

No.

IN THE SUPREME COURT OF THE UNITED STATES

JORGE MARTIN MENDOZA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to
SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of
Justice, 950 Pennsylvania Ave. NW, Washington, DC 20530-0001, by U.S. Mail this
7th day of February 2018.



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APPENDIX A

Plea Agreement

AF Approval ALB

Chief Approval RAB

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:15-cr-363-T-30AEP

JORGE MARTIN MARTINEZ MEDOZA

PLEA AGREEMENT

Pursuant to Fed. R. Crim. P. 11(c), the United States of America, by A. Lee Bentley, III, United States Attorney for the Middle District of Florida, and the defendant, JORGE MARTIN MARTINEZ MEDOZA, and the attorney for the defendant, Charles E. Lykes, Esquire, mutually agree as follows:

A. Particularized Terms

1. Count(s) Pleading To

The defendant shall enter a plea of guilty to Count One of the Indictment. Count One charges the defendant with conspiracy to possess with intent to distribute five (5) kilograms or more of cocaine, while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a) and 70506(a) and (b); and 21 U.S.C. § 960(b)(1)(B)(ii).

2. Minimum and Maximum Penalties

Count One is punishable by a mandatory minimum term of imprisonment of 10 years up to Life, a fine of up to \$10,000,000, a term of

Defendant's Initials JMM

supervised release of at least 5 years, and a special assessment of \$100, said special assessment to be due on the date of sentencing.

3. Alleyne v. United States and Apprendi v. New Jersey

Under *Alleyne v. United States*, 570 U.S. —, 133 S.Ct. 2151 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a minimum sentence of ten (10) years imprisonment and a maximum sentence of life imprisonment may be imposed because the following facts have been admitted by the defendant and are established by this plea of guilty:

The conspiracy involved five (5) or more kilograms of cocaine.

4. Elements of the Offense(s)

The defendant acknowledges understanding the nature and elements of the offense(s) with which defendant has been charged and to which defendant is pleading guilty. The elements of Count One are:

First: Two or more persons in some way agreed to try to accomplish a shared and unlawful plan to possess with intent to distribute and distribute five (5) kilograms or more of cocaine, while aboard a vessel subject to the jurisdiction of the United States; and,

Second: The defendant knew the unlawful purpose of the plan and willfully joined in it.

5. Counts Dismissed

At the time of sentencing, the remaining count(s) against the defendant, Count Two, will be dismissed pursuant to Fed. R. Crim. P. 11(c)(1)(A).

6. Guidelines Sentence

Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States will recommend to the Court that the defendant be sentenced within the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines, as adjusted by any departure the United States has agreed to recommend in this plea agreement. The parties understand that such a recommendation is not binding on the Court and that, if it is not accepted by this Court, neither the United States nor the defendant will be allowed to withdraw from the plea agreement, and the defendant will not be allowed to withdraw from the plea of guilty.

7. Acceptance of Responsibility - Three Levels

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will recommend to the Court that the defendant receive a two-level downward adjustment for acceptance of responsibility, pursuant to USSG §3E1.1(a). The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

Further, at the time of sentencing, if the defendant's offense level prior to operation of subsection (a) is level 16 or greater, and if the defendant complies with the provisions of USSG §3E1.1(b) and all terms of this Plea Agreement, including but not limited to, the timely submission of the financial

affidavit referenced in Paragraph B.4., the United States agrees to file a motion pursuant to USSG §3E1.1(b) for a downward adjustment of one additional level. The defendant understands that the determination as to whether the defendant has qualified for a downward adjustment of a third level for acceptance of responsibility rests solely with the United States Attorney for the Middle District of Florida, and the defendant agrees that the defendant cannot and will not challenge that determination, whether by appeal, collateral attack, or otherwise.

8. Low End

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will not oppose the defendant's request to the Court that the defendant receive a sentence at the low end of the applicable guideline range, as calculated by the Court. The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

9. Cooperation - Substantial Assistance to be Considered

Defendant agrees to cooperate fully with the United States in the investigation and prosecution of other persons, and to testify, subject to a prosecution for perjury or making a false statement, fully and truthfully before any federal court proceeding or federal grand jury in connection with the charges in this case and other matters, such cooperation to further include a full and complete disclosure of all relevant information, including production of any and all

books, papers, documents, and other objects in defendant's possession or control, and to be reasonably available for interviews which the United States may require. If the cooperation is completed prior to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" in accordance with the policy of the United States Attorney for the Middle District of Florida, warranting the filing of a motion at the time of sentencing recommending (1) a downward departure from the applicable guideline range pursuant to USSG §5K1.1, or (2) the imposition of a sentence below a statutory minimum, if any, pursuant to 18 U.S.C. § 3553(e), or (3) both. If the cooperation is completed subsequent to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" in accordance with the policy of the United States Attorney for the Middle District of Florida, warranting the filing of a motion for a reduction of sentence within one year of the imposition of sentence pursuant to Fed. R. Crim. P. 35(b). In any case, the defendant understands that the determination as to whether "substantial assistance" has been provided or what type of motion related thereto will be filed, if any, rests solely with the United States Attorney for the Middle District of Florida, and the defendant agrees that defendant cannot and will not challenge that determination, whether by appeal, collateral attack, or otherwise.

10. Use of Information - Section 1B1.8

Pursuant to USSG §1B1.8(a), the United States agrees that no self-incriminating information which the defendant may provide during the course of defendant's cooperation and pursuant to this agreement shall be used in determining the applicable sentencing guideline range, subject to the restrictions and limitations set forth in USSG §1B1.8(b).

11. Cooperation - Responsibilities of Parties

a. The government will make known to the Court and other relevant authorities the nature and extent of defendant's cooperation and any other mitigating circumstances indicative of the defendant's rehabilitative intent by assuming the fundamental civic duty of reporting crime. However, the defendant understands that the government can make no representation that the Court will impose a lesser sentence solely on account of, or in consideration of, such cooperation.

b. It is understood that should the defendant knowingly provide incomplete or untruthful testimony, statements, or information pursuant to this agreement, or should the defendant falsely implicate or incriminate any person, or should the defendant fail to voluntarily and unreservedly disclose and provide full, complete, truthful, and honest knowledge, information, and cooperation regarding any of the matters noted herein, the following conditions shall apply:

(1) The defendant may be prosecuted for any perjury or false declarations, if any, committed while testifying pursuant to this agreement, or for obstruction of justice.

(2) The United States may prosecute the defendant for the charges which are to be dismissed pursuant to this agreement, if any, and may either seek reinstatement of or refile such charges and prosecute the defendant thereon in the event such charges have been dismissed pursuant to this agreement. With regard to such charges, if any, which have been dismissed, the defendant, being fully aware of the nature of all such charges now pending in the instant case, and being further aware of defendant's rights, as to all felony charges pending in such cases (those offenses punishable by imprisonment for a term of over one year), to not be held to answer to said felony charges unless on a presentment or indictment of a grand jury, and further being aware that all such felony charges in the instant case have heretofore properly been returned by the indictment of a grand jury, does hereby agree to reinstatement of such charges by decision of any order dismissing them or, alternatively, does hereby waive, in open court, prosecution by indictment and consents that the United States may proceed by information instead of by indictment with regard to any felony charges which may be dismissed in the instant case, pursuant to this plea agreement, and the defendant further agrees to waive the statute of limitations and any speedy trial claims on such charges.

(3) The United States may prosecute the defendant for any offenses set forth herein, if any, the prosecution of which in accordance with this agreement, the United States agrees to forego, and the defendant agrees to waive the statute of limitations and any speedy trial claims as to any such offenses.

(4) The government may use against the defendant the defendant's own admissions and statements and the information and books, papers, documents, and objects that the defendant has furnished in the course of the defendant's cooperation with the government.

(5) The defendant will not be permitted to withdraw the guilty pleas to those counts to which defendant hereby agrees to plead in the instant case but, in that event, defendant will be entitled to the sentencing limitations, if any, set forth in this plea agreement, with regard to those counts to which the defendant has pled; or in the alternative, at the option of the United States, the United States may move the Court to declare this entire plea agreement null and void.

12. Forfeiture of Assets

The defendant agrees to forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, pursuant to 46 U.S.C. § 70507, 21 U.S.C. § 881(a), and 28 U.S.C. § 2461(c), whether in the possession or control of the United States, the defendant or defendant's nominees.

The defendant agrees and consents to the forfeiture of these assets pursuant to any federal criminal, civil judicial or administrative forfeiture action. The defendant also hereby agrees to waive all constitutional, statutory and procedural challenges in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture described herein constitutes an excessive fine, was not properly noticed in the charging instrument, addressed by the Court at the time of the guilty plea, announced at sentencing, or incorporated into the judgment.

The defendant admits and agrees that the conduct described in the Factual Basis below provides a sufficient factual and statutory basis for the forfeiture of the property sought by the government. Pursuant to the provisions of Rule 32.2(b)(1)(A), the United States and the defendant request that at the time of accepting this plea agreement, the Court make a determination that the government has established the requisite nexus between the property subject to forfeiture and the offense to which defendant is pleading guilty and enter a preliminary order of forfeiture. Pursuant to Rule 32.2(b)(4), the defendant agrees that the preliminary order of forfeiture will satisfy the notice requirement and will be final as to the defendant at the time it is entered. In the event the forfeiture is omitted from the judgment, the defendant agrees that the forfeiture order may be incorporated into the written judgment at any time pursuant to Rule 36.

The defendant agrees to take all steps necessary to identify and locate all property subject to forfeiture and to transfer custody of such property to the United States before the defendant's sentencing. To that end, the defendant agrees to make a full and complete disclosure of all assets over which defendant exercises control directly or indirectly, including all assets held by nominees, to execute any documents requested by the United States to obtain from any other parties by lawful means any records of assets owned by the defendant, and to consent to the release of the defendant's tax returns for the previous five years. The defendant agrees to be interviewed by the government, prior to and after sentencing, regarding such assets and their connection to criminal conduct. The defendant further agrees to be polygraphed on the issue of assets, if it is deemed necessary by the United States. The defendant agrees that Federal Rule of Criminal Procedure 11 and U.S.S.G. § 1B1.8 will not protect from forfeiture assets disclosed by the defendant as part of his cooperation.

The defendant agrees to take all steps necessary to assist the government in obtaining clear title to the forfeitable assets before the defendant's sentencing. In addition to providing full and complete information about forfeitable assets, these steps include, but are not limited to, the surrender of title, the signing of a consent decree of forfeiture, and signing of any other documents necessary to effectuate such transfers.

The defendant agrees that the United States is not limited to forfeiture of the property specifically identified for forfeiture in this Plea Agreement. If the

United States determines that property of the defendant identified for forfeiture cannot be located upon the exercise of due diligence; has been transferred or sold to, or deposited with, a third party; has been placed beyond the jurisdiction of the Court; has been substantially diminished in value; or has been commingled with other property which cannot be divided without difficulty; then the United States shall, at its option, be entitled to forfeiture of any other property (substitute assets) of the defendant up to the value of any property described above. The Court shall retain jurisdiction to settle any disputes arising from application of this clause. The defendant agrees that forfeiture of substitute assets as authorized herein shall not be deemed an alteration of the defendant's sentence.

Forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon the defendant in addition to forfeiture.

The defendant agrees that, in the event the Court determines that the defendant has breached this section of the Plea Agreement, the defendant may be found ineligible for a reduction in the Guidelines calculation for acceptance of responsibility and substantial assistance, and may be eligible for an obstruction of justice enhancement.

B. Standard Terms and Conditions

1. Special Assessment and Fine

On the count to which a plea of guilty is entered, the Court shall impose a special assessment of \$100 pursuant to 18 U.S.C. § 3013. The special assessment is due on the date of sentencing.

The defendant understands that this agreement imposes no limitations as to fine.

2. Supervised Release

The defendant understands that the offense(s) to which the defendant is pleading provide(s) for imposition of a term of supervised release upon release from imprisonment, and that, if the defendant should violate the conditions of release, the defendant would be subject to a further term of imprisonment.

3. Immigration Consequences of Pleading Guilty

The defendant has been advised and understands that, upon conviction, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

4. Sentencing Information

The United States reserves its right and obligation to report to the Court and the United States Probation Office all information concerning the background, character, and conduct of the defendant, to provide relevant factual

information, including the totality of the defendant's criminal activities, if any, not limited to the count(s) to which defendant pleads, to respond to comments made by the defendant or defendant's counsel, and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject to any limitations set forth herein, if any.

