and the correct ratio based upon detailed scientific testimony as Judge Altonaga ruled in *Malespin*, the correct ratio is 1 to 250:

I am not a lawyer nor a scientist, but based on what I have read I feel very strongly about this and I would not have taken this current plea had I known this information at the time. But I did not find out till after 3 weeks after I took my plea.

At a hearing in December 2015 on the motion for withdrawal of retained counsel, the court heard arguments and then retired to chambers with Telemaque and his attorney for *in camera* proceedings that are sealed. In the public hearing the prosecutor explained that they reached the joint recommended sentence of 151 months based on the two victims of the alleged assault with a deadly weapon (a vehicle). He said that ***the officers both agreed to a sentence of 151 months.*** Defense counsel added that "...that recommended sentence of 151 was based in part [on] Mr. Telemaque's of [sic] having the current calculation of one to five hundred." The prosecutor responded that he was not concerned about the drugs when he made the calculations.

Retained counsel was allowed to withdraw. CJA counsel was appointed and filed a motion to withdraw the guilty plea, alleging that Telemaque entered into a guilty plea with a joint recommendation for a sentence of 151 months ***based on advice of counsel that the ratio of ethylone was 1 to 500 grams of marijuana.*** Another judge in the district recently held that the ratio is 1 to 250 grams. For that reason, the plea agreement was based on a factual mistake and should be withdrawn. The government responded *inter alia*, that pursuant to the terms of the agreement Telemaque knew that he could not withdraw his plea even if the sentence imposed would be more severe than he expected.

The plea agreement not only obliged Telemaque to agree to a sentence more than three years greater than the low end of a plea straight up to the indictment, but also it contained the insidious appeal waiver. The district court found that Telemaque did not meet requirements for withdrawal of plea. The motion was denied.

At sentencing Telemaque asked that the court not be bound by the joint recommendation of 151 months. Defense counsel moved to withdraw. The court “split the baby” and applied a 1 to 380 ratio, rather than the plea agreement’s 1 to 500 or Judge Altonaga’s 1 to 250, which resulted in a guidelines range of 108 to 135 months. The government stood by its plea agreement recommendation of 151 months. The defense argued for a sentence at the low end of the 108 to 135 range.

The court then surprised everyone, stating that Telemaque used bad judgment, referred to injuries suffered by the codefendant and two officers, and concluded that Telemaque was a danger to society, thereupon announcing its intent to vary upward from the 108-135 advisory range, to a sentence of 180 months. The defense renewed its objections.

In its opinion the Eleventh Circuit concluded that the plea was knowing and voluntary, that Telemaque had close assistance of counsel, and that the denial of the motion to withdraw the guilty plea should be affirmed.

Reasons for granting the writ

First Reason

The Eleventh Circuit reversibly erred when it refused to find that the district court erred and abused its discretion when it denied Telemaque's motion to withdraw his guilty plea, once he realized that the agreement was based upon an erroneous, mistaken ratio to calculate sentencing guidelines for ethylone. The motion was made after entry of the plea, but before sentencing on grounds that the agreed recommended sentence of 151 months was founded upon mistaken information concerning the drug conversion ratio. The district court ultimately denied the motion to withdraw, relieved Telemaque of the provision in the plea agreement that provided for a joint recommended sentence of 151 months, and allowed him to challenge the proper drug conversion ratio. The court found the advisory guideline imprisonment range was 108 to 135 months, but then saw fit to impose an upward variance to a sentence of 180 months in prison.

It is worth noting that two Southern District of Florida cases on which the government relied in the Eleventh Circuit, *United States v. Fernandez*, No. 15-CR-20249-DG, and *United States v. Brey*, No. 14-CR-20488-JLK, *affirmed* 2015 WL 552118 (11th Cir. 2015), both were decided prior to *Malespin*. The judges in those two cases did not have benefit of the eminently qualified defense expert in

Malespin, or the extensive and thorough expert testimony he gave, explaining the proper ratio calculation. That testimony was the foundation for Judge Altonaga’s well-reasoned and fact-based ruling. In *Fernandez* and *Brey* the ratio was found to be 1 to 500, based on the insufficient, inaccurate, or incomplete expert testimony given by government experts who were less competent with fewer qualifications.

