

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANGEL MELENDEZ-ORSINI, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Now comes the Petitioner, ANGEL MELENDEZ-ORSINI, who states that he has previously been granted leave to proceed in forma pauperis in the United States Court of Appeals for the First Circuit, and further that the United States Court of Appeals for the First Circuit appointed the undersigned attorney to represent him under the Criminal Justice Act of 1964, U.S.C. § 3006A.

THE PETITIONER
BY HIS ATTORNEY

/s/ John T. Ouderkirk, Jr.

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Dated: December 21, 2017

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANGEL MELENDEZ-ORSINI, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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October Term, 2017

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Victor O. Acevedo-Hernandez, Esq., AUSA

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Angel Melendez-Orsini, Defendant

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QUESTION PRESENTED

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WHICH WAIVERS OF APPELLATE RIGHTS ARE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR A WRIT OF CERTIORARI

Angel Melendez-Orsini, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit which affirmed his conviction and sentence as reported in U.S. v. Angel Melendez-Orsini, 15-2535, (1st Cir., 9-27-2017) decided on September 27, 2017.

OPINIONS BELOW

The September 27, 2017 decision of the United States Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed was reported without argument, as United States v. Angel Melendez-Orsini, 15-2535 (1st Cir., 9-27-2017), and is reprinted in the Appendix to the Petition at p..

JURISDICTION

This case arises from a plea agreement in the United States

District Court for the District of Puerto Rico.¹ The defendant's change of plea was wrongfully accepted. At his arraignment the defendant pled not guilty to three counts; the sale or distribution of controlled substances, 21 U.S.C. § 841, violent crimes involving drugs and a machine gun, 18 U.S.C. § 924, and criminal forfeitures, 21 U.S.C. § 853, on July 24, 2007. A.1-2, 7. The case involved a large number of defendants, and all the related cases were consolidated on August 22, 2007. Apx.9. On December 11, 2014, the defendant filed a plea agreement. Apx.24. The Defendant then pled guilty to Counts one and two on that date. The third Count was dismissed. On November 20, 2015, the District Court sentenced the defendant to 120 months on count one, and 60 months on count two, to run consecutively. Apx.26. A notice of appeal was filed on December 1, 2015. Apx.84. A notice of appeal was filed pro se by the defendant on November 24, 2015. A.84.

The rules of the Supreme Court of the United States provide jurisdiction over this matter with this Court as well as the jurisdiction conferred by 28 U.S.C. § 1254(1). 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND
REGULATIONS INVOLVED

Federal Rule of Criminal Procedure Number 11

1

References to the Addendum are denoted "A." followed by the page number in the Addendum. References to the brief are denoted "P." followed by the page number. References to the Appendix are denoted "Apx." followed by the page number.

STATEMENT OF THE CASE

The defendant stipulated to the following facts as part of his plea agreement. From in or about the year 2003, and coming up to July, 2007, the defendant and others knowingly and intentionally combined, conspired and agreed with each other to knowingly and intentionally possess with intent to distribute and/or distribute heroin, cocaine base, cocaine, and marijuana within 1,000 feet of a school. The defendant and others agreed to distribute controlled substances for significant financial gain and profit. The defendant acted as a leader for the drug trafficking organization, and would routinely possess firearms in furtherance of the conspiracy. The defendant possessed with the intent to distribute at least five kilograms but less than fifteen kilograms of cocaine. The defendant joined the conspiracy knowingly, and it was his intent at all times that the objects of the conspiracy succeed. Apx.39.

REASON FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE FIRST CIRCUIT SHOULD HAVE CONSIDERED THE MERITS OF THE DEFENDANT'S APPEAL EVEN THOUGH THE PLEA AGREEMENT CONTAINED AN APPELLATE WAIVER.

Reviewing courts have been willing to intervene when an error in the guilty plea process arguably affects a "core concern" of Rule 11 because a guilty plea is a shortcut around the fact finding process. United States v. Gandia-Maysonet, 226 F.3d. 1, 3 (1st Cir., 2000). In a guilty plea, the defendant stands as a witness against himself, forgoing the protection of the Fifth Amendment. Brady v. United States, 397 U.S. 742, 748

(1970). A guilty plea is also a waiver of the defendant's right to a trial before a jury or judge, and waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Id. at 748.

Here, there was evidence that the defendant did not waive his constitutional rights voluntarily, or knowingly, and it was not an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. When the court addressed the defendant the following exchange took place:

" COURT: Have you had enough time to consult with your wife and Mr. Dansoh, Mr. Chico, before coming here this morning and telling me that you accept the offer?