5. Financial Disclosures

Pursuant to 18 U.S.C. § 3664(d)(3) and Fed. R. Crim. P. 32(d)(2)(A)(ii), the defendant agrees to complete and submit to the United States Attorney's Office within 30 days of execution of this agreement an affidavit reflecting the defendant's financial condition. The defendant promises that his financial statement and disclosures will be complete, accurate and truthful and will include all assets in which he has any interest or over which the defendant exercises control, directly or indirectly, including those held by a spouse, dependent, nominee or other third party. The defendant further agrees to execute any documents requested by the United States needed to obtain from any third parties any records of assets owned by the defendant, directly or through a nominee, and, by the execution of this Plea Agreement, consents to the release of the defendant's tax returns for the previous five years. The defendant similarly agrees and authorizes the United States Attorney's Office to provide to, and obtain from, the United States Probation Office, the financial affidavit, any of the defendant's federal, state, and local tax returns, bank records

and any other financial information concerning the defendant, for the purpose of making any recommendations to the Court and for collecting any assessments, fines, restitution, or forfeiture ordered by the Court. The defendant expressly authorizes the United States Attorney's Office to obtain current credit reports in order to evaluate the defendant's ability to satisfy any financial obligation imposed by the Court.

6. Sentencing Recommendations

It is understood by the parties that the Court is neither a party to nor bound by this agreement. The Court may accept or reject the agreement, or defer a decision until it has had an opportunity to consider the presentence report prepared by the United States Probation Office. The defendant understands and acknowledges that, although the parties are permitted to make recommendations and present arguments to the Court, the sentence will be determined solely by the Court, with the assistance of the United States Probation Office. Defendant further understands and acknowledges that any discussions between defendant or defendant's attorney and the attorney or other agents for the government regarding any recommendations by the government are not binding on the Court and that, should any recommendations be rejected, defendant will not be permitted to withdraw defendant's plea pursuant to this plea agreement. The government expressly reserves the right to support and defend any decision that the Court may make with regard to the defendant's sentence, whether or not

such decision is consistent with the government's recommendations contained herein.

7. Defendant's Waiver of Right to Appeal the Sentence

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's sentence on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

8. Middle District of Florida Agreement

It is further understood that this agreement is limited to the Office of the United States Attorney for the Middle District of Florida and cannot bind other federal, state, or local prosecuting authorities, although this office will bring defendant's cooperation, if any, to the attention of other prosecuting officers or others, if requested.

9. Filing of Agreement

This agreement shall be presented to the Court, in open court or in camera, in whole or in part, upon a showing of good cause, and filed in this cause, at the time of defendant's entry of a plea of guilty pursuant hereto.

10. Voluntariness

The defendant acknowledges that defendant is entering into this agreement and is pleading guilty freely and voluntarily without reliance upon any discussions between the attorney for the government and the defendant and defendant's attorney and without promise of benefit of any kind (other than the concessions contained herein), and without threats, force, intimidation, or coercion of any kind. The defendant further acknowledges defendant's understanding of the nature of the offense or offenses to which defendant is pleading guilty and the elements thereof, including the penalties provided by law, and defendant's complete satisfaction with the representation and advice received from defendant's undersigned counsel (if any). The defendant also understands that defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that defendant has the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against defendant, the right against compulsory self-incrimination, and the right to compulsory process for the attendance of witnesses to testify in defendant's defense; but, by pleading guilty, defendant waives or gives up those rights and there will be no trial. The defendant further understands that if

defendant pleads guilty, the Court may ask defendant questions about the offense or offenses to which defendant pleaded, and if defendant answers those questions under oath, on the record, and in the presence of counsel (if any), defendant's answers may later be used against defendant in a prosecution for perjury or false statement. The defendant also understands that defendant will be adjudicated guilty of the offenses to which defendant has pleaded and, if any of such offenses are felonies, may thereby be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to have possession of firearms.

11. Factual Basis

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove those specific facts and others beyond a reasonable doubt.

FACTS

On or about August 31, 2015, defendants PAULINO JIMNEZ BIOJO, MARCOS GAMBOA ARAGON, SEGUNDO BOYA VELASCO, and JORGE MARTIN MARTINEZ MEDOZA were transporting cocaine for delivery to others aboard a self-propelled semi-submersible vessel (SPSS) when they were intercepted by the United States Coast Guard (USCG) in international waters in the Eastern Pacific Ocean. The master of the vessel made no claim of nationality for the vessel, rendering the vessel subject to the jurisdiction of the

United States. During a search of the vessel, over 6000 kilograms of cocaine (sample field tests positive) were recovered before the SPSS became unstable and the search was terminated. After the vessel was sunk as a hazard to navigation, additional cocaine rose to the surface and was recovered. The defendants were to deliver the cocaine to others. The defendants first entered the United States in the Middle District of Florida.

12. Entire Agreement

This plea agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements, or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea.

13. Certification

The defendant and defendant's counsel certify that this plea agreement has been read in its entirety by (or has been read to) the defendant and that defendant fully understands its terms.

DATED this 9th day of November, 2015.

Jorge Martin Martinez Medoza
JORGE MARTIN MARTINEZ MEDOZA
Defendant

Charles E. Lykes
CHARLES E. LYKES
Attorney for Defendant

A. LEE BENTLEY, III
United States Attorney

James C. Preston, Jr.
JAMES C. PRESTON, JR.
Assistant United States Attorney

Joseph K. Ruddy
JOSEPH K. RUDDY
Assistant United States Attorney
Chief, Narcotics Section

IN THE SUPREME COURT OF THE UNITED STATES

JORGE MARTIN MENDOZA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX B

Judgment

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

vs.

Case Number: 8:15-cr-363-T-30AEP

USM Number: 63228-018

JORGE MARTIN MARTINEZ MENDOZA

Charles E. Lykes, Jr., CJA

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
46 U.S.C. §§ 70503(a), 70506(a) and 70506(b), and 21 U.S.C. § 960(b)(1)(B)(ii)	Conspiracy to Possess With Intent to Distribute 5 Kilograms or More of Cocaine While on Board a Vessel Subject to the Jurisdiction of the United States (Class A Felony)	August 31, 2015	One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

In accordance with the plea agreement, it is ordered that Count Two of the Indictment be dismissed as to this defendant.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

March 8, 2016



JAMES S. MOODY, JR.
SENIOR UNITED STATES DISTRICT JUDGE

March 8, 2016

Jorge Martin Martinez Mendoza
8:15-cr-363-T-30AEP

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of ONE HUNDRED AND SIXTY-EIGHT (168) MONTHS.

The defendant is remanded to the custody of the United States Marshal.

The Court recommends that Defendant be placed at FCI Fort Dix.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

Jorge Martin Martinez Mendoza
8:15-cr-363-T-30AEP

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The mandatory drug testing requirements of the Violent Crime Control Act are imposed. The Court orders the defendant to submit to random drug testing not to exceed 104 tests per year.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days** prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

Jorge Martin Martinez Mendoza

8:15-cr-363-T-30AEP

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. Should the defendant be deported, he shall not be allowed to re-enter the United States without the express permission of the appropriate governmental authority.
2. The defendant shall cooperate in the collection of DNA, as directed by the Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment

\$100.00

Total Fine

Waived

Total Restitution

N/A

SCHEDULE OF PAYMENTS

Special assessment shall be paid in full and is due immediately.

The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

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JORGE MARTIN MENDOZA,
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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
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APPENDIX C

Sentencing Transcript

1 UNITED STATES OF AMERICA
2 UNITED STATES DISTRICT COURT
3 MIDDLE DISTRICT OF FLORIDA

4 - - -
5 HONORABLE JAMES S. MOODY, JR.
6 UNITED STATES DISTRICT JUDGE PRESIDING
7 - - -

8 UNITED STATES OF AMERICA)
9)
10 PLAINTIFF,)
11)
12 VS.) NO. 8:15-cr-363-T-30AEP
13)
14 JORGE MARTIN MARTINEZ-)
15 MENDOZA,)
16)
17 DEFENDANT.)
18)
19)
20)
21)
22)
23)
24)
25)

SENTENCING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MARCH 8, 2016
TAMPA, FLORIDA

MELISSA A. PIERSON, CA CSR 12499,
IL CSR 084.003138, RPR
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12 ON BEHALF OF DEFENDANT:

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25

1 TAMPA, FLORIDA; MARCH 8, 2016

2 - - -

3 (COURT IN SESSION AT 9:02 A.M.)

4 THE COURT: Good morning. Identify yourselves for
5 the record, please.

6 MS. PRESTON: Good morning, your Honor. Jim
7 Preston for the United States.

8 MR. LYKES: Good morning, your Honor. Charles
9 Lykes for Mr. Martinez, who is seated next to me.

10 THE COURT: Swear the interpreter.

11 MADAM CLERK: Please rise and raise your right
12 hand.

13 (Interpreter sworn.)

14 THE INTERPRETER: I do.

15 MADAM CLERK: Please state your name for the
16 record.

17 THE WITNESS: Etienne VanHissenhoven.

18 E-T-I-E-N-N-E, V-A-N-H-I-S-S-E-N-H-O-V-E-N.

19 MADAM CLERK: Thank you.

20 THE COURT: Swear the Defendant, please.

21 MADAM CLERK: Sir, please rise and raise your right
22 hand.

23 (Defendant sworn.)

24 THE DEFENDANT: I swear.

25 MADAM CLERK: Please state your name and spell your

1 first and last name for the record.

2 THE DEFENDANT: Jorge Martin Martinez Mendoza.

3 MADAM CLERK: Please spell your first and last name
4 for the record.

5 THE DEFENDANT: I only know how to do the first
6 one, J-O-R-G-E.

7 THE COURT: All right. Do you recognize your name
8 when you see it?

9 THE DEFENDANT: Yes.

10 THE COURT: Show him the front of the pre-sentence
11 report.

12 MR. LYKES: Your Honor, we went over it together in
13 Citrus County, but I can't seem to put my hands on it right
14 now.

15 (Defendant peruses document.)

16 THE COURT: Thank you. Point to his name, please.
17 Show him where his name is. Is your name spelled correctly?

18 THE DEFENDANT: Yes. Yes.

19 THE COURT: All right. Thank you. You may have a
20 seat.

21 Mr. Martinez, on November 23, 2015, you entered a
22 plea of guilty to Count one of the indictment charging you
23 with conspiracy with the intent to distribute five kilograms
24 or more of cocaine while on board a vessel subject to the
25 jurisdiction of the United States in violation of Title 26 --

1 46, United States Code, Sections 70503(a), 70506(a) and (b),
2 and Title 21, United States Code, Section 960(b)(1)(B)(ii).
3 The Court has previously accepted your guilty plea and has
4 adjudged you guilty of that offense.

5 We've now reached the stage in the proceedings
6 where it's my duty to address certain questions to you and
7 your lawyer, as well as the lawyer for the Government.

8 **JORGE MARTIN MARTINEZ-MENDOZA**

9 Called as a witness herein, having been first duly sworn
10 was examined and testified as follows:

11 **EXAMINATION**

12 **BY THE COURT:**

13 **Q.** Have you had the opportunity to read and discuss the
14 pre-sentence report?

15 **A.** Yes.

16 **Q.** Do you agree that the facts contained in the report are
17 accurate?

18 **MR. LYKES:** Your Honor, may I speak on just a
19 couple things. They say he's 5'7. I think it's pretty much
20 -- but as you see, he's only 5', at the most. I think that
21 was probably just boilerplate; and his mother is Estela, with
22 one L, not two L's, and he pointed that out to me.

23 As far as the facts go, we agree with the amounts
24 that were on board and what have you, but we reserve some
25 right to make some argument about that later in the

1 proceedings. Thank you.

2 BY THE COURT:

3 Q. All right. Mr. Martinez, after correcting the spelling
4 of your mother's name to have one L, and correcting your
5 height to be what five-foot --

6 MR. LYKES: I would say 5' or 5'1.

7 BY THE COURT:

8 Q. All right. Correcting your height to 5'1, do you agree
9 that the facts contained in the report are accurate?

10 A. Yes.

11 Q. Do you or your lawyer wish to make any objections to the
12 probation officer's applications of the guidelines?

13 MR. LYKES: Do I do that now, your Honor?

14 THE COURT: Did you have any objections to the
15 guidelines? Make them now.

16 MR. LYKES: Yes, your Honor. First of all, I'm
17 well aware of the relevant conduct. That's been the law for
18 a long time, but nevertheless, I still have a problem when
19 someone like him, who boards a vessel that is in transit,
20 with no idea how much cocaine is on it, and several days
21 later it's apprehended on the high seas, and he still doesn't
22 know how much until it's weighed, he's charged with five
23 kilograms or more, that satisfies the requirement for the
24 minimum mandatory, but to elevate him all the way to level
25 38, based on something he had no knowledge or control of, and

1 I think he'll tell you when he addresses you that he
2 certainly wouldn't have embarked on this If he had any idea.
3 He's on a semi-submersible, another thing he didn't know
4 about. He simply wouldn't have taken part in this operation
5 had he had any idea there was so much involved.