On appeal, the government relied on *United States v. Symington*, 781 F.3d 1308, 1312 (11th Cir. 2015), which the Eleventh Circuit cited in the slip opinion, pages 5-6, for the proposition that denial of a motion to withdraw a guilty plea is reviewed for an abuse of discretion. The holding in *Symington*, however, was that under the totality of the circumstances surrounding the plea, the district court did abuse its discretion by denying Symington’s motion to withdraw his plea after he presented a “fair and just reason” to support the motion. As a result, the Eleventh Circuit was “compelled” to vacate the conviction and sentence, and remand with directions to the district court to allow Symington to withdraw his guilty plea. 781 F.3d at 1314.

The facts in *Symington* are somewhat different than those in the present case. Specifically, in *Symington* everyone agreed that the defendant was not eligible for enhanced sentencing – and yet he was found to be eligible for sentencing under the

ACCA, and punished accordingly. In that situation, the district court was found to have abused its discretion in refusing to allow withdrawal of the plea. The same relief should be granted for Stephen Telemaque because the law in the Southern District of Florida regarding the drug ratio was reduced significantly (by one half, in fact) based upon thorough, professional, expert testimony. Telemaque's plea agreement was entered only two weeks before that change occurred.

The government suggested in its appellate brief that Telemaques' "...desire to withdraw his guilty plea was premised on his ***newly-minted*** assertion that his agreement to recommend a 151-month sentence was based on mistaken advice regarding the drug conversion ratio to be used in calculating his guideline range;" and further that although the court denied the motion to withdraw the plea agreement, it "... nevertheless gave Telemaque the relief he sought by relieving him of his obligation to recommend the 151-month sentence. Accordingly, Telemaque "***prevailed in his desire to challenge the drug conversion ratio....***"

At times an attempt at humor is misplaced. In light of the fifteen-year, upward variance sentence that was imposed, Telemaque can hardly be said to have prevailed at anything. Petitioner would not suggest that the Government was being flippant, sarcastic, mean-spirited, was mocking him by referring to his issue

as being “newly minted,” or by arguing that in some twisted universe he could be considered to have “prevailed” on any issue simply because the judge listened to his drug ratio argument. The judge did decide to employ a somewhat lower drug ratio (1-380), but nonetheless did not grant the relief sought which was to apply the *Malespin* ratio. There is no place for levity or sarcasm in proceedings by a defendant serving a sentence of incarceration for 180 months (fifteen years), in assertions that Telemaque made a “newly minted” argument, or that he “prevailed” on anything in the district court.

Telemaque ***raised the issue as soon as he knew that he had an issue.*** If this renders an issue “newly minted” then that is correct. However, because neither Telemaque nor his lawyer had a crystal ball or otherwise was possessed of the ability to predict the future, at the time he entered into the plea agreement, the issue did not exist.

Additionally it was peculiar and unfair to suggest that Telemaque “prevailed” in any way, shape, or form. True the court did agree to release the parties from the recommended sentence under the plea agreement. In spite of the prosecutor’s request for imposition of the formerly agreed 151 months, the court calculated a lower sentencing guidelines range than the one originally calculated

(based on a 1 to 380 ratio, although still greater than *Malespin's* 1 to 250 ratio), and then surprised everyone by varying upward and imposing a sentence of 180 months, exceeding the top of the guidelines range of 108 to 135 months, as well as the formerly agreed sentence of 151 months.

The plea agreement was based upon a mutual mistake and thus was voidable; and the appeal waiver portion of the plea agreement was neither valid nor enforceable because the entire agreement was founded upon the mistaken, erroneous premise that the correct ratio for ethylone to marijuana was 1 to 500. After the court “relieved” Telemaque of the 151 month agreed sentence, it found the ratio to be 1 to 380, which still was excessive.

There was no meeting of the minds. Telemaque moved to withdraw his plea when he became aware of the mistake. The law is clear that after the entry of a guilty plea but before sentence is imposed, the district court may allow a defendant to withdraw a guilty plea when good and just cause is shown. The cause here is conflict within the Southern District of Florida as to the ratio for ethylone. This conflict cries out for resolution because similarly situated defendants are receiving drastically disparate sentences depending upon the judge presiding over any given case. The Eleventh Circuit should have, but failed to

resolve the disparity by providing settled guidance for the correct ratio to be used.