DEFENDANT: Well, yes. If there was more time, one would even think more about it. But no."

(Apx.45-46.)

The next exchange between the court and the defendant was as follows:

" COURT: All right. Is there anything you would like to tell me or anything else you would like to express before we proceed to take your change of plea?

DEFENDANT: No. That's fine.

COURT: You don't seem sure.

DEFENDANT: Well, there's no opportunity - I don't know."

(Apx.46.)

District Court judge then explained to the defendant that the co-defendants who had gone to trial had been found guilty.

The judge explained that the majority of the co-defendants had pled guilty. At this point, the defendant agreed to go ahead with the change of plea. Apx.46-47. He asked the defendant if the defendant's signature on the plea agreement meant that the facts contain therein were accurate in every respect. Apx.59. Although the defendant answered "yes," at sentencing the defendant disputed that the facts were accurate.

When asked if the defendant agreed with the government's evidence, he replied:

" DEFENDANT: Well, I - yes. But I honestly want to say that I didn't see any videos or tapes because when I was brought down at MDC, there weren't any videos."

The defendant went on to say:

" COURT: Did you discuss - did you discuss thoroughly your case and your participation in the case with your attorney.

DEFENDANT: Yes. Well, he told me that I was not being shown in the photos or the videos, but I wasn't able to see them at MDC."

(Apx.65-66.)(emphasis added)

When asked if he possessed or carried firearms, the defendant replied, "[w]ell, there were weapons - I - well - ." Apx.66. Then the trial judge related a series of facts from another defendant's jury trial. Apx.67. The defendant's knowing and voluntary acceptance of responsibility came up again at sentencing.

When asked if he wanted to say anything at sentencing, the defendant replied:

" DEFENDANT: I would like to state, Your Honor, that sincerely as to Count 1, the drug count, I am guilty; but as I previously stated, as to Count 2 I didn't really want to plead guilty because I had nothing to do with weapons or giving protection to the drugs or anything like that.

The investigators have never been able to prove that I used firearms or carried them. In spite, of that, since 1995 the Supreme Court requires sufficient evidence to prove such a charge, such as to show, pull out, to fire, to hit or strike or assault with the gun. And if there's no active use, there is no 924(c) charge. That is not what happened in my case."

(Apx.74-75).

If there was any doubt whether the defendant intended to plead guilty to Count number two, it was soundly resolved here. The defendant could not have been more clear that he was not knowingly and voluntarily pleading guilty to the firearms charge. Interestingly, the First Circuit Court of Appeals took the single word "yes" completely out of context to justify their totality of the circumstances rationale. United States v. Angel Melendez-Orsini, 15-2535, p.6, (1st Cir., 9-27-2017). Additionally, the First Circuit acknowledged the above denial of the government's evidence, but reasoned that the denial of the facts at sentencing was inapplicable to the change of plea. United States v. Angel Melendez-Orsini, 15-2535, p.8, n.5. (1st Cir., 9-27-2017).

Another indication that the defendant did not understand the consequences of his plea can be found in the fact that he filed a pro se notice of appeal. Apx.84. He apparently did not understand that the terms of his agreement waived the right to appeal this sentence.

The First Circuit Court of Appeals reviews the totality of the circumstances when considering whether a defendant's guilty plea was knowing, voluntary and intelligent. United States v. Bierd, 217 F.3d. 15, 18 (1st Cir., 2000). The defendant in the instant case did not raise his claim in the trial court at the change of plea hearing, however, "a Rule 11 challenge will not be deemed waived upon a party's failure to raise it in the district court." United States v. Parra-Ibanez, 936 F.2d. 588, 593 (1st Cir., 1991). Where the error was not called to the district court's attention, First Circuit appellate review is governed by the plain error standard, which requires not only an error affecting substantial rights but also a finding by the reviewing court that the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings. United States v. Savinon-Acosta, 232 F.3d. 265, 268 (1st Cir., 2000). The fairness, integrity, or reputation plain error standard is a flexible one and depends significantly on the nature of the error, its context, and the facts of the case. United States v. Young, 470 U.S. 1, 16 (1984); United States v. Gandia-Maysonet, 226 F.3d. 1, 6 (2000).

In the present case there was ample evidence that the defendant did not want to make a knowing and voluntary guilty

plea. A plea of guilty is constitutionally valid only to the extent that it is voluntary and intelligent. Bousley v. United States, 523 U.S. 614, 618 (1998).

"Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine the defendant understands, the following...." F.R.Crim.P. 11(b)(1). In the present case, the trial court judge had ample reason to believe that the defendant did not understand the nature of his plea to Count two. The change of plea should not have been taken under those circumstances.

"Second, even if the waiver is knowing and voluntary, [this court retains] discretion not to enforce the waiver if it would result in a 'miscarriage of justice'." Sotirion v. United States, 617 F.3d 27, 33 (1st Cir., 2010).

The defendant did not object to the plea being accepted at the change of plea hearing although he did state an objection at sentencing. Therefore the standard of review is "plain error." According to the First Circuit Court of Appeals, the error must be clear, affect the defendant's substantial rights, and impair the integrity of the judicial proceedings. United States v. Lopez-Garcia, 672 F.3d 58, 62 (1st Cir., 2012). All three criteria were met in the present case. Acceptance of an unknowing and involuntary plea is clear and impairs the integrity of the proceedings. The imposition of 180 months confinement affected the defendant's substantial rights.

On direct appeal the standard of review in the First Circuit is more advantageous to the defendant than on collateral appeal. United States v. DiCarlo, 575 F.2d 952, 954-55 (1st Cir., 1978). Prejudice inheres in a failure to comply with Rule 11. McCarthy v. United States, 394 U.S. 459, 471 (1967). Therefore, the plea of guilty should have been be vacated.

Twice the defendant told the trial court judge that he did not want to waive his Constitutional rights and plead guilty. The trial court judge was not willing to postpone or terminate the proceedings after hearing the defendant's refusal to change his plea. On the third inquiry, the defendant stated that he disputed the government's fact on Count Two. Once the defendant plainly denied the facts on which the government relied, the trial court judge should have suspended the change of plea hearing.

Although there was a waiver of appeal clause in the original plea agreement, Apx.25, the Court can set aside the waiver. Pre-sentence waivers are enforceable if they meet certain criteria. The defendant must enter the waiver knowingly and voluntarily. "In examining whether the defendant knowingly and voluntarily waived his appellate rights, the text of the written plea agreement and the change of plea colloquy are of critical importance." Sotirion v. United States, 617 F.3d 27, 33 (1st Cir., 2010).

"Second, even if the waiver is knowing and voluntary, [this court retains] discretion not to enforce the waiver if it would result in a 'miscarriage of justice'." Sotirion v. United States, 617 F.3d 27, 33 (1st Cir., 2010). Although the error was subject

to “plain error” review, here, the defendant’s initial reluctance before the District Court judge met the criteria for review. There was error; the District Court judge continued with the change of plea knowing that the defendant had twice indicated that he was not sure that he wanted to plead guilty, followed by a clear refutation of the government’s facts.

Reviewing courts have been willing to intervene when an error in the guilty plea process arguably affects a “core concern” of Rule 11 because a guilty plea is a shortcut around the fact finding process. United States v. Gandia-Maysonet, 226 F.3d. 1, 3 (1st Cir., 2000). In a guilty plea, the defendant stands as a witness against himself, forgoing the protection of the Fifth Amendment. Brady v. United States, 397 U.S. 742, 748 (1970). A guilty plea is also a waiver of the defendant’s right to a trial before a jury or judge, and waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Id. at 748.

The First Circuit Court of Appeals reviews the totality of the circumstances when considering whether a defendant’s guilty plea was knowing, voluntary and intelligent. United States v. Bierd, 217 F.3d. 15, 18 (1st Cir., 2000). The defendant in the instant case did not raise his claim in the trial court, however, “a Rule 11 challenge will not be deemed waived upon a party’s failure to raise it in the district court.” United States v. Parra-Ibanez, 936 F.2d. 588, 593 (1st Cir., 1991). Where the error was not called to the district court’s attention, appellate

review is governed by the plain error standard, which requires not only an error affecting substantial rights but also a finding by the reviewing court that the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings. United States v. Savinon-Acosta, 232 F.3d. 265, 268 (1st Cir., 2000). The fairness, integrity, or reputation plain error standard is a flexible one and depends significantly on the nature of the error, its context, and the facts of the case. United States v. Young, 470 U.S. 1, 16 (1984); United States v. Gandia-Maysonet, 226 F.3d. 1, 6 (1st Cir., 2000).

In the present case there was ample evidence that the defendant did not make a knowing and voluntary guilty plea. A plea of guilty is constitutionally valid only to the extent that it is voluntary and intelligent. Bousley v. United States, 523 U.S. 614, 618 (1998).

"Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine the defendant understands, the following...." F.R.Crim.P. 11(b)(1). In the present case, the trial court judge knew, and acknowledged on the record, that the defendant was not sure that he wanted to plead guilty. The change of plea should not have been taken under those circumstances.

The defendant did not object to the plea being accepted. Therefore the standard of review is "plain error." In the First Circuit, the error must be clear, affect the defendant's

substantial rights, and impair the integrity of the judicial proceedings. United States v. Lopez-Garcia, 672 F.3d 58, 62 (1st Cir., 2012). All three criteria were met in the present case. Acceptance of an unknowing and involuntary plea impairs the integrity of the proceedings. The imposition of 180 months confinement affected the defendant's substantial rights.

On direct appeal the standard of review is more advantageous to the defendant than on collateral appeal. United States v. DiCarlo, 575 F.2d 952, 954-55 (1st Cir., 1978). Prejudice inheres in a failure to comply with Rule 11. McCarthy v. United States, 394 U.S. 459, 471 (1967). Therefore, the plea of guilty should have been vacated on direct appeal.

The First Circuit Court of Appeals' inconsistent application of the "totality of the circumstances" analysis, in the face of a contrary clear record, should be addressed, and a concrete formula for analysis should be established by this Honorable Court.

CONCLUSION

For all the reasons stated above, this Honorable Court should review the decision of the United States Court of Appeals for the First Circuit and grant the writ of certiorari.

THE DEFENDANT
BY HIS ATTORNEY

/s/ John T. Ouderkirk, Jr.

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CERTIFICATE OF SERVICE

I, John T. Ouderkirk, Jr., do hereby certify that I have caused the foregoing to be served by mailing a complete copy to the Clerk of the United States Court of Appeal for the First Circuit, 1 Courthouse Way, Suite 2500, Boston, MA 02210-3004, one copy each to Victor O. Acevedo-Hernandez, Esq. and Mariana E. Bauza Almonte, Esq., both of the U.S. Attorney's Office, 350 Carlos Chardon Ave., Torre Chardon Ste. 1201, San Juan, PR 00918-0000, and the Solicitor General of the United States, Room 5614, DOJ, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001, on this 22nd day of December, 2017.

/s/ John T. Ouderkirk, Jr

John T. Ouderkirk, Jr.

AFFIDAVIT OF TIMELY FILING (SUP. CT. R. 29.2)

Under oath I depose and say that my name is John T. Ouderkirk, Jr., and that I am the attorney for the petitioner. On December 22, 2017, I mailed an original and ten copies of the Petition to the Clerk of the United States Supreme Court at 1st Street, N.E., Washington, DC 20543-0001 via the United Parcel Service, overnight delivery. The judgement was entered on

September 27, 2017 and the last day for filing is December 26, 2017.

/s/ John T. Ouderkirk, Jr.

John T. Ouderkirk, Jr.

APPENDIX

<u>United States v. Angel Melendez-Orsini</u> , 15-2535 (1 st Cir., 9-27-2017)	1
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Not for Publication in West's Federal Reporter
United States Court of Appeals
For the First Circuit

No. 15-2535

UNITED STATES OF AMERICA,

Appellee,

v.

ANGEL MELÉNDEZ-ORSINI, a/k/a Gelo, a/k/a Cerebro, a/k/a Primo,

Defendant, Appellant.

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

[Hon. Juan M. Pérez-Giménez, U.S. District Judge]

Before

Lynch, Stahl and Thompson,
Circuit Judges.

John T. Ouderkirk, Jr., on brief for appellant.
Rosa Emilia Rodríguez-Vélez, United States Attorney, Mariana E. Bauzá-Almonete, Assistant United States Attorney Chief, Appellate Division, and Julia M. Meconiates, Assistant United States Attorney, on brief for appellee.

September 27, 2017

STAHL, Circuit Judge. Appellant Angel Meléndez-Orsini ("Meléndez-Orsini") seeks to vacate his conviction on a guilty plea for conspiracy to possess with the intent to distribute a controlled substance within a protected location and possession of a firearm during and in relation to a drug trafficking offense. The United States District Court for the District of Puerto Rico, Juan M. Pérez-Giménez, District Judge, accepted Meléndez-Orsini's plea and sentenced him to a prison term of 180 months. In this appeal, Meléndez-Orsini challenges the voluntariness of his change of plea. We AFFIRM.