6 Because he's aware that the amount, you know,
7 governs the punishment -- should I make all my arguments at
8 this time as far as the scoring goes?

9 THE COURT: Where did he board the boat?

10 MR. LYKES: He boarded the boat in Mexico. He was
11 recruited by an individual who was a wealthy person.
12 Mr. Martinez is very hard working, and I'll show you some
13 pictures and some records of his life that I got from his
14 wife. He's a very hard working automobile mechanic. He's
15 raising three children. He's doing -- or trying to do right
16 by them. Obviously it's very meager in Mexico City. If you
17 make a couple \$100 in a month working hard every day, you're
18 lucky.

19 So this fella comes by, doesn't even know the guy's
20 name. He comes by, buys him beer every now and then, and
21 takes him to dinner, and convinces him he can do -- make a
22 lot of money if he takes this one transit and he agrees to do
23 it. He's aware there are probably drugs involved, but he
24 doesn't know how much, and says, "Gee, I can do a lot better
25 by my family if I just go out for three weeks and take this

1 voyage and come back." That's probably as much as he makes
2 in five years.

3 THE COURT: Where was the voyage going?

4 MR. LYKES: Where did you get on the boat and where
5 did you understand you were going?

6 THE DEFENDANT: I got on and was told I was going
7 to Mexico.

8 MR. LYKES: How did you get --

9 THE DEFENDANT: Through the person who was telling
10 me about the trip.

11 THE COURT: So he got on in Colombia, not Mexico?

12 MR. LYKES: Right. Sorry. I misspoke before.
13 Generally, the gist of that is just the facts of the case.

14 THE COURT: How did he get to Colombia?

15 MR. LYKES: That's what I was just asking him. How
16 did you get to Colombia?

17 THE DEFENDANT: I came from the airport. I came
18 through Medellin, and they were waiting for me there, and
19 then I went to Calle, and then they drove me on the road in a
20 car all day, and then the afternoon we got to a boarding
21 place, and there were lots of people. There were houses, but
22 I don't know exactly what part of Colombia it was, and then I
23 got on a boat. Then they -- we went about a half hour to the
24 ocean still, and we got to some sort of an island, and there
25 were a lot of trees and stuff like that, and then there was

1 -- where the boat -- where the ship was, and that's where it
2 all began.

3 MR. LYKES: Were any drugs loaded onto the boat
4 after you got on?

5 THE DEFENDANT: The first one?

6 MR. LYKES: No, the boat, the semi-submersible were
7 the drugs already on the boat when you got on it?

8 THE DEFENDANT: They were, yes.

9 MR. LYKES: Were you ever told how much was on it?

10 THE DEFENDANT: Nothing.

11 MR. LYKES: And basically, I mean, that's it, your
12 Honor. I think you go back to the Magna Carta, Western law
13 has been we punish people for what they know they did wrong.
14 We punish people for their intent, for knowledge, and we
15 don't punish them for things they don't know about, and
16 that's what's always given me a problem with relevant
17 conduct, and probably just another voice in the air saying
18 that, but I do wish -- do wish to make that objection.

19 Also, your Honor, the same with the
20 semi-submersible, he had no idea what kind of vessel it was
21 going to be. As he told me, he would never have gotten on a
22 semi-submersible for the simple fact it's dangerous. As a
23 matter of fact, they ended up stranded at-sea and needed
24 help.

25 THE COURT: So some guy he buys beer for happened

1 to wander by his shop and suggest to him he could go to
2 Colombia, and get on a boat coming to Mexico and earn a
3 little money. That's all he knew?

4 MR. LYKES: How much money did you get in cash from
5 this man?

6 THE WITNESS: He gave me 30,000 Mexican pesos.

7 MR. LYKES: Which I think now is about \$3,000, and
8 is as much as he makes in a year.

9 THE COURT: Why do they need somebody from Mexico
10 to fly down to Colombia? There are plenty of people standing
11 on the docks in Colombia waiting to get on these boats.

12 MR. LYKES: I'm not sure and he's not sure.

13 THE COURT: He doesn't know?

14 MR. LYKES: The FBI, the agents felt as though they
15 wanted to have a Mexican representative in case there were
16 situations where Mexicans and Colombians would be dividing
17 money, but he wasn't aware of that. This was his first time.
18 He understood that he was in training for some purpose.

19 THE COURT: It sounds like he's a load guard.

20 MR. LYKES: A what?

21 THE COURT: A load guard.

22 MR. LYKES: Perhaps so, which leads me to my next
23 argument, is -- well, two arguments I would like to make.
24 First of all, I think of those on board the vessel, there's
25 probably no one less culpable than him, and I would ask your

1 Honor for a minor role adjustment.

2 I would also ask your Honor to consider, even if
3 all my other arguments just fly away in the wind, that
4 perhaps he's over scored. Everything together, he's over
5 scored, and if your Honor could see fit to reduce him a few
6 levels as a result of that, he's grossly over scored, I would
7 appreciate it. I'm going to ask you, please, to reserve the
8 comment on that until you have a chance to have me read the
9 statement they wrote and was translated by the interpreter.

10 And also, to identify a few of these letters and
11 what have you. We've got report cards from his daughter, and
12 a few pictures of he, and his daughter and his wife.

13 So let me read this statement:

14 "Honorable James S. Moody, Jr., thank you for your
15 kind attentiveness by receiving and reading this letter. I
16 am very grateful because I, Jorge Martinez Mendoza, would
17 like to express in a most personal and direct way an apology
18 for the crime that brings me to your court. In these long
19 six months away from my country and my family I have not
20 stopped thinking about how remorseful I am. Your Honor, I
21 would like to not only express my apologies to you and the
22 Government of the United States, but also would like you to
23 hear my own voice and see in writing from my own hand the
24 kind of person I am, and so that you would not only have a
25 negative view of my person.

1 I would like to start by saying that I come from a
2 family of four siblings and two exceptional parents, and they
3 are Martin Martinez-Jimenez and Estela Mendoza-Bautista, a
4 family of many moral values and much love. I am, as well,
5 the husband of a great lady Cinthia Martinez-Mena, who I love
6 very much; and lastly, I am the father of three beautiful
7 children, Jorge Osvaldo, 19 years old, Monserrat Abigail,
8 15 years old, and Dasha Airam, four years old, who are my
9 life and utter happiness. With all this, I wish you to see
10 that I am not a bad person who looks for trouble or looks to
11 harm others, rather the contrary. I am a very honest person,
12 noble and hard working, which is why the situation I am in
13 pains me because I have never gone against law.

14 I know that I committed a very great mistake, and I
15 am totally conscious of it, however, allow me to tell you
16 that if it were not for poverty and below-salaries in my
17 country, I would never have even thought of committing a
18 mistake like this.

19 Honorable Judge James S. Moody, Jr., as a father, I
20 could not see my humble family suffer day by day, nor could I
21 not see how even without my great efforts at work I was not
22 able to offer them a home of their own, courses and schools
23 for my children, medical services and food.

24 Aside from all of this, I help my humble parents
25 with a little money since they are too old to work. What

1 father or son would not give his life for his family.

2 As you can see, your Honor, all these are problems
3 that a person of humble origins faces. It makes one fall
4 into bad situations that cannot -- that can affect the whole
5 family. I can assure you that if I had not been in this
6 situation, I would never have even thought of making this
7 terrible trip.

8 As you know, I am a mechanic in my country of
9 Mexico, and thank God a very good and professional mechanic,
10 and the bosses at work can attest to this. I have always
11 dreamed of buying a taxi, and working as a taxi driver and
12 creating my own taxi company. With this hope and the vision
13 of seeing my family happy, I made the decision to take this
14 trip. It never crossed my mind to do this for a profit
15 without thinking about my family or to do harm. That I can
16 swear to you. Even so, I cannot stop thinking that it was a
17 great mistake and I feel very remorseful.

18 You know, during these months that I have been
19 locked up, I have not stopped writing letters that I would
20 have liked to send you. However, it was not until today, (I
21 believe he wrote this about a month ago) that I decided to
22 send you mine. All of them coincide in four points that I
23 would like you to know.

24 One, apologize to you and the Government of the
25 United States for what happened.

1 No. 2, acknowledge my guilt.

2 No. 3, express how remorseful I feel.

3 No. 4, promise to you that I will never again
4 commit a mistake like this, even if I find myself in
5 difficult situations.

6 Again, I thank you for the time you took to read
7 this letter and get to know me from a human and humble point
8 of view. I wish to attest that everything I say in this
9 letter is true and from the bottom of my heart.

10 I also hope that my cooperation with authorities
11 was useful to them. I ask your Honor that at the time of
12 handing down my sentence, to have compassion and mercy upon
13 me. We are all human beings and we make mistakes, however, I
14 learned from my mistakes and I will not repeat them.

15 Thank you for your kindness. May God guide you and
16 protect you always." Signed by Jorge Martin Martinez
17 Mendoza. I would like to offer this.

18 THE COURT: Well, you read it into the record. So,
19 it's not necessary to put it into evidence.

20 MR. LYKES: I have a series -- if I could approach?

21 THE COURT: All right.

22 MR. LYKES: I have a series of documents, and
23 please forgive that they are not necessarily in order or easy
24 to describe to you, but they are just various things I'm
25 going to ask him to identify, maybe report cards of his

1 children, pictures. I asked his wife if she would send them
2 to me. So with the magic of email and electronic media we
3 can now do these things. Would you tell us what this means.?

4 First off -- he's seen them -- they were -- this is
5 the first time. They were downloaded last night. Can you
6 tell us what this is?

7 THE DEFENDANT: It's a letter from my wife.

8 MR. LYKES: And basically says --

9 THE DEFENDANT: That she is my wife, and that I
10 have three children with her.

11 MR. LYKES: And this is?

12 THE DEFENDANT: I can't see it.

13 MR. LYKES: It's difficult to see.

14 THE DEFENDANT: That I work at a mechanic shop.

15 THE INTERPRETER: "Through this letter we make it
16 known that Martin Martinez Mendoza for the last four years
17 has worked with us, working as a mechanic assistant. He has
18 always shown excellent behavior, is responsible and honest.
19 He helps doing diverse activities that have to do with this
20 shop, and we issue this at the request of the interested
21 party hoping that it complies with what is expected of it.

22 To whom it may concern: Mexico DF, December 9,
23 2015. Through this letter we wish to completely recommend
24 Jorge Martin Martinez Mendoza, since we have known him for
25 several years, and he has always demonstrated being a

1 responsible, hard working person, a good husband and above
2 all, a good person. We signed the current letter for
3 anything that him or his wife deem necessary, and we add our
4 names, and our addresses, and phone numbers for any further
5 information that you need. Thank you."

6 MR. LYKES: Who is this from?

7 THE INTERPRETER: This is from Gloria Mena Moreno
8 Wagner, Lucille Galvan Ortiz Wagner, Luis Angel Romero
9 Garrido Verdi, Antonio Penilla, Viancey Cervantez Sanchez,
10 Juan Martinez Anaya, Guillermo Castaneda Verdi, Estefan
11 Garrido (inaudible), Brisa Selene Huerta Vazquez Verdi,
12 Estela Mena Moreno, Sandra Ivette Garcia Perez Verdi.

13 MR. LYKES: Your Honor, I must have ten of those
14 from relatives and acquaintances of his, and I'll just kind
15 of skip through them, but let's see. I must have at least a
16 dozen of those, but I've got some pictures here.

17 THE COURT: I reviewed the pictures already. If
18 you need more than 30 minutes, you need to notify the Court
19 in advance.

20 MR. LYKES: Okay. Well, your Honor, I think where
21 I'm going is clear. I think his background is clear. He's a
22 good man that made a single mistake. Because it's a single
23 mistake, when he goes to the Government and says, "Well, I
24 want to cooperate with you, and I want to do everything I can
25 to help solve this," he doesn't know enough to help. So it

1 just puts him in a real hard position here. I ask your Honor
2 to extend to him any kindness, or mercy, or consideration
3 that you can give this case, because I believe I'm
4 representing a very good man in this matter. Thank you.

5 THE COURT: All right. Well, Mr. Lykes, what I'm
6 having a hard time believing is that a drug organization in
7 Mexico would pick up somebody that they don't trust to a
8 great degree and send him down to Colombia to be a load
9 guard.

10 MR. LYKES: Well, I think that was the purpose of
11 the fairly long-term recruitment. How long did you know this
12 individual before you went --

13 THE COURT: Mr. Lykes, what I'm saying, I don't
14 think they just picked somebody up off the street for the
15 first time and make him a load guard. There's a reason they
16 trust somebody.