Again it is well to note that there was no expert testimony presented by the defense in cases where the judges selected a 1 to 500 ratio to calculate sentencing guidelines. In those cases, the courts relied exclusively on the testimony of government experts. In Judge Altonaga's case the defense presented an expert witness who was more competent and more thorough than the government's experts because he explained, among other things, the potency of ethylone, leading to the ineluctable conclusion that a lower ratio of 1 to 250 is the correct, accurate, and proper ratio to be used to calculate a guidelines sentence. That is the result that should have been reached in this case and should apply to all ethylone-related prosecutions in the Eleventh Circuit and in all circuits across the country.

If as the Government argued below, Telemaque "prevailed" and the court relieved him of the terms of the plea agreement, then why was the appeal waiver enforced with regard to his other issues raised on appeal? Generally, a defendant may withdraw a guilty plea after the court has accepted it but before sentencing if he shows a fair and just reason to do so. Fed.R.Crim.P. 11(d)(2)(B). This rule is to be liberally construed. *United States v. Buckles*. 843 F.2d 469 (11th Cir. 1988). If in the exercise of the court's discretion there appears to be a reason to allow

withdrawal of a guilty plea prior to sentencing, leave should be freely granted. *United States v. Pressley*, 602 F.2d 709, 711 (5th Cir. 1979) (*per curiam*), citing *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927).

When the defendant waives his constitutional rights by pleading guilty, it is crucial that his waiver be knowing and voluntary. *See McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). Courts must always be diligent to ascertain whether a plea of guilty was understandingly made. When it appears before sentencing that such a plea was entered by a defendant who acted as a result of mistake, it is an abuse of discretion not to permit the plea to be withdrawn. *DeLeon v. United States*, 355 F.2d 286, 298 (5th Cir. 1966).

Telemaque's plea was based on incorrect advice from counsel. Using the 1-250 ratio the offense would have been reduced by four levels. With criminal history category III, the advisory guidelines range would have been 87to 108 months, which is three and a half to more than five years less than the 151 months agreed to in the plea agreement. Had Telemaque gotten correct information from counsel he never would have entered into the plea agreement. The short time that transpired between the entry of the plea and the decision to withdraw the plea would have created little if any prejudice for the government.

As stated above, the Eleventh Circuit approved the 1 to 500 ratio in *United States v. Brey*, 627 Fed.Appx. 775 (11th Cir. 2015), but it was decided two months before Judge Altonaga ruled in *Malespin*; and *Malespin* was based upon testimony from an expert who specifically about the potency of ethylone. As Judge Altonaga found in *Malespin*, the potency of ethylone is merely one half that of MDEA from whence the 1 to 500 ratio was used, rather than the correct 1 to 250. The testimony presented by Dr. Dudley before Judge Altonaga in *Malespin* was more thorough, more sophisticated, and more accurate than that given by the government's experts. As Judge Altonaga concluded, the ratio of 1 to 250 is the appropriate ratio for ethylone based on its potency.

Telemaque's plea was not voluntary because it was based upon incorrect information about sentencing calculations for ethylone. See, *United States v. Hourihan*, 936 F.2d 508, 510-11 (11th Cir. 1991); *United States v. Johnson*, 973 F.2d 857, 861 (10th Cir. 1992), both of which involve misinformation about minimum and maximum sentences. The present case involved a mistake regarding the basis for calculating the guidelines. For these reasons, the Eleventh Circuit reversibly erred in affirming the denial of the motion to withdraw the guilty plea. The judgment of the Eleventh Circuit should be vacated and the cause remanded with instructions that the motion to withdraw be granted.

Second Reason

The plea agreement was based upon a mutual mistake and thus was voidable. The appeal waiver portion of the plea agreement was neither valid nor enforceable because the entire plea agreement was founded upon the mistaken, erroneous premise that the correct ratio for marijuana-ethylone was 1 to 500.

There was no meeting of the minds. Telemaque moved to withdraw his plea when he became aware of the mistake. The Eleventh Circuit reversibly erred in affirming the imposition of a sentence of 180 months when the reasons given for that upward variance were matters that already had been factored into the guidelines calculation in the PSR. No appeal waiver should preclude a defendant from presenting an argument that he was sentenced twice for the same factors. The court double-counted and punished Telemaque twice for matters already taken into consideration in calculating the guidelines.