I. Factual Background and Prior Proceedings

We recite here the relevant facts. Meléndez-Orsini was indicted on three counts: (1) conspiracy to possess with the intent to distribute at least 5 but less than 15 kilograms of cocaine within a protected location, in violation of 21 U.S.C. §§ 860 and 841(b)(1)(A); (2) possession of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A); and (3) criminal forfeitures, in violation of 21 U.S.C. § 853. There were 94 co-conspirators involved in the drug trafficking organization whose members distributed heroin, cocaine, crack and marijuana within one thousand feet of a public housing project. Often, members of the conspiracy would carry and brandish firearms in connection with their activities.

On December 11, 2014, pursuant to a plea agreement, Meléndez-Orsini pled guilty to Counts One and Two of the indictment. The plea agreement contained a waiver of the right to appeal if the district court sentenced Defendant to the parties' joint recommendation of 120 months on Count One, and 60 months on Count Two, to be served consecutively to Count One. At the change of plea hearing, the district court inquired into Meléndez-Orsini's competence, the voluntariness of his plea and the sufficiency of defense counsel. The court also reviewed the relevant charges in the indictment, the statutorily mandated minimum and maximum sentences, the government's evidence and the signed plea agreement.

At Meléndez-Orsini's sentencing on November 20, 2015, for the first time he asked the court to review the evidence as to Count Two because he had not wanted to plead guilty to that count. The district court denied Defendant's request to review the facts as to Count Two and sentenced Defendant to a total of 180 months incarceration.¹ This timely appeal followed.

II. Discussion

Meléndez-Orsini claims the district court violated Rule 11 by accepting his change of plea because it was not voluntary,

¹ The court sentenced Defendant to a term of 120 months on Count One, and 60 months on Count Two, to be served consecutively to Count One.

intelligent and knowing. Rule 11 provides that "[b]efore accepting a plea of guilty . . . the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises" Fed.R.Crim.P. 11(b)(2). On appeal, we consider the totality of circumstances to determine if a violation of Rule 11 occurred. See United States v. Martinez-Martinez, 69 F.3d 1215, 1220 (1st Cir. 1995).

A. Waiver

Before addressing the merits of Meléndez-Orsini's argument, we acknowledge that the plea agreement contains a waiver of appeal provision, which generally "forecloses appellate review of many claims of error." United States v. Chambers, 710 F.3d 23, 27 (1st Cir. 2013). "But where, as here, a defendant enters a guilty plea and agrees to waive his right to appeal . . . a reviewing court must 'address the merits of [his] appeal because his claim of involuntariness, if successful, would invalidate both the plea itself and the waiver of his right to appeal.'" Id. (alteration in original)(quoting United States v. Santiago Miranda, 654 F.3d 130, 136 (1st Cir. 2011)).

B. Rule 11 Plea Proceedings

We review Meléndez-Orsini's underlying Rule 11 claim for plain error because Defendant failed to object previously.² "In order to establish plain error, a defendant must show that: (1) an error occurred; (2) the error was plain; (3) the error affected the defendant's substantial rights; and (4) the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Ortiz-Garcia, 665 F.3d 279, 285 (1st Cir. 2011)(alteration in original)(citation omitted). Defendant maintains that the district court erred in accepting his change of plea because there was evidence showing that his change of plea was neither knowing nor voluntary. We find no such error.

First, the record reflects that during the colloquy the court asked Meléndez-Orsini on two separate occasions if anyone forced, threatened or harassed him to accept the plea offer, to which he responded "No." The district court also reviewed aloud paragraph 19 of the written plea agreement, which provided that no

² At sentencing, Meléndez-Orsini asked the district court to "see the evidence as to [Count 2] and make a decision", but at no point did Defendant seek to withdraw his plea prior to sentencing. See United States v. Delgado-Hernandez, 420 F.3d 16, 19 (1st Cir. 2005) ("[B]ecause [defendant] failed to call the district court's attention to the alleged errors in the plea proceedings . . . for example, by seeking to withdraw his plea prior to sentencing . . . his claim is subject only to plain error review on direct appeal.").

threats were made to force Meléndez-Orsini to plead guilty and that he is pleading guilty freely and voluntarily because, in fact, he is guilty.

While the above facts support that the plea was not coerced, we acknowledge that at the beginning of the colloquy, Meléndez-Orsini did express some apprehension about the timing of the plea, conveying that if he had more time, he would think more about his decision to plead guilty.³ However, Meléndez-Orsini's minor apprehension does not render his guilty plea involuntary. See United States v. Negron-Narvaez, 403 F.3d 33, 39 (1st Cir. 2005) ("The mere fact that the appellant at one point took a contradictory position as to his culpability . . . neither alters our conclusion nor dispels the factual basis for the plea.").