17 MR. LYKES: How did you come to know this man?

18 THE DEFENDANT: Between where I live and where I
19 work there is a bar, and I go by it every time I'm at work,
20 and every weekend it was full, and of course, I know
21 everybody in the neighborhood. I know who belongs and who's
22 not from there, and I saw him, and I knew that he wasn't from
23 the neighborhood. Since everybody there knows me, we talk.
24 They buy me a beer, whatever, and that's where I met him.

25 MR. LYKES: Your Honor, I think he would be obliged

1 to answer any question you had for him. He's very handy.

2 THE COURT: Mr. Martinez, would you like to say
3 anything in addition to what you wrote in your letter?
4 You're not required to, but you may if you wish.

5 THE DEFENDANT: Well, I ask forgiveness for what I
6 did, and that's it. I don't have anything else. Nothing
7 else to say.

8 THE COURT: All right.

9 MR. LYKES: Thank you, your Honor.

10 THE COURT: Anything from the Government?

11 MS. PRESTON: Judge, I think you made some of the
12 points for me already. It just defies logic and common sense
13 that the Mexican side of this venture would put a
14 non-trusted, ignorant individual, give him responsibility
15 over almost 6,000 kilograms of cocaine. All the Defendants
16 -- I ask you don't give him a minor role.

17 THE COURT: I'm not going to give him a minor role
18 for a load guard. Anything further from the Defense?

19 MR. LYKES: No, your Honor.

20 THE COURT: The Court adopts the factual statements
21 as amended in the pre-sentence report, and the guideline
22 applications contained therein as its finding of fact, and
23 determines that the advisory guidelines are:

24 Total offense level 35, criminal history
25 category 1, which calls for imprisonment of 168 to

1 210 months, supervised release of five years, a fine of
2 \$20,000 to \$10 million, and a \$100 special assessment.

3 Do you know of any reason why the Court should not
4 now proceed with imposition of sentence?

5 MS. PRESTON: No, your Honor.

6 MR. LYKES: No, your Honor.

7 THE COURT: The Court has asked the Defendant why
8 judgment should not now be pronounced, and has heard no cause
9 to the contrary, and Mr. Martinez having made a statement on
10 his behalf together with his lawyer, and the Court having
11 reviewed the pre-sentence report and considered the advisory
12 guidelines, and the factors of 18 USC, Section 3553, it is
13 now the judgment of the Court that the Defendant,
14 Jorge Martin Martinez Mendoza is hereby committed to the
15 custody of the Bureau of Prisons to be in prison for a term
16 of 168 months.

17 Upon release from imprisonment, the Defendant shall
18 serve a five-year term of supervised release.

19 While on supervised release, the Defendant shall
20 comply with the standard conditions adopted by the Court in
21 the Middle District of Florida.

22 If the Defendant is deported, he shall not re-enter
23 the United States without the express permission of the
24 appropriate governmental authority.

25 The Defendant shall cooperate in the collection of

1 DNA as directed by the probation officer.

2 The mandatory drug testing requirements of the
3 Violent Crime Control Act are imposed.

4 The Court orders the Defendant to submit to random
5 drug testing not to exceed 104 tests per year.

6 Based on the financial status of the Defendant, the
7 Court waives imposition of a fine.

8 The Defendant shall pay to the United States a
9 special assessment of \$100, which is due immediately.

10 The Court finds that the sentence imposed is
11 sufficient, but not greater than necessary to comply with the
12 statutory purposes of sentencing.

13 The Court has accepted the plea agreement because
14 it is satisfied that the agreement adequately reflects the
15 seriousness of the actual offense behavior, and that
16 accepting the plea agreement will not undermine the statutory
17 purposes of sentencing.

18 Under the plea agreement, the Defendant entered a
19 guilty plea to Count one, in return for the dismissal of
20 Count two. Therefore, in accordance with the plea agreement,
21 it is ordered that Count two of the indictment be dismissed
22 as to this Defendant.

23 The Court having pronounced sentence, does Counsel
24 for the Defendant or the Government have any objections to
25 the sentence, or to the manner in which the Court pronounced

1 sentence, other than those previously stated for the record?

2 MS. PRESTON: No, your Honor.

3 MR. LYKES: None other than those previously stated
4 for the record, your Honor. I think we gave you all of
5 those.

6 THE COURT: The Defendant is hereby remanded to the
7 custody of the United States Marshal to await designation by
8 the Bureau of Prisons.

9 Does he want Coleman?

10 MR. LYKES: Your Honor?

11 THE COURT: Does he want Coleman Penitentiary?

12 MR. LYKES: He would, yes. He would like --

13 THE DEFENDANT: Actually, a different one.
14 Fort Dix.

15 THE COURT: Okay. I'll recommend Fort Dix.

16 Mr. Martinez, to the extent permitted by your plea
17 agreement you have the right of appeal from the judgment and
18 sentence within 14 days from today. Failure to appeal within
19 the 14 days would be a waiver of your right to appeal.

20 You have in front of you a form entitled
21 Declaration of Intent to Appeal, together with a stamped
22 envelope addressed to the Clerk's office. Does he have that
23 form in front of him?

24 MR. LYKES: He does, your Honor.

25 THE COURT: All right. That form states whether

1 you do or do not wish to file an appeal. It is written in
2 English on one side and Spanish on the other. I direct you
3 to complete the form and mail it into the Clerk's office at
4 the end of the 14-day appeal period. Don't give it to your
5 lawyer. It's up to you to return the form.

6 If you do not return the form, I will accept that
7 as an acknowledgement that you do not wish to file an appeal
8 and that that was an informed or voluntary choice on your
9 part.

10 The Government also has a right to file an appeal
11 from this sentence.

12 You're entitled to the assistance of a lawyer in
13 taking an appeal, and if you are unable to afford a lawyer,
14 one will be provided for you.

15 If you are unable to afford the filing fee, the
16 Clerk of the Court would be directed to accept the notice of
17 appeal without such fee.

18 All right. We are adjourned.

19 THE COURT: Ariana, put these documents from the
20 Defense in evidence as Defendant's Composite Exhibit 1.

21 (Court adjourned at 9:38 a.m.)
22
23
24
25

CERTIFICATE OF REPORTER

COUNTY OF HILLSBOROUGH)
) SS.
STATE OF FLORIDA)

I, MELISSA A. PIERSON, OFFICIAL COURT REPORTER, REGISTERED
PROFESSIONAL REPORTER, IN AND FOR THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF FLORIDA, DO HEREBY CERTIFY
THAT I REPORTED, STENOGRAPHICALLY, THE FOREGOING PROCEEDINGS
AT THE TIME AND PLACE HEREINBEFORE SET FORTH; THAT THE SAME
WAS THEREAFTER REDUCED TO TYPEWRITTEN FORM BY MEANS OF
COMPUTER-AIDED TRANSCRIPTION; AND I DO FURTHER CERTIFY THAT
THIS IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC
NOTES.

DATE: 5/11/2016

S:/MELISSA A. PIERSON

MELISSA A. PIERSON, CA/CSR 12499

IL/CSR 084.003138, RPR

FEDERAL OFFICIAL COURT REPORTER

IN THE SUPREME COURT OF THE UNITED STATES

JORGE MARTIN MENDOZA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX D

Initial Brief

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11382-GG
DC DKT NO.: 8:15-cr-363-JSM-AEP-4

UNITED STATES OF AMERICA,
Appellee,

v.

JORGE MARTIN MENDOZA,
Appellant.

INITIAL BRIEF

Valarie Linnen, Esq.
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Attorney for Appellant

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this federal criminal action pursuant to Title 18, Section 3231, United States Code (2011). This Court has appellate jurisdiction to review the final sentence pursuant to Title 18, Section 3742, United States Code (2016). As the *Judgment* was entered on March 8, 2016 (Dkt.98), Appellant timely filed a notice of appeal on March 28, 2016. (Dkt.107) Appellant appeals the convictions and sentences which disposed of all parties' claims.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument in order to assist the court in determining the issues presented.

STATEMENT OF THE ISSUES

- I. Under the Sixth Amendment, is a claim of ineffective assistance of counsel cognizable on direct appeal, where the appeal waiver contained in the plea agreement only bars a direct appeal of judgment and sentence?
- II. Under the Sixth Amendment, does defense counsel deprive the defendant of effective assistance, where the PSR finds at least nine bases for a downward variance, yet defense counsel fails to ask the district court for a downward variance based on the Section 3553(a) factors identified in the PSR?

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1 (2017), counsel for Appellant, JORGE MENDOZA, hereby files this Certificate of Interested Persons:

- 1) ARAGON, Marcos Gamboa – Co-defendant
- 2) BENTLEY, Arthur Lee III – U.S. Attorney
- 3) BIOJO, Paulino Jimnez – Co-defendant
- 4) JENKINS, Elizabeth – U.S. Magistrate Judge
- 5) KRIGSMEN, Cherie – Assistant U.S. Attorney
- 6) LINNEN, Valarie – Appointed CJA Appellate Counsel
- 7) LYKES, Charles – Defense Counsel
- 8) McNAMARA, Linda Julin – Assistant U.S. Attorney
- 9) MENDOZA, Jorge Martinez – Defendant
- 10) MOODY, James S. – U.S. District Court Judge
- 11) PORCELLI, Anthony – U.S. Magistrate Judge
- 12) PRESTON, James – Assistant U.S. Attorney
- 13) VELASCO, Segundo Boya – Co-defendant

STATEMENT OF THE CASE

A grand jury indicted Appellant, JORGE MARTIN MARTINEZ MENDOZA, along with three other co-defendants on two counts of criminal conduct:

- I. COUNT I: possession with intent to distribute five (5) kilograms or more of a mixture and substance containing cocaine in violation of 46 U.S.C. §§ 70503(a) and 70506(a)-(b), and 21 U.S.C. § 960(b)(1)(B)(ii) (2014); and
- II. COUNT II: possession with intent to distribute five kilograms or more of a cocaine mixture while aboard a vessel subject to the jurisdiction of the United States in violation of 46 U.S.C. §§ 70503(a) and 70506(a), 18 U.S.C. § 2, and 21 U.S.C. § 960(b)(1)(B)(ii) (2015).

(Dkt.1 p.1-2)

Mr. Mendoza pled guilty to Count I pursuant to a plea agreement with Appellee, UNITED STATES OF AMERICA. (Dkt.40) As part of every plea agreement offered by the government in the Middle District of Florida, the written plea agreement contained a waiver of appellate rights by Mr. Mendoza unless: (a) the sentence exceeded the applicable guideline range as determined by the district court (but not determined at the time of entering into the plea agreement); (b) the sentence exceeded the statutory maximum penalty (in this case, life imprisonment);

and (c) the ground that the sentence violates the Eighth Amendment of the United States Constitution. (Dkt.40 p.15)

In the Presentence Report (PSR), the probation officer found that Mr. Mendoza was 41 years old at the time of sentence (PSR.3), that he had no criminal history (PSR.7), that he had a continuous and steady employment history (PSR.9), and that he would be deported following any custodial term imposed. (PSR.8) The PSR also listed the names of the co-defendants and the dates of their sentencing hearings. (PSR.1) Nonetheless, defense counsel did not file any sentencing memorandum and did not challenge the PSR prior to the sentencing hearing.

At the sentencing hearing, Mr. Mendoza's testimony was provided via interpreter. (Dkt.115) Defense counsel argued that Mr. Mendoza worked hard as an automotive mechanic in Mexico City but earned a meager living, and that he agreed to participate in the offense to provide for his family. (Dkt.115 p.7) Defense counsel also offered a letter to the district court from Mr. Mendoza's employer, who described him as showing "excellent behavior, is responsible and honest." (Dkt.115 p.15)

As for the offense itself, Mr. Mendoza told the district court that the cocaine was already loaded onto the ship when he boarded and nothing was loaded after he got on the ship. Thus, he was unaware of how much cocaine was aboard the vessel. (Dkt.115 p.9) Defense counsel also argued that none of the co-defendants were "less

culpable than him,” then asked for a minor role adjustment to account. (Dkt.115 p.11)

Defense counsel read a letter from Mr. Mendoza, in which he apologized and expressed remorse for his conduct multiple times. (Dkt.115 p.13) He told the district court, “...if it were not for poverty and below-salaries in my country, I would never have even thought of committing a mistake like this.” (Dkt.115 p.12) He then told the court that he is married to Cinthia Martinez-Mena and that they have three children together: a 19-year-old son, a 15-year-old daughter, and a 4-year-old daughter. (Dkt.115 p.12)

Despite this testimony, defense counsel did not ask the district court to grant a downward variance based on the Section 3553(a) factors and Section 5K2.0.

The government did not argue that Mr. Mendoza was more culpable than any of the three other co-defendants, but simply asked the court not to assign him a minor role in the offense. (Dkt.115 p.18) The government also did not dispute the adverse impact on this family, his extreme remorsefulness, or his hard-working character.