It is true that Telemaque asked to withdraw his plea agreement, and then asked the court to relieve him of the agreed 151 month sentence in the plea agreement. He did not, however, ask for several more years in prison. To suggest that he got what he wanted is simply ridiculous and misleading.

There always should be common sense, fairness, and reasonableness in sentencing. The imposition of this sentence of fifteen years is unreasonable and unfair. Telemaque asks this Court to vacate the decision of the Eleventh Circuit and remand with instructions for a to the Southern District of Florida with instructions that he be permitted to withdraw his guilty plea, and that any future sentencing will be based upon the ratio of 1 to 250 in accordance with Judge Altonaga's ruling in *Malespin*.

A guilty plea is a contract. In order to have a contract there must be an offer and acceptance, a meeting of the minds, and the parties must perform their duties, responsibilities, and obligations under the contract, and will receive the benefit of their bargain. When there is a mutual mistake, such as the one in the present case, the contract is voidable. General principles of contract law provide that an agreement is unenforceable when there is a lack of mutual assent between the parties. A contract is unenforceable where there is no meeting of the minds as to the term of the contract. Courts look to the terms of a written agreement to determine whether assent has occurred. See, for example, Judge Dimitrouleas's order in a civil matter, *OCE North America, Inc., v. Caputo*, 416 F.Supp.2d 1321, 1327 (Florida, Southern District 2006).

Basic contract law provides that a contract is founded upon a mutual mistake when there is (1) a **mistake** that is (2) **material**, meaning it concerns substantive characteristics of the subject of the contract, and (3) the mistake was **mutual**, meaning both parties had the same mistaken belief.

Florida law provides that a court of equity has the power to reform a written instrument where, due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument. *Goodall v. Whispering Woods Center*, 990 So.2d 695, 699 (Fla. 4th DCA 2008), and cases cited therein. At the hearing on the motion to withdraw the guilty plea in December 2015, the prosecutor explained:

PROSECUTOR: ... I can tell you what the factors were that led the government to [arrive at 151 months].

* * *

... we did our calculation as we always do for the entire course of conduct that was charged in the five counts.

Now the five counts were multiple drug counts, two drugs counts, as well as a conspiracy to possess with intent to distribute the drugs. The drug in question was Molly.

There were also two counts of assault on a federal law enforcement officer. Now Your Honor, the assault on the federal law enforcement officer counts . . . those are the counts that are driving the guidelines calculations.

Mr. Telemaque's counsel represented to the government that while he didn't necessarily dispute - - this obviously is represented through counsel, so not sworn testimony...But while he didn't necessarily dis-

pute the government's allegations, he was not able to recall them with specificity, and thus he would not be able to plead guilty to those counts.

I ... being the representative of the United States, said well then let's go to trial and we'll prove it up.

And Mr. Rosen [defense counsel] told me, we don't want to go to trial. We want to plead guilty. . .

So what ... the government decided would be a fair offer would be to come to a calculation of guidelines that would include the offense conduct relating to the assault on a federal law enforcement officer, but have him plead guilty to the drug count.

That way the drug count which is - - he doesn't seem to dispute was carrying whatever sentence it would carry. The assault on a federal law enforcement officer, which in our eyes and in the eyes of the victims because obviously there are real victims here, federal law enforcement officers, two of them, both of whom, Your Honor, are prepared to testify at the sentencing hearing if they need to. But they are the real victims.

We wanted to make sure that they were taken care of. That their - - the 3553(a) factors with respect to them were encompassed. And thus we arrived at the 151, the joint recommendation, which we thought was actually going to be significantly lower than the guideline calculation if he had pled guilty to the assault on a federal law enforcement officer charges.

It was sort of a best of both worlds situation for the government. We avoided a trial, we avoided the expense. We allowed Mr. Telemaque to accept his responsibility while still maintaining his - - whether or not it's truthfully held or whatever position that he doesn't recall the events leading to the assault.

That's how we arrived at that number. We spoke with the victims as we are required to do under the Victims ... Act, discussed this plea agreement. They told us that they were okay with that, with that number. Obviously that was not binding on us but we spoke with them to get their input. They gave us their input.