Second, the district court adequately reviewed the facts as to Counts One and Two. As to Count Two, the court described a conspiracy, where members knowingly, intentionally and unlawfully possessed and used firearms. The district court inquired, "is that what you did as to Count II?" Meléndez-Orsini responded "Yes." Defendant expressed no confusion as to these facts.

³ The district court asked Defendant if he had enough time to consult with counsel and his wife before pleading guilty. Meléndez-Orsini explained that he did, but if there was more time, "one would even think more about it." The court explained that even with more time, the options would still be the same, either go to trial or plead guilty. The Defendant agreed with the court's statement.

Meléndez-Orsini maintains that the court should have realized his change of plea was not voluntary based on his confusion over the government's weapons evidence. During the plea colloquy, the government explained that full discovery was provided to Defendant, including photographs and recordings, which would have been used at trial to prove that Meléndez-Orsini acted as a leader in the drug trafficking organization and routinely possessed firearms in furtherance of the conspiracy. When asked by the court if he agreed with the evidence in possession of the government as to Counts One and Two, Meléndez-Orsini explained that his attorney had viewed the evidence, but that he had not seen the videos.⁴ The court then again asked the Defendant whether he participated in the conspiracy as to Counts One and Two, noting, "the fact that you had not seen any videos . . . doesn't preclude you from pleading guilty." Meléndez-Orsini responded, "Yes I'm going to plead guilty." At no point did Defendant deny his involvement as to Counts One or Two.

Although Meléndez-Orsini did not view personally all of the discovery provided by the government, he signed the plea agreement, repeatedly agreed to the statement of facts as summarized by the district court at the plea colloquy and acknowledged on multiple

⁴ Meléndez-Orsini told the court that he was unable to view the videos, although his counsel had informed him that he did not appear in the videos.

occasions that his decision to plead guilty to Counts One and Two was voluntary. Viewed in totality, Defendant's statements at the colloquy⁵ negate a claim that his change of plea was neither unknowing nor involuntary.

Upon a thorough review of the record and consideration of the totality of the circumstances, we uphold the district court's finding that Meléndez-Orsini understood the nature of the change of plea and voluntarily pleaded guilty. Meléndez-Orsini failed to meet his burden as to the first prong of plain error review; therefore, we need not address the other factors. The judgment of the district court is AFFIRMED.

⁵ At the sentencing hearing, Defendant explained, "I didn't really want to plead guilty [as to Count Two] because I had nothing to do with weapons or giving protection to the drugs or anything like that." This statement, albeit clear, occurred almost a year after Meléndez-Orsini's change of plea. This change of position is insufficient to warrant a finding of error based on the voluntariness of the plea.

United States Court of Appeals For the First Circuit

No. 15-2535

UNITED STATES OF AMERICA,

Appellee,

v.

ANGEL MELÉNDEZ-ORSINI, a/k/a Gelo, a/k/a Cerebro, a/k/a Primo,

Defendant, Appellant.

JUDGMENT

Entered: September 27, 2017

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Margaret Carter, Clerk

cc:

John T. Ouderkirk Jr.

Angel Melendez-Orsini

Julia Meconiates

Victor O. Acevedo-Hernandez

Jose Capo-Iriarte

Myriam Yvette Fernandez-Gonzalez

Mariana E. Bauza Almonte

Alberto R. Lopez Rocafort

Teresa S. Zapata-Valladares

Vanessa Elsie Bonhomme

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANGEL MELENDEZ-ORSINI, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

PROOF OF SERVICE

I, John T. Ouderkirk, Jr., do hereby certify that I have caused the foregoing to be served by mailing a complete copy of the enclosed Motion for leave to proceed in Forma Pauperis and Petition for a Writ of Certiorari to the Clerk of the United States Court of Appeals for the First Circuit, 1 Courthouse Way, Suite 2500, Boston, MA 02210-3004, the U.S. Solicitor General, and one copy each to Victor O. Acevedo-Hernandez, Esq. and Mariana E. Bauza Almonte, Esq. both of the U.S. Attorney's Office, 350 Carlos Chardon Avenue, Torre Chardon Suite 1201, San Juan, PR 00918-0000, on this 22nd day of December, 2017.

/s/ John T. Ouderkirk, Jr.

John T. Ouderkirk, Jr.