Ultimately, the district court accepted the factual basis contained in the presentence investigation report. Although not alleged in the factual basis contained in the plea agreement or even in the presentence investigation report, the district court denied the request for a role adjustment on the basis that the court believed Mr. Mendoza to be a “load guard.” (Dkt.115 p.18) Thus, court determined the Offense

Level as 35 and Criminal History Category I, with a guideline range of 168-to-210 months imprisonment. (Dkt.115 p.18-19) Thereafter, the district court sentenced Mr. Mendoza to 168 months imprisonment. (Dkt.115 p.19)

Five days prior to Mr. Mendoza's sentencing hearing, the same district court judge sentenced co-defendant Marcos Gamboa Aragon to the statutory mandatory minimum sentence of 120 months imprisonment. See United States v. Aragon, 8:15-cr-363-JSM-AEP (Dkt.90) (M.D.F.L. March 3, 2016). Immediately following Mr. Mendoza's sentencing, the same district court judge sentenced co-defendant Segundo Boya Velasco to the statutory mandatory minimum sentence of 120 months imprisonment. See United States v. Velasco, 8:15-cr-363-JSM-AEP (Dkt.100) (M.D.F.L. March 8, 2016).¹

This appeal now follows.

¹ The district court judge sentenced a third co-defendant, Paulino Jimnez Biojo, whom the PSR identified as the "master/person in charge of the vessel", see PSR.5, to 240-months imprisonment after determining his total Offense Level as 37, with a Criminal History Category III, and a sentencing range of 262-327 months imprisonment. See United States v. Paulino, 815-cr-363-JSM-AEP-1 (Dkt.87) (M.D.F.L. March 2, 2016).

SUMMARY OF THE ARGUMENT

Under the Sixth Amendment, it is evident from the face of the record that defense counsel deprived Mr. Mendoza of effective assistance when the Presentence Report identified at least nine different mitigating factors, yet defense counsel failed to ask the district court for a downward variance based on the Section 3553(a) factors identified in the PSR.

Procedurally, a claim of ineffective assistance of counsel on direct appeal is not prohibited by the appeal waiver. As the appeal waiver only prohibits a direct appeal of sentence, the plain language does not prohibit Mr. Mendoza from challenging the performance of counsel during sentencing—and thus asserting his constitutional right to effective assistance of counsel at all critical stages of the proceeding.

Substantively, it is evident without any further fact-finding that defense counsel deprived Mr. Mendoza of his Sixth Amendment right to effective assistance of counsel during sentencing. Counsel's performance was deficient because he was aware of the findings in the PSR, yet failed to request a downward variance based on the Section 3553(a) factors and pursuant to Section 5K2.0. The PSR found that: (1) Mr. Mendoza was 41 years old at the time of sentence; (2) that he had no criminal history; (3) that he had a continuous and steady employment history; and (4) that he would be deported following any custodial term imposed. The PSR also listed the

names of the co-defendants and the dates of their sentencing hearings. While existing decisional clearly supports a downward variance based on each of these Section 3553(a) factors, defense counsel nevertheless failed to move for a downward variance pursuant to Section 5K2.0. Although defense counsel cited various facts regarding Mr. Mendoza's life during sentencing, defense counsel could not invoke the district court's authority to downward vary pursuant to Section 3553(a) and Section 5K2.0 merely by reciting to the court a list of mitigating facts.

Mr. Howard was prejudiced by the deficiency, because there is a reasonable probability, given the number and weight of the identified sentencing factors, that the district court would have imposed a lesser sentence (perhaps one closer to the 120-month statutory mandatory minimum as received by his equally-culpable co-defendants) had defense counsel requested a downward variance.

As the deficiency and prejudice are evident from the face of the record without need for further fact-finding, Mr. Mendoza requests that this Court hold that defense counsel deprived him of his Sixth Amendment right to effective assistance of counsel and remand for resentencing.

ARGUMENT

- I. Under the Sixth Amendment, it is evident from the face of the record that defense counsel deprived Mr. Mendoza of effective assistance when the Presentence Report identified at least nine different mitigating factors, yet defense counsel failed to ask the district court for a downward variance based on the Section 3553(a) factors identified in the PSR.**

Appellant, JORGE MENDOZA, pled guilty to one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States (Class A felony) in violation of 46 U.S.C. §§ 70503(a), 70506(a), and 70506(b), in addition to 21 U.S.C. § 960(b)(1)(B)(ii) (2015). (Dkt.98)

As part of the written plea agreement, Mr. Mendoza agreed to waive his right to appeal his judgment and sentence unless: (a) the sentence imposed exceeded his applicable guideline range; (b) the sentence exceeded the statutory maximum penalty; and (c) the sentence violated the Eighth Amendment. (Dkt.40 p.15)

Prior to sentencing, the presentence report revealed that Mr. Mendoza was 41 years old at the time of sentence (PSR.3), that he had no criminal history (PSR.7), that he had a continuous and steady employment history (PSR.9), and that he would be deported following any custodial term imposed. (PSR.8) Nonetheless, defense counsel did not file any sentencing memorandum and did not challenge the PSR prior to the sentencing hearing.

Ultimately, the district court determined Mr. Mendoza's criminal offense level to be 35, criminal history Category I, and the applicable guideline range to be 168 to 210 months. (Dkt.115 p.18-19) Thereafter, the district court sentenced Mr. Mendoza to 168 months imprisonment. (Dkt.115 p.19)

However, defense counsel deprived Mr. Mendoza of his Sixth Amendment right to effective assistance at all critical phases of the proceeding, because he failed to request a downward variance based on at least nine mitigating factors identified in the PSR.

Law: A reviewing court will consider a claim of ineffective assistance of counsel on direct appeal, where there is sufficient record evidence to support the claim. United States v. Andrews, 953 F.2d 1312, 1340 (11th Cir. 1992). Counsel is held to a standard of "reasonably effective assistance," and if an error is made, reversal is warranted if it influenced the sentence. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

This Court previously held that claims of ineffective assistance of counsel are barred where the appellant expressly waives his right to **both directly and collaterally attack** his sentence pursuant to a plea agreement, see Williams v. United States, 396 F.3d 1340, 1342 (11th Cir. 2005).

Where a defendant appears on the face of the record to satisfy the standards for a downward adjustment of sentence, yet counsel fails to request the downward

adjustment, this omission constitutes ineffective assistance of counsel cognizable on direct appeal. United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997). In Soto, it was evident from the record that the defendant qualified for a sentencing reduction based on minimal or minor participation in the offense pursuant to Section 3B1.2, United States Sentencing Guidelines. Id. at 57. However, “her counsel did no more than cite section 3B1.2 in the course of arguing for a downward departure under section 5K2.0...” Id. at 58. The court further pointed out that counsel failed to request the downward adjustment pursuant to Section 3B1.2 in the sentencing memorandum or at the sentencing hearing: “[C]ounsel cannot properly invoke a particular Guidelines provision ‘merely by reciting to the court a list of mitigating facts.’” Id. (citing United States v. Sergio, 934 F.3d 875, 881 (7th Cir. 1991)). Because it was evident on the face of the record without any additional fact-finding, the court held that the Strickland standard was satisfied on direct appeal, because the downward adjustment would have decreased the defendant’s sentence by at least seventeen months had defense counsel actually requested the downward adjustment pursuant to Section 3B1.2. Id. at 59.

Argument: First, Mr. Mendoza’s ineffective assistance of counsel claim is not barred under the appeal waiver contained in the plea agreement. Second, defense counsel’s deficiency in failing to request a downward variance pursuant to Section 3553(a) and Section 5K2.0 is evident from the face of the record without any

additional fact-finding: Appellant is prejudiced by the deficiency because there is a reasonable probability, but-for counsel's deficient performance, the district court would have imposed a different sentence. See Strickland, 466 U.S. at 687; Andrews, 953 F.2d at 1340.

A. Procedurally, a claim of ineffective assistance of counsel on direct appeal is not prohibited by the appeal waiver.

First, a claim of ineffective assistance of counsel on direct appeal is not prohibited by the appeal waiver. The agreement contained a waiver of the right to directly appeal the sentence only as follows:

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's **sentence** on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the **sentence** exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the **sentence** exceeds the statutory maximum penalty; or (c) the ground that the **sentence** violates the Eighth Amendment to the Constitution...

See Dkt.40 p.15-16 (emphasis added). According to the agreement, Mr. Mendoza is only prohibited from directly appealing the sentence. The plain language of the agreement does not prohibit Mr. Mendoza from challenging the performance of counsel during sentencing—and thus asserting his constitutional right to effective

assistance of counsel at all critical stages of the proceeding.² Indeed, it is in the interest of judicial economy to permit Mr. Mendoza to challenge the effectiveness of his counsel now, rather than in a separate habeas corpus proceeding, as the record is already fully developed on the issue.

Mr. Mendoza notes that this Court previously reasoned that, where an appeal waiver bars both direct and collateral challenges of sentence, this also waives a claim of ineffective assistance of counsel during sentencing, because “a contrary result would permit a defendant to circumvent the terms of the sentence-appeal waiver **simply by recasting a challenge to his sentence as a claim of ineffective assistance**, thus rendering the waiver meaningless.” Williams, 396 F.3d at 1342. (Emphasis added.) While the waiver in this case does not prevent collateral challenges to sentence, the undersigned counsel urges this Court to recede from position. Rather than “rendering the waiver meaningless,” this position operates to the opposite effect, instead trivializing Mr. Mendoza’s Sixth Amendment right to effective assistance of counsel at “the most critical stage of criminal proceedings”³ as explicitly guaranteed by the Constitution. See U.S. Const. amend. VI (“In all

² See “Notes of the Advisory Committee 1993”, Fed. R. Crim. P. 32 (“We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the ‘bottom-line’ for the defendant, particularly where the defendant has pled guilty.”)

³ See id.

criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence.”) Because the appeal waiver in this case does not expressly prohibit collateral challenges of the sentence, his claim of ineffective assistance of counsel on direct appeal is not barred by the appeal waiver.

B. Substantively, it is evident without any further fact-finding that defense counsel deprived Mr. Mendoza of his Sixth Amendment right to effective assistance of counsel during sentencing.

Substantively, defense counsel’s performance was deficient because he was aware of the findings in the PSR, yet failed to request a downward variance based on the Section 3553(a) factors and pursuant to Section 5K2.0. The PSR found that: (1) Mr. Mendoza was 41 years old at the time of sentence (PSR.3); (2) that he had no criminal history (PSR.7); (3) that he had a continuous and steady employment history (PSR.9); and (4) that he would be deported following any custodial term imposed. (PSR.8) The PSR also listed the names of the co-defendants and the dates of their sentencing hearings. (PSR.1) While existing decisional clearly supports a downward variance based on each of these Section 3553(a) factors, defense counsel nevertheless failed to move for a downward variance pursuant to Section 5K2.0. Although defense counsel cited various facts regarding Mr. Mendoza’s life during sentencing, defense counsel could not invoke the district court’s authority to downward vary pursuant to Section 3553(a) and Section 5K2.0 “merely by reciting to the court a list of mitigating facts.” See Sergio, 934 F.3d at 881.

Specifically, there is a reasonable probability that the district court would have granted a downward variance, and thus imposed a difference sentence, on each of the following Section 3553(a) factors identified in the PSR:

1. **Lack of Criminal History:** The PSR identified that Mr. Mendoza had absolutely zero criminal history. This factor alone could have formed the basis for a downward variance had defense counsel requested one. See United States v. Amezcua-Vasquez, 567 F.3d 1050, 1058 (9th Cir. 2009) (“It is not reasonable for Amezcua’s record of relative harmlessness to others for the past twenty years to subject him to the same severe offense level enhancement applied to a recent violent offender.”)
2. **Consequences of Deportation:** The PSR identified that Mr. Mendoza will be deported following the commitment. Courts have found this is an appropriate factor to consider under Section 3553(a), because the consequences of deportation mitigate the amount of imprisonment necessary to punish the defendant. Deportation also mitigates the need to impose a long prison sentence for deterrence or protection of the public. See United States v. Mendez-Velarde, 798 F. Supp. 2d 1249 (D.N.M. 2011) (varying downward eighty months for myriad reasons, including defendant’s deportation

following his sentence); United States v. Villanueva, 2007 WL 4410378 (E.D. Wisc. Dec. 14, 2007) (varying down twenty-four-months in drug case partly because defendant would be deported and separated from his family as a result of the conviction); Jordan v. De George, 341 U.S. 223, 232 (1951) (Jackson, J., dissenting) (deportation is “a life sentence of banishment in addition to the punishment which a citizen would suffer from the identical acts.”).