We pushed up through the chain. It was approved by our office. We presented it to Mr. Telemaque. He signed it in front of Judge Ungaro. He was colloquied on it.

Defense counsel responded that the “jointly recommended sentence of 151 was based in part [on] Mr. Telemaque’s of [sic] having the current calculation of one to five hundred.” Telemaque had a memory issue regarding whether he injured the officers/agents when fleeing (emphasis added):

DEFENSE COUNSEL: Part of Mr. Telemaque’s position of entering into the deal was a little bit more than just the allegations of disputing - - not disputing the allegations of assaulting the federal officers. There was a memory issue. There was also where it was stated to me by Mr. Telemaque that he did not hit these agents.

And also for the record, which is part of all our pleadings leading up to sentencing, is that there is currently a split in the courts right now in the Southern District of the proper ethylone calculation.

Mr. Telemaque in taking this deal - - ***part of him taking this deal was the current calculation of five hundred to one and that calculation has possibly changed, and that’s part of what’s going to be argued at sentencing.*** So - -

THE COURT: Five hundred to one meaning?

DEFENSE COUNSEL: Meaning that the proper - - ***because ethylone is not listed under 2D1.1. It - - you need a marijuana equivalency for the drugs that’s most closely related to ethylone.***

So there are ***some judges in the Southern District that have said it is more like MDEA, and there has been one court - - there is two that had found MDA, there has been one where it’s closer to metcathinone.*** So that’s - -

THE COURT: So that's for the difference in the five hundred and two fifty - -

DEFENSE COUNSEL: Right. Now, there is a joint recommended sentence which, you know, part of why we are here in part Mr. Telemaque of having the current calculation of one to five hundred ...

PROSECUTOR: . . . Now Mr. Telemaque may have done his own calculations. But I wasn't concerned about the drug amount when I did the calculations. So let me put that out there.

* * *

. . . [if] it was simply just a sort of street level possession, without anything else it would be significantly lower. It would have been probably in the neighborhood of 60 months. But we're not in that universe.....

As Judge Kaufman, writing for the Court, recognized in *United States v. Weaver*, 905 F.2d 1466, 1472 (11th Cir. 1990), the reformation of a written agreement is warranted only when the evidence demonstrates that the parties' mutual mistake resulted in a written document which does not accurately reflect the terms of their agreement. He then cites to *Restatement (Second) of Contracts §155 (1979)*. *Weaver* involved a letter that constituted a grant of immunity in exchange for a defendant's cooperation with the government in an ongoing investigation. Federal prosecutors may enter into such agreements, and due process requires the government adhere to the terms of any plea bargain or immu-

nity agreement it makes, and courts will enforce such agreements when the defendant or witness has fulfilled his side of the bargain. *United States v. Harvey*, 869 F.2d 1439, 1443-44 (11th Cir. 1989) (*en banc*).

But the written agreement must be unambiguous on its face, and whether it is ambiguous or unambiguous on its face should ordinarily be decided by the courts as a matter of law. As the Fourth Circuit recognized, if it is unambiguous as a matter of law and there is no suggestion of government overreaching, the agreement should be interpreted and enforced accordingly. *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986).

In the present case the issue is not ambiguity, nor is it government overreaching, but rather mutual mistake. The parties relied on the wrong ratio to calculate the drug equivalency for ethylone, a mistake by both parties. Had they known that the correct ratio was 250 to 1, the base offense level would have been significantly lower and in all likelihood the joint, agreed sentence in the plea agreement would have been more reasonable as well.

For the foregoing reasons, the appeal waiver was invalid and unenforceable. Telemaquaue should have been permitted to proceed with his appeal on the merits as to all issues raised.

Third Reason

The sentence was unreasonable, excessive, unduly harsh, and illegal not only because: (1) it was calculated based upon an incorrect, erroneous ratio for the substance ethylone (street name Molly); but also because (2) imposition of an upward variance to 180 months from the advisory range of 108 to 135 for injuries to officers constituted improper double-counting because Telemaque already received a six level upward adjustment for those injuries. To impose an upward variance was unfair and was impermissible double-counting.