3. Prison Has a Greater Significance for those Imprisoned for the

First Time: The PSR revealed that Mr. Mendoza was a first-time offender who would thus be incarcerated for the first time in his life. This is a previously-recognized basis for a downward variance. See United States v. Baker, 445 F.3d 987 (7th Cir. 2006) (affirming downward variance, justified in part by court’s finding that prison would mean more to this defendant than one who has been imprisoned before); see also Valerie Wright, *Deterrence in Criminal Justice*, The Sentencing Project, at 7 (Nov. 2010) (“When prison sentences are relatively short, offenders are more likely to maintain their ties to family, employers, and their community, all of which promote successful reentry into society. Conversely, when prisoners serve longer sentences they are more likely to become

institutionalized, lose pro-social contracts in the community, and become removed from legitimate opportunities, all of which promote recidivism.”)

4. **Aberrant Behavior:** Even though Mr. Mendoza did not qualify for a departure under Section 5K2.20, existing decisional law permitted the district court to vary downward, if defense counsel had so requested, because the offense appears to be an isolated mistake a defendant’s otherwise law-abiding life. See United States v. Germosen, 473 F. Supp. 2d 221 (D. Mass. 2007) (sentence of two years’ probation with six months’ home detention justified where Guideline range was thirty-seven to forty-six months for conspiracy involving heroin importation, because, although defendant disqualified from aberrant behavior departure because of “serious drug trafficking offense,” defendant was first time offender who was “far down the organizational tree”).

5. **Excellent Employment History:** Mr. Mendoza’s excellent employment history as an automotive mechanic, as identified in the PSR, constituted a recognized basis for a downward variance if defense counsel had requested such. See Gall v. United States, 552 U.S. 38, 42, 54 (2007) (a defendant’s excellent work history may

merit a sentencing reductions); United States v. Jagmohan, 909 F.2d 61 (2d Cir. 1990) (downward departure from fifteen to twenty-one months to probation where defendant had nine years of work history, painting a picture of a person with a stable background whose criminal activity was uncharacteristic mistake); United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (upholding downward departure for twenty-three-year-old defendant in assault case based on excellent employment record since age seventeen despite an unemployment rate of 72% on Indian reservation); United States v. Munoz-Nava, 524 F.3d 1137 (10th Cir. 2008) (upheld sentence of one year and one day for defendant convicted of possession with intent to distribute 100 grams of heroin with Guideline range of forty-six to fifty-seven months, citing in part defendant's "long and consistent work history" at a legitimate job, demonstrated by letters from employers).

6. **Age Reduces the Risk of Recidivism:** As the PSR identified that Mr. Mendoza was just short of his 42nd birthday, defense counsel failed to request a downward variance on the basis that age reduces the risk of recidivism. See U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY

COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES, at 12, 28 (2004) (“Recidivism rates decline relatively consistently as age increases,” and **defendants “over the age of forty . . . exhibit markedly lower rates of recidivism in comparison to younger defendants.”**); see also United States v. Saenz-Nunez, 2011 WL 6013477 (D. N.M. Nov. 28, 2011) (granting four-level downward departure in part because, at 53 years old, defendant was less likely to recidivate); United States v. Phinney, 599 F. Supp. 2d 1037 (E.D. Wis. 2009) (sentencing child pornography defendant to six months custody despite Guidelines range of thirty-seven to forty-six, citing defendant’s reduced recidivism potential because of his age as well as his health problems, which would be better treated in the community); United States v. Nellum, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (departing downward sixty months for fifty-seven-year old defendant convicted of distributing crack based on lower recidivism rates for older defendants).

7. **Disparity in Sentencing Amongst Co-Defendants:** The PSR identified all three co-defendants and the dates of their sentencing hearings. Five days prior to Mr. Mendoza’s sentencing hearing, the

same district court judge sentenced co-defendant Marcos Gamboa Aragon to the statutory mandatory minimum sentence of 120 months imprisonment. See United States v. Aragon, 8:15-cr-363-JSM-AEP (Dkt.90) (M.D.F.L. March 3, 2016). Immediately following Mr. Mendoza's sentencing, the same district court judge sentenced co-defendant Segundo Boya Velasco to the same statutory mandatory minimum sentence of 120 months imprisonment. See United States v. Velasco, 8:15-cr-363-JSM-AEP (Dkt.100) (M.D.F.L. March 8, 2016). Although he argued that Mr. Mendoza was no more culpable than his co-defendants, and the government did not dispute this argument, defense counsel failed to request a downward variance to even out the substantially higher sentencing range of Mr. Mendoza as compared to Mr. Aragon and Mr. Velasco. See United States v. Zavala, 300 F. App'x 792, 794 (11th Cir. 2008) (affirming district court's downward variance granted based on the district court's belief that "the imposition of a greater sentence than [that of the co-defendant and head of the criminal organization] would cause the public to question the justice of a system that imposes a greater sentence on a follower than a leader."); United States v. Lazenby, 439 F.3d 928, 934 (8th Cir.

2006) (finding sentences of two co-defendants substantively unreasonable where one was substantially higher than the other, creating an extreme disparity that could diminish respect for the law); United States v. Tzoc-Sierra, 387 F.3d 978 (9th Cir. 2004) (affirming district court's ten-month downward departure from Guideline range for drug offense where district court wanted to ensure sentence was equivalent to that of comparable co-defendants); United States v. Doan, 498 F. Supp. 2d 816, 821 (E.D. Va. 2007) (“[T]his Court cannot hold that Defendant is so culpable as to require a term of incarceration of 292 months, a sentence more than double of his co-Defendant brother, who had a worse criminal history, yet received 135 months.”).

8. **Lack of Knowledge of the Quantity of Drugs:** Although not specifically identified in the PSR, defense counsel argued that Mr. Mendoza did not know the quantity of the drugs, yet failed to request a downward variance on this basis as well. Mr. Mendoza told the district court that the drugs had already been loaded on the vessel at the time he boarded it and that he was unaware of the quantity aboard the ship. The government did not dispute this claim. See United States v. Chalarca, 95 F.3d 239 (2d Cir. 1996) (defendant

had no knowledge of any particular quantity of cocaine and no particular quantity was foreseeable to him in connection with conspiracy); United States v. Mendoza, 121 F.3d 510 (9th Cir. 1997) (defendant had no knowledge of or control over the amount or purity of the drugs, and court determined that the facts were outside the heartland of such cases); United States v. Jaber, 362 F. Supp. 2d 365 (D. Mass. 2005) (defendant was a mere functionary who took orders from codefendant, and the amount of pseudo-ephedrine that passed through his hands reflected others' decisions).

9. **Totality of the Circumstances:** While any one of these factors was alone sufficient to grant a downward variance, defense counsel also failed to ask the district court to consider downward varying based on the totality of the Section 3553(a) factors. See United States v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. 2009) (“a sentencing judge has the discretion to consider a variance under the totality of the § 3553(a) factors (rather than one factor in isolation) on the basis of a defendant's fast-track argument, and [] such a variance would be reasonable in an appropriate case”).

Given the sheer number of mitigating circumstances and the gravity of each, there is a reasonable probability that the district court would have granted a

downward variance based on any one of these factors, and could also have done so based on the totality of the factors, had defense counsel actually requested a downward variance pursuant to Section 3553(a) and Section 5K2.0. See Andrews, 953 F.2d at 1340; Soto, 32 F.3d at 59.

In sum, defense counsel was aware of the Section 3553(a) factors identified by the PSR. The government did not dispute the findings contained therein. Nonetheless, defense counsel failed to ask the district court to grant a downward variance based on Section 3553(a) and Section 5K2.0, resulting in deficient performance. See Soto 32 F.3d at 59. Mr. Howard was prejudiced by the deficiency, because there is a reasonable probability, given the number and weight of the identified sentencing factors, that the district court would have imposed a lesser sentence (perhaps one closer to the 120-month statutory mandatory minimum as received by his equally-culpable co-defendants) had defense counsel requested a downward variance. See Andrews, 953 F.2d at 1340. As the deficiency and prejudice are evident from the face of the record without need for further fact-finding, Mr. Mendoza requests that this Court hold that defense counsel deprived him of his Sixth Amendment right to effective assistance of counsel and remand for resentencing.

CONCLUSION

Mr. Mendoza requests that this Court vacate his sentence and remand to the district court for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to LINDA JULIN MCNAMARA, United States Attorney's Office, Appellate Division, via electronic case mail delivery on this 1st day of September 2017.

CERTIFICATE OF TYPEFACE COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 4,473 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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IN THE SUPREME COURT OF THE UNITED STATES

JORGE MARTIN MENDOZA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX E

Motion to Dismiss

No. 16-11382-GG

In the
**United States Court of Appeals
for the Eleventh Circuit**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JORGE MENDOZA,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
No. 8:15-CR-363-T-30AEP-4

**UNITED STATES' MOTION TO DISMISS APPEAL
BASED ON (1) WAIVER IN PLEA AGREEMENT AND
(2) INSUFFICIENTLY DEVELOPED RECORD**

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October 2, 2017

United States v. Jorge Mendoza
No. 16-11382-GG

**Certificate of Interested Persons
and Corporate Disclosure Statement**

The following persons have an interest in the outcome of this case:

1. Bentley, A. Lee, III, former United States Attorney;
2. Gershow, Holly L., Assistant United States Attorney;
3. Jenkins, Hon. Elizabeth A., United States Magistrate Judge;
4. Linnen, Valarie, Esq.;
5. Lykes, Charles, Jr., Esq.;
6. Mendoza, Jorge, defendant-appellant;
7. Moody, Hon. James S., Jr., Senior United States District Judge;
8. Muldrow, W. Stephen, Acting United States Attorney;
9. Porcelli, Hon. Anthony E., United States Magistrate Judge;
10. Preston, James C., Jr., Assistant United States Attorney;
11. Rhodes, David P., Assistant United States Attorney,
Chief, Appellate Division; and
12. Rhodes, Yvette, Assistant United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

In the United States Court of Appeals
for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 16-11382-GG

JORGE MENDOZA,
Defendant-Respondent

**United States' Motion to Dismiss Appeal
Based on (1) Waiver in Plea Agreement
and (2) Insufficiently Developed Record**

The United States moves to dismiss this appeal because Jorge Mendoza knowingly and voluntarily waived his right to appeal his sentence on the grounds he asserts in this appeal. Further, even if Mendoza had not waived his right to appeal, the record is insufficiently developed to resolve his claim on direct appeal.

Course of Proceedings

Jorge Mendoza was indicted for conspiring to possess with the intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a) and 70506(a) and (b) (count one), and for possessing five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States, in

violation of 46 U.S.C. §§ 70503(a) and 70506(a) (count two). Doc. 1. He entered into a plea agreement with the United States, in which he agreed to plead guilty to count one. Doc. 40 at 1. In return, the United States agreed to dismiss the second count, to recommend a downward adjustment for Mendoza's acceptance of responsibility, to consider moving for a downward departure for substantial assistance, and to recommend a guidelines-range sentence and not oppose his request for a sentence at the low-end of his guidelines range. *Id.* at 2–5.¹

As part of the plea agreement, Mendoza waived his right to appeal his sentence on most grounds:

The defendant ... expressly waives the right to appeal [his] sentence on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range *as determined by the Court* pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

Doc. 40 at 15 (emphasis in original).

At the change-of-plea hearing, the magistrate judge reviewed the

¹The plea agreement is Attachment A.

sentence-appeal waiver with Mendoza and established that he understood the waiver:

THE COURT: All right, sir. It's very important you understand that absent your plea agreement in this case you would have the right to appeal any sentence that you would receive, that is by a specific provision in paragraph B(8) starting on page 15—or, excuse me, B(7) on page 15, by this provision you have specifically agreed to waive your right to appeal the sentence, that is to waive your right to complain to a higher court about your sentence, unless certain events occur. Those events include: One, the ground that the sentence exceeds the applicable advisory guideline range as calculated by the Court pursuant to the United States Sentencing Guidelines; two, the ground that the sentence exceeds the statutory maximum penalty; three, the ground that the sentence violates the Eighth Amendment to the Constitution, which is cruel or unusual punishment; or four, in the event that the Government files an appeal in your case, you would then be free from the waiver and you could appeal your sentence as well.

Do you understand that, sir, that by this provision of your plea agreement you have expressly waived your right to appeal the sentence unless one of those events occurs as I've just described them?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about this provision?

THE DEFENDANT: No.

THE COURT: Has anyone forced you or threatened you in any way in order for you to waive your right to appeal the sentence?

THE DEFENDANT: No.

THE COURT: Other than what's in your plea agreement,

has anyone promised you anything else of value in order for you to waive that right?

THE DEFENDANT: No.

Doc. 129 at 17–19.²

The district court accepted Mendoza’s guilty plea, Doc. 65, and sentenced him to serve 168 months’ imprisonment, Doc. 98. Mendoza now appeals that sentence.

Argument

1. Mendoza waived his right to appeal his sentence on the basis asserted in his appeal.

A defendant may waive his statutory right to appeal. *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). This Court will enforce the waiver if “either (1) the district court specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, or (2) it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver.” *Id.* at 1351.

Moreover, “[m]otions to dismiss based upon sentence appeal waivers should be decided at the earliest stage in the process at which it is feasible to do so, and except in extraordinary circumstances should not be carried with the case until after briefing.” *United States v. Buchanan*, 131 F.3d 1005, 1008 (11th

²The change-of-plea hearing transcript is Attachment B.

Cir. 1997). Carrying a motion to dismiss with the case “deprives the government of the benefit that it has bargained for and obtained in the plea agreement containing the ... waiver.” *Id.* “Accordingly, where it is clear from the plea agreement and the Rule 11 colloquy, or from some other part of the record, that the defendant knowingly and voluntarily entered into a sentence-appeal waiver, that waiver should be enforced without requiring the government to brief the merits of the appeal.” *Id.*

Further, a defendant is not permitted “to circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless.”

Williams v. United States, 396 F.3d 1340, 1342 (11th Cir. 2005); *see also United States v. Hanlon*, No. 16-17457, 2017 WL 3278881, *1 (11th Cir. Aug. 2, 2017) (unpublished).

Here, the plea agreement, Doc. 40 at 15, and the Rule 11 colloquy, Doc. 129 at 17–19, make clear that Mendoza knowingly and voluntarily waived his right to appeal his sentence. Despite his waiver, Mendoza challenges his sentence, arguing that his counsel at sentencing was ineffective for failing to request a downward variance. *See* Mendoza’s brief at 10, 17–26. But this challenge does not fall within any exception to the waiver. *See* Doc. 40 at 15. Therefore, this Court should dismiss Mendoza’s appeal without requiring the

United States to brief the merits of his ineffectiveness claim. *See Buchanan*, 131 F.3d at 1008.

Mendoza argues, however, that because his appeal waiver does not expressly prohibit collateral challenges of his sentence, his waiver does not apply to his claim. *See Mendoza's* brief at 13, 16–17. But whether his waiver applies to collateral attacks is beside the point. Mendoza is attacking his sentence on direct appeal, and such challenges are within the scope of his appeal waiver. Mendoza cannot evade that waiver simply by framing his claim as ineffective assistance of counsel. *See Williams*, 396 F.3d at 1342; *Hanlon*, 2017 WL 3278881 at *1–2. Indeed, faced with a similar claim that trial counsel had been ineffective at sentencing, this Court dismissed that claim based on an appeal waiver identical to Mendoza's. *See Hanlon*, 2017 WL 3278881 at *2; *compare* Doc. 40 at 11–12 *with United States v. Hanlon*, No. 2:14-cr-18, Doc. 33.³ This Court should do the same here.

2. The record is insufficiently developed for this Court to resolve Mendoza's claim on direct appeal.

Even if Mendoza had not waived his right to challenge his sentence, this Court should dismiss his appeal because the record is not sufficiently developed to resolve his ineffectiveness claim on direct appeal. This Court

³The plea agreement from *Hanlon* is Attachment C.

“will not generally consider claims of ineffective assistance of counsel raised on direct appeal where the district court did not entertain the claim nor develop a factual record.” *United States v. Patterson*, 595 F.3d 1324, 1328 (11th Cir. 2010). Only in the “rare instance” when the record is sufficiently developed will this Court do so. *United States v. Curbelo*, 726 F.3d 1260, 1267 (11th Cir. 2013).

One of the required showings for an ineffective-assistance-of-counsel claim is that no reasonable strategy supported counsel’s actions, and on direct appeal, the “appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.” *Massaro v. United States*, 538 U.S. 500, 505 (2003). Such claims are “almost without exception” developed in a proceeding under 28 U.S.C. § 2255 motions. *Patterson*, 595 F.3d at 132.

This is not one of those rare cases with a record sufficiently developed to allow resolution of an ineffective-assistance-of-counsel claim on direct appeal. Mendoza argues that counsel should have requested a variance based on factors identified in the PSR. *See* Mendoza’s brief at 18–25. As an initial matter, defense counsel did request, in a general way, that the court vary downward from Mendoza’s guideline’s range based on mitigating factors. *See* Doc. 115 at 11–17. Mendoza’s argument, therefore, is that defense counsel did

not make this request in a compelling enough manner, but no evidence in the record suggests that defense counsel's advocacy was deficient or that it prejudiced Mendoza. Because the district court had no opportunity to consider Mendoza's claim of ineffective assistance of counsel and so did not develop a record on the issue, this Court should decline to consider Mendoza's claim on direct appeal. *See United States v. Valencia*, 556 F. App'x 916, 920 (11th Cir. 2014) (declining to consider claim that counsel was ineffective for failing to request variance at sentencing when record did not make clear what strategic considerations, if any, went into that decision).

Again, nothing in Mendoza's plea agreement prevents him from raising his claim of ineffective assistance of counsel through an 18 U.S.C. § 2255 motion. This would be the appropriate avenue for Mendoza to seek the relief he requests.

Conclusion

For these reasons, this Court should dismiss this appeal.

Respectfully submitted,

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Acting United States Attorney

YVETTE RHODES
Assistant United States Attorney
Appellate Division

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Certificate of Compliance with Type-Volume Limitation

This motion, which contains 1671 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P 32(a)(5), (6).

Certificate of Service

I certify that a copy of this motion and the notice of electronic filing was sent by CM/ECF on October 2, 2017, to:

VALERIE LINNEN, ESQ.
Counsel for Jorge Mendoza

s/ Holly L. Gershow
HOLLY L. GERSHOW
Assistant United States Attorney

AF Approval HG

Chief Approval KAB

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:15-cr-363-T-30AEP

JORGE MARTIN MARTINEZ MEDOZA

PLEA AGREEMENT

Pursuant to Fed. R. Crim. P. 11(c), the United States of America, by A. Lee Bentley, III, United States Attorney for the Middle District of Florida, and the defendant, JORGE MARTIN MARTINEZ MEDOZA, and the attorney for the defendant, Charles E. Lykes, Esquire, mutually agree as follows:

A. Particularized Terms

1. Count(s) Pleading To

The defendant shall enter a plea of guilty to Count One of the Indictment. Count One charges the defendant with conspiracy to possess with intent to distribute five (5) kilograms or more of cocaine, while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a) and 70506(a) and (b); and 21 U.S.C. § 960(b)(1)(B)(ii).

2. Minimum and Maximum Penalties

Count One is punishable by a mandatory minimum term of imprisonment of 10 years up to Life, a fine of up to \$10,000,000, a term of

Defendant's Initials JMM

supervised release of at least 5 years, and a special assessment of \$100, said special assessment to be due on the date of sentencing.

3. Alleyne v. United States and Apprendi v. New Jersey

Under *Alleyne v. United States*, 570 U.S. —, 133 S.Ct. 2151 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a minimum sentence of ten (10) years imprisonment and a maximum sentence of life imprisonment may be imposed because the following facts have been admitted by the defendant and are established by this plea of guilty:

The conspiracy involved five (5) or more kilograms of cocaine.

4. Elements of the Offense(s)

The defendant acknowledges understanding the nature and elements of the offense(s) with which defendant has been charged and to which defendant is pleading guilty. The elements of Count One are:

First: Two or more persons in some way agreed to try to accomplish a shared and unlawful plan to possess with intent to distribute and distribute five (5) kilograms or more of cocaine, while aboard a vessel subject to the jurisdiction of the United States; and,

Second: The defendant knew the unlawful purpose of the plan and willfully joined in it.

5. Counts Dismissed

At the time of sentencing, the remaining count(s) against the defendant, Count Two, will be dismissed pursuant to Fed. R. Crim. P. 11(c)(1)(A).

6. Guidelines Sentence

Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States will recommend to the Court that the defendant be sentenced within the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines, as adjusted by any departure the United States has agreed to recommend in this plea agreement. The parties understand that such a recommendation is not binding on the Court and that, if it is not accepted by this Court, neither the United States nor the defendant will be allowed to withdraw from the plea agreement, and the defendant will not be allowed to withdraw from the plea of guilty.

7. Acceptance of Responsibility - Three Levels

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will recommend to the Court that the defendant receive a two-level downward adjustment for acceptance of responsibility, pursuant to USSG §3E1.1(a). The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

Further, at the time of sentencing, if the defendant's offense level prior to operation of subsection (a) is level 16 or greater, and if the defendant complies with the provisions of USSG §3E1.1(b) and all terms of this Plea Agreement, including but not limited to, the timely submission of the financial

affidavit referenced in Paragraph B.4., the United States agrees to file a motion pursuant to USSG §3E1.1(b) for a downward adjustment of one additional level. The defendant understands that the determination as to whether the defendant has qualified for a downward adjustment of a third level for acceptance of responsibility rests solely with the United States Attorney for the Middle District of Florida, and the defendant agrees that the defendant cannot and will not challenge that determination, whether by appeal, collateral attack, or otherwise.

8. Low End

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will not oppose the defendant's request to the Court that the defendant receive a sentence at the low end of the applicable guideline range, as calculated by the Court. The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

9. Cooperation - Substantial Assistance to be Considered

Defendant agrees to cooperate fully with the United States in the investigation and prosecution of other persons, and to testify, subject to a prosecution for perjury or making a false statement, fully and truthfully before any federal court proceeding or federal grand jury in connection with the charges in this case and other matters, such cooperation to further include a full and complete disclosure of all relevant information, including production of any and all

books, papers, documents, and other objects in defendant's possession or control, and to be reasonably available for interviews which the United States may require. If the cooperation is completed prior to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" in accordance with the policy of the United States Attorney for the Middle District of Florida, warranting the filing of a motion at the time of sentencing recommending (1) a downward departure from the applicable guideline range pursuant to USSG §5K1.1, or (2) the imposition of a sentence below a statutory minimum, if any, pursuant to 18 U.S.C. § 3553(e), or (3) both. If the cooperation is completed subsequent to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" in accordance with the policy of the United States Attorney for the Middle District of Florida, warranting the filing of a motion for a reduction of sentence within one year of the imposition of sentence pursuant to Fed. R. Crim. P. 35(b). In any case, the defendant understands that the determination as to whether "substantial assistance" has been provided or what type of motion related thereto will be filed, if any, rests solely with the United States Attorney for the Middle District of Florida, and the defendant agrees that defendant cannot and will not challenge that determination, whether by appeal, collateral attack, or otherwise.

10. Use of Information - Section 1B1.8

Pursuant to USSG §1B1.8(a), the United States agrees that no self-incriminating information which the defendant may provide during the course of defendant's cooperation and pursuant to this agreement shall be used in determining the applicable sentencing guideline range, subject to the restrictions and limitations set forth in USSG §1B1.8(b).

11. Cooperation - Responsibilities of Parties

a. The government will make known to the Court and other relevant authorities the nature and extent of defendant's cooperation and any other mitigating circumstances indicative of the defendant's rehabilitative intent by assuming the fundamental civic duty of reporting crime. However, the defendant understands that the government can make no representation that the Court will impose a lesser sentence solely on account of, or in consideration of, such cooperation.

b. It is understood that should the defendant knowingly provide incomplete or untruthful testimony, statements, or information pursuant to this agreement, or should the defendant falsely implicate or incriminate any person, or should the defendant fail to voluntarily and unreservedly disclose and provide full, complete, truthful, and honest knowledge, information, and cooperation regarding any of the matters noted herein, the following conditions shall apply:

(1) The defendant may be prosecuted for any perjury or false declarations, if any, committed while testifying pursuant to this agreement, or for obstruction of justice.

(2) The United States may prosecute the defendant for the charges which are to be dismissed pursuant to this agreement, if any, and may either seek reinstatement of or refile such charges and prosecute the defendant thereon in the event such charges have been dismissed pursuant to this agreement. With regard to such charges, if any, which have been dismissed, the defendant, being fully aware of the nature of all such charges now pending in the instant case, and being further aware of defendant's rights, as to all felony charges pending in such cases (those offenses punishable by imprisonment for a term of over one year), to not be held to answer to said felony charges unless on a presentment or indictment of a grand jury, and further being aware that all such felony charges in the instant case have heretofore properly been returned by the indictment of a grand jury, does hereby agree to reinstatement of such charges by decision of any order dismissing them or, alternatively, does hereby waive, in open court, prosecution by indictment and consents that the United States may proceed by information instead of by indictment with regard to any felony charges which may be dismissed in the instant case, pursuant to this plea agreement, and the defendant further agrees to waive the statute of limitations and any speedy trial claims on such charges.