The court stated at sentencing:

It's true that Mr. Telemaque has never done a lot of jail time, but I don't know that that's a reason to be more lenient. What has happened here is Mr. Telemaque has had many shots over the bow from law enforcement, many messages sent by law enforcement that he needed to get his act together or things were not going to go well. So, after what, 10, 12, 29 encounters with the police or with law enforcement here we are.

I also think it's interesting that anyone would ... argue to me that the birth of his children have had some positive effect on his conduct. His child with his fiancé was, if I recall correctly ... that child was born in 2013. This offense in which several people were injured occurred in 2015. So I find it hard to accept that the birth of this child had any particular impact on Mr. Telemaque.

Now, let's just talk about the offense. [The prosecutor] has sort of soft-pedaled the circumstances here to some degree. We are talking about a high speed crash under uncontrolled circumstances in which people could easily have been killed.

Let's just talk about the codefendant. He may be a codefendant but did he deserve to be in the hospital for a month with an open wound in his abdomen? Did he deserve to go wander around with a colostomy bag because Mr. Telemaque didn't have the good sense to stop?

I don't think so.

Did these officers have to be out of work and suffer any kind of injury, have their lives threatened, because that's what happened here because Mr. Telemaque has no judgment.

Mr. Telemaque is a danger to society. It's obvious from his record and it's obvious from the circumstances of this case and it is my intention to depart - - not depart, to vary upward. So if you will stand, Mr. Telemaque, the Court is going to impose sentence now.

The Court has considered the statements of the parties, the Presentence Investigation Report containing the advisory guidelines and the statutory factors. The Court finds that the sentence, which is sufficient but not greater than necessary in this case taking into consideration the nature and circumstances of this offense the characteristics of this defendant as well as all of the other factors is 180 months

(1) The 180-months sentence imposed in this case should be vacated and the cause remanded for a new sentencing hearing because it was calculated based upon an incorrect, erroneous ratio for the substance ethylone (street name Molly).

Petitioner relies and adopts as though set forth in its entirety herein the argument in the First Reason, *supra*, for this issue about the ratio to be used to calculate the sentencing guidelines. Petitioner would add that there are two cases in the Southern District of Florida which concluded to the contrary. But it must be noted that *in those cases, the government experts testified UNOPPOSED and*

even then were unable to opine on the potency of ethylone. *United States v. Li Valdes*, Case No. 14-CR-20488-JLK in January of 2015, and *United States v. Fernandez*, Case No. 15-CR-20249-DPG in October of 2015.

The Eleventh Circuit has yet to specify the correct ratio for ethylone, although in *United States v. Brey*, *supra*, there was discussion of the proper procedure for application of §2D1.1, n.6 to determine a ratio in an ethylone case. A careful reading of *Brey* revealed no substantive discussion about the proper ethylone ratio. This Court did conclude, however, in *United States v. Marte*, 586 Fed.Appx. 574 (11th Cir. 2014), that the conversion rate for ***methylone*** is 1 to 250.

According to Professor Dudley, MDMA is more potent than methylone and that methylone is more potent than ethylone by 4.7 times. From this testimony, Judge Altonaga concluded that at most the ratio for ethylone should be 250 to 1. Judge Altonaga found that Dr. Dudley met the factors to be shown, and was not satisfied that the government's witnesses had been as thorough. They both were capable and conducted analyses, but Dr. Dudley had background, experience, and perspective that was more academic, more sophisticated, and more complete in answering the court's questions. All of the foregoing may be found in the transcript of the hearing before Judge Altonaga in *Malespin* on October 27, 2015, which was attached as Exhibit A to Telemaque's sentencing objections in the trial

court. The argument and expert testimony from *Malespin* both were set out in great detail in Telemaque's supplemental objections to the PSR filed on December 4, 2015, at DE-57, and also in the appendix to his brief in the Eleventh Circuit.

(2) Imposition of an upward variance to 180 months from the advisory range of 108 to 135 for injuries to officers constituted improper double-counting because Mr. Telemaque already had received a six level upward adjustment for those very same injuries.