(3) The United States may prosecute the defendant for any offenses set forth herein, if any, the prosecution of which in accordance with this agreement, the United States agrees to forego, and the defendant agrees to waive the statute of limitations and any speedy trial claims as to any such offenses.

(4) The government may use against the defendant the defendant's own admissions and statements and the information and books, papers, documents, and objects that the defendant has furnished in the course of the defendant's cooperation with the government.

(5) The defendant will not be permitted to withdraw the guilty pleas to those counts to which defendant hereby agrees to plead in the instant case but, in that event, defendant will be entitled to the sentencing limitations, if any, set forth in this plea agreement, with regard to those counts to which the defendant has pled; or in the alternative, at the option of the United States, the United States may move the Court to declare this entire plea agreement null and void.

12. Forfeiture of Assets

The defendant agrees to forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, pursuant to 46 U.S.C. § 70507, 21 U.S.C. § 881(a), and 28 U.S.C. § 2461(c), whether in the possession or control of the United States, the defendant or defendant's nominees.

The defendant agrees and consents to the forfeiture of these assets pursuant to any federal criminal, civil judicial or administrative forfeiture action. The defendant also hereby agrees to waive all constitutional, statutory and procedural challenges in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture described herein constitutes an excessive fine, was not properly noticed in the charging instrument, addressed by the Court at the time of the guilty plea, announced at sentencing, or incorporated into the judgment.

The defendant admits and agrees that the conduct described in the Factual Basis below provides a sufficient factual and statutory basis for the forfeiture of the property sought by the government. Pursuant to the provisions of Rule 32.2(b)(1)(A), the United States and the defendant request that at the time of accepting this plea agreement, the Court make a determination that the government has established the requisite nexus between the property subject to forfeiture and the offense to which defendant is pleading guilty and enter a preliminary order of forfeiture. Pursuant to Rule 32.2(b)(4), the defendant agrees that the preliminary order of forfeiture will satisfy the notice requirement and will be final as to the defendant at the time it is entered. In the event the forfeiture is omitted from the judgment, the defendant agrees that the forfeiture order may be incorporated into the written judgment at any time pursuant to Rule 36.

The defendant agrees to take all steps necessary to identify and locate all property subject to forfeiture and to transfer custody of such property to the United States before the defendant's sentencing. To that end, the defendant agrees to make a full and complete disclosure of all assets over which defendant exercises control directly or indirectly, including all assets held by nominees, to execute any documents requested by the United States to obtain from any other parties by lawful means any records of assets owned by the defendant, and to consent to the release of the defendant's tax returns for the previous five years. The defendant agrees to be interviewed by the government, prior to and after sentencing, regarding such assets and their connection to criminal conduct. The defendant further agrees to be polygraphed on the issue of assets, if it is deemed necessary by the United States. The defendant agrees that Federal Rule of Criminal Procedure 11 and U.S.S.G. § 1B1.8 will not protect from forfeiture assets disclosed by the defendant as part of his cooperation.

The defendant agrees to take all steps necessary to assist the government in obtaining clear title to the forfeitable assets before the defendant's sentencing. In addition to providing full and complete information about forfeitable assets, these steps include, but are not limited to, the surrender of title, the signing of a consent decree of forfeiture, and signing of any other documents necessary to effectuate such transfers.

The defendant agrees that the United States is not limited to forfeiture of the property specifically identified for forfeiture in this Plea Agreement. If the

United States determines that property of the defendant identified for forfeiture cannot be located upon the exercise of due diligence; has been transferred or sold to, or deposited with, a third party; has been placed beyond the jurisdiction of the Court; has been substantially diminished in value; or has been commingled with other property which cannot be divided without difficulty; then the United States shall, at its option, be entitled to forfeiture of any other property (substitute assets) of the defendant up to the value of any property described above. The Court shall retain jurisdiction to settle any disputes arising from application of this clause. The defendant agrees that forfeiture of substitute assets as authorized herein shall not be deemed an alteration of the defendant's sentence.

Forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon the defendant in addition to forfeiture.

The defendant agrees that, in the event the Court determines that the defendant has breached this section of the Plea Agreement, the defendant may be found ineligible for a reduction in the Guidelines calculation for acceptance of responsibility and substantial assistance, and may be eligible for an obstruction of justice enhancement.

B. Standard Terms and Conditions

1. Special Assessment and Fine

On the count to which a plea of guilty is entered, the Court shall impose a special assessment of \$100 pursuant to 18 U.S.C. § 3013. The special assessment is due on the date of sentencing.

The defendant understands that this agreement imposes no limitations as to fine.

2. Supervised Release

The defendant understands that the offense(s) to which the defendant is pleading provide(s) for imposition of a term of supervised release upon release from imprisonment, and that, if the defendant should violate the conditions of release, the defendant would be subject to a further term of imprisonment.

3. Immigration Consequences of Pleading Guilty

The defendant has been advised and understands that, upon conviction, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

4. Sentencing Information

The United States reserves its right and obligation to report to the Court and the United States Probation Office all information concerning the background, character, and conduct of the defendant, to provide relevant factual

information, including the totality of the defendant's criminal activities, if any, not limited to the count(s) to which defendant pleads, to respond to comments made by the defendant or defendant's counsel, and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject to any limitations set forth herein, if any.

5. Financial Disclosures

Pursuant to 18 U.S.C. § 3664(d)(3) and Fed. R. Crim. P. 32(d)(2)(A)(ii), the defendant agrees to complete and submit to the United States Attorney's Office within 30 days of execution of this agreement an affidavit reflecting the defendant's financial condition. The defendant promises that his financial statement and disclosures will be complete, accurate and truthful and will include all assets in which he has any interest or over which the defendant exercises control, directly or indirectly, including those held by a spouse, dependent, nominee or other third party. The defendant further agrees to execute any documents requested by the United States needed to obtain from any third parties any records of assets owned by the defendant, directly or through a nominee, and, by the execution of this Plea Agreement, consents to the release of the defendant's tax returns for the previous five years. The defendant similarly agrees and authorizes the United States Attorney's Office to provide to, and obtain from, the United States Probation Office, the financial affidavit, any of the defendant's federal, state, and local tax returns, bank records

and any other financial information concerning the defendant, for the purpose of making any recommendations to the Court and for collecting any assessments, fines, restitution, or forfeiture ordered by the Court. The defendant expressly authorizes the United States Attorney's Office to obtain current credit reports in order to evaluate the defendant's ability to satisfy any financial obligation imposed by the Court.

6. Sentencing Recommendations

It is understood by the parties that the Court is neither a party to nor bound by this agreement. The Court may accept or reject the agreement, or defer a decision until it has had an opportunity to consider the presentence report prepared by the United States Probation Office. The defendant understands and acknowledges that, although the parties are permitted to make recommendations and present arguments to the Court, the sentence will be determined solely by the Court, with the assistance of the United States Probation Office. Defendant further understands and acknowledges that any discussions between defendant or defendant's attorney and the attorney or other agents for the government regarding any recommendations by the government are not binding on the Court and that, should any recommendations be rejected, defendant will not be permitted to withdraw defendant's plea pursuant to this plea agreement. The government expressly reserves the right to support and defend any decision that the Court may make with regard to the defendant's sentence, whether or not

such decision is consistent with the government's recommendations contained herein.

7. Defendant's Waiver of Right to Appeal the Sentence

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's sentence on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

8. Middle District of Florida Agreement

It is further understood that this agreement is limited to the Office of the United States Attorney for the Middle District of Florida and cannot bind other federal, state, or local prosecuting authorities, although this office will bring defendant's cooperation, if any, to the attention of other prosecuting officers or others, if requested.

9. Filing of Agreement

This agreement shall be presented to the Court, in open court or in camera, in whole or in part, upon a showing of good cause, and filed in this cause, at the time of defendant's entry of a plea of guilty pursuant hereto.

10. Voluntariness

The defendant acknowledges that defendant is entering into this agreement and is pleading guilty freely and voluntarily without reliance upon any discussions between the attorney for the government and the defendant and defendant's attorney and without promise of benefit of any kind (other than the concessions contained herein), and without threats, force, intimidation, or coercion of any kind. The defendant further acknowledges defendant's understanding of the nature of the offense or offenses to which defendant is pleading guilty and the elements thereof, including the penalties provided by law, and defendant's complete satisfaction with the representation and advice received from defendant's undersigned counsel (if any). The defendant also understands that defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that defendant has the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against defendant, the right against compulsory self-incrimination, and the right to compulsory process for the attendance of witnesses to testify in defendant's defense; but, by pleading guilty, defendant waives or gives up those rights and there will be no trial. The defendant further understands that if

Defendant's Initials JMM

defendant pleads guilty, the Court may ask defendant questions about the offense or offenses to which defendant pleaded, and if defendant answers those questions under oath, on the record, and in the presence of counsel (if any), defendant's answers may later be used against defendant in a prosecution for perjury or false statement. The defendant also understands that defendant will be adjudicated guilty of the offenses to which defendant has pleaded and, if any of such offenses are felonies, may thereby be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to have possession of firearms.

11. Factual Basis

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove those specific facts and others beyond a reasonable doubt.

FACTS

On or about August 31, 2015, defendants PAULINO JIMNEZ BIOJO, MARCOS GAMBOA ARAGON, SEGUNDO BOYA VELASCO, and JORGE MARTIN MARTINEZ MEDOZA were transporting cocaine for delivery to others aboard a self-propelled semi-submersible vessel (SPSS) when they were intercepted by the United States Coast Guard (USCG) in international waters in the Eastern Pacific Ocean. The master of the vessel made no claim of nationality for the vessel, rendering the vessel subject to the jurisdiction of the

United States. During a search of the vessel, over 6000 kilograms of cocaine (sample field tests positive) were recovered before the SPSS became unstable and the search was terminated. After the vessel was sunk as a hazard to navigation, additional cocaine rose to the surface and was recovered. The defendants were to deliver the cocaine to others. The defendants first entered the United States in the Middle District of Florida.

12. Entire Agreement

This plea agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements, or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea.

13. Certification

The defendant and defendant's counsel certify that this plea agreement has been read in its entirety by (or has been read to) the defendant and that defendant fully understands its terms.

DATED this 9th day of November, 2015.

Jorge Martin Martinez Medoza
JORGE MARTIN MARTINEZ MEDOZA
Defendant

Charles E. Lykes
CHARLES E. LYKES
Attorney for Defendant

A. LEE BENTLEY, III
United States Attorney

James C. Preston, Jr.
JAMES C. PRESTON, JR.
Assistant United States Attorney

Joseph K. Ruddy
JOSEPH K. RUDDY
Assistant United States Attorney
Chief, Narcotics Section

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) Case No.
) 8:15-CR-00363-JSM-AEP-4
)
JORGE MARTIN MARTINEZ MENDOZA,)
)
Defendant.)

CHANGE OF PLEA HEARING
BEFORE THE HONORABLE ANTHONY E. PORCELLI
UNITED STATES MAGISTRATE JUDGE

NOVEMBER 23, 2015
2:08 P.M.
TAMPA, FLORIDA

Proceedings transcribed via courtroom digital
audio recording by transcriptionist using computer-aided
transcription.

DAVID J. COLLIER, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER
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Interpreter: Javier Keogh

P R O C E E D I N G S

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THE COURT: Call the case.

COURTROOM DEPUTY: United States versus Mendoza,
8:15-CR-363-T-30AEP.

THE COURT: If Counsel would state their
appearance for the record, please.

MR. PRESTON: Good morning, Your Honor.
Jim Preston for the United States.

THE COURT: Thank you, Mr. Preston.

MR. LYKES: Your Honor, Charles Lykes for the
defendant, Mr. Martinez.

THE COURT: Thank you.

MR. LYKES: And, Your Honor, may I thank you for
accommodating me. You've enabled us to do a sentencing
which we had already put off a couple of times last week in
Sarasota.

THE COURT: No problem.

Good morning, sir. It's my understanding you want
to plead guilty pursuant to a written plea agreement;
is that correct?

THE DEFENDANT: Yes.

THE COURT: The purpose of this hearing is so that
I can conduct an inquiry into your decision to ensure that
your decision is being done both knowingly and voluntarily.

1 THE DEFENDANT: Yes.

2 THE COURT: Therefore, during the hearing I'm
3 going to ask you a number of questions as well as some
4 questions for your attorney and the prosecutor. It is vital
5 that you understand everything that we are going to discuss.
6 If at any point you do not understand something, I want you
7 to feel free to interrupt me so I can explain further.
8 Additionally, if at any time you need to discuss anything
9 with Mr. Lykes, just let me know and I will stop the hearing
10 and give you all the time that you need. Do you understand
11 that, sir?

12 THE DEFENDANT: Yes.