The sentence of 180 months is unreasonably excessive and harsh. It should have been vacated, reversed, and the cause remanded for a new sentencing hearing with instructions for further proceedings. The Eleventh Circuit reversibly erred in failing to grant relief for the district court's imposition of an unreasonable and illegal sentence, punishing Telemaque twice for the same conduct (injuries to officers). The court impermissibly "double-counted" by first approving a six-point increase in offense level for assaulting persons known to be officers, in the course of fleeing, and then by double-counting on grounds of "bad judgment," for doing so, by imposing a significant upward variance from the advisory guidelines range.

Even the prosecutor asked the court to impose the previously agreed-to sentence of 151 months, stating that *he had discussed the plea agreement with the two injured officers, and they were in agreement with 151 months*. And that of course, all was based upon the mistaken 1 to 500 ratio.

After the district court determined that the ratio should be 1 to 380 and calculated the guidelines at 108 to 135 months, and after Telemaque released the court from the agreed sentence of 151 months, it was anticipated that a sentence would be imposed within the advisory guidelines range, lower than 151 months, and in any event certainly not greater than 151 months.

The court, however, upended expectations by ruling that an upward variance to 180 for Mr. Telemaque's "bad judgment." That is ***two and a half years greater than the agreed sentence in the plea agreement, almost four years greater than the high end of the advisory guidelines range, and a full six years greater than the low end of the advisory range.*** Perhaps the time was nigh for the Eleventh Circuit to reverse a draconian upward variance, just as it has in so very many cases, seen fit to reverse downward variance sentences for being unreasonable.

As set forth at sentencing, Telemaque had limited memory of the incident involving the officers. Certainly he had no intention of injuring officers or his co-defendant. Images and data from the scene show that his vehicle was impacted on the side in a precision immobilization technique (PIT) maneuver by the federal agents. The intent to collide was on behalf of the agents. Telemaque received a six-level increase for their injuries. True, Telemaque initiated the chase, but that resulted from the PIT maneuver which is dangerous and is within the officers'

reasonable scope of employment. The officers are trained for this action and to minimize their risk of injury. It was unreasonable for the court to impose the six level enhancement and then to also vary upward from the advisory range.

The factual proffer did not specify whether Telemaque hit the agent's vehicle or whether the agents' vehicle hit Telemaque's before he fled on foot. Although not specifically addressed in the proffer the PSR made certain assumptions about what transpired, which resulted in a six-level upward enhancement. Telemaque was not convicted of assault on an officer, nor did he and the government stipulate to any form of underlying assault conduct in the proffer. They did agree that Telemaque fled and in so doing drove the wrong way down a one-way street, hit a civilian vehicle and collided with a concrete sign.

Review of a sentence for reasonableness is a two-step process. First the court reviews for significant procedural error. *United States v. Pugh*, 51 F.3d 1179, 1190 (11th Cir. 2008). Second the sentence will be reviewed for substantive reasonableness under a deferential abuse of discretion standard. *United States v. Livesay*, 52 F.3d 1081, 1091 (11th Cir. 2008). A sentence is substantively unreasonable if the district court has weighed the §3553 factors in a manner that demonstrably yielded an unreasonable sentence and the court is left with a definite and firm conviction that the district court committed a clear error of judgment by

arriving at a sentence outside the range of reasonable sentences dictated by the facts of the case. The court is permitted to attach great weight to one factor over others. *United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009).

The sentence imposed was substantively unreasonable as a result of the upward variance from an advisory guidelines range of 108 to 135 months, to 180 months. In *United States v. Rivero*, 619 Fed.Appx. 784 (11th Cir. 2015), the defendant appealed his upward variance sentence to 360 months imprisonment for possession with intent to distribute cocaine, cocaine base and marijuana. His advisory guidelines range was 188 to 235 months. The government requested a sentence at the bottom of the advisory range. Based upon Rivero's criminal record, however, the court imposed an upward variance to 360 months. The Eleventh Circuit found no error and affirmed.

The Eleventh Circuit will presume that a sentence within the guidelines range is reasonable, and may not presume that a sentence outside the guideline range is unreasonable. *United States v. Irey*, 612 F.3d 1160, 1187 (11th Cir. 2010) (*en banc*). A district court must state reasons for a variance if it chooses to vary upward from the guidelines range. See *Rita v. United States*, 551 U.S. 338, 356-58, 127 S.Ct. 2456, 2468-69, 168 L.Ed.2d 203 (2007).

In *Rivero*, the Eleventh Circuit found no significant procedural error. 619 Fed.Appx. at 787. The record was clear that the district court considered the guidelines range and the 3553 factors, and the variance was based on prior criminal conduct and also a finding that defendant's prior criminal conduct, nature and circumstances of the offense, defendant's history and characteristics, and the need to promote deterrence and respect for the law all weighed in favor of a longer sentence. The court rejected the defendant's argument that the district court impermissibly double-counted his criminal history by imposing an enhancement and an upward variance for prior criminal conduct. District courts are permitted to rely on the same factors in imposing a variance that they already considered in determining the advisory guidelines range. *United States v. Rodriguez*, 628 F.3d 1258, 1264 (11th Cir. 2010).

The defendant in *Rivero* had a lengthy criminal history. The PSR showed an almost uninterrupted string of arrests and convictions over 30 years including drugs, theft, armed robbery, and battery on a law enforcement officer. From this the panel found that the district court was entitled to find that his case fell outside the "heartland" of cases covered by the guidelines. *Irey*, 612 F.3d at 1202.

In an interesting dissent in *Rivero*, Judge Martin opined that the 30-year sentence was too long to be a just sentence for the offense committed. It was fif-

teen years greater than the sentence requested by the government, and ten years greater than the top of the guidelines range. A within-guidelines sentence would have been sufficient for the 56 year old defendant. The Eleventh Circuit will review *de novo* a double counting claim. *United States v. Aimufua*, 935 F.2d 1199, 1200 (11th Cir. 1991). Double counting may be permissible if the Sentencing Commission intended the result and if the result is permissible because each section concerns conceptually separate notions related to sentencing. *United States v. Adeleke*, 968 F.2d 1159, 1161 (11th Cir. 1992).

The issue here was an upward enhancement for assaulting an officer and then an upward variance from the guidelines range. Nonetheless the significant upward variance in this case was impermissible because it was for the same conduct already taken into consideration in imposing the six-level upward adjustment. The enhancement and the upward variance were levied solely on the basis of the same conduct, rendering the sentence a result of impermissible double counting. The conduct having been taken into consideration in the imposition of a six level upward adjustment in the offense level, should not have been used to double-count and impose an upward variance, and especially not a variance of the extent imposed in here. The Eleventh Circuit reversibly erred in dismissing this issue and in not vacating the sentence and remanding for a new, fair, reasonable sentence.

CONCLUSION

Based upon the foregoing arguments and authorities Petitioner Steljem Telemaque respectfully asks this Honorable Court to issue its most gracious writ and to find that the Eleventh Circuit reversibly erred in affirming the denial of the motion to withdraw the guilty plea; to find that the appeal waiver in the plea agreement was invalid and unenforceable; and to remand with instructions that the Eleventh Circuit has the power, the duty, the jurisdiction and the authority to hear this appeal on the merits, or at the very least to remand to the district court for a determination of whether the appeal waiver was valid; and thereupon to vacate the sentence imposed and to remand the cause with instructions to impose a new and reasonable sentence based upon a corrected ratio for ethylone that is based upon reliable scientific testimony, and also without an impermissible upward variance for facts already taken into consideration in calculating the offense level; and also to consider granting the request to withdraw the plea agreement in its entirety.

Respectfully submitted,

/s/ Sheryl J. Lowenthal

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CERTIFICATE OF COMPLIANCE WITH
ELECTRONIC FILING & SERVICE

Undersigned hereby certifies that the foregoing petition with motion to proceed IFP, and with the Appendix, was electronically filed with the Clerk of Court on November 24, 2017. Eleven paper copies will be mailed to the Clerk of Court as soon as possible; the Solicitor General will be served with a copy of this petition via email on this date; and a paper copy will be mailed *via* the United States Postal Service, to Stephen Telemaque (Legal Mail) at FCI Coleman Low.

/s/ Sheryl J. Lowenthal

Appellate Counsel for Mr. Telemaque

Dated: November 24, 2017

Corrected and electronically filed with Clerk of Court on November 28, 2017 with motion to proceed IFP, Proof of Service, and the Appendix each filed as a separate document.

The Solocitor General will be served by E-Mail: SupremeCtBriefs@USDOJ.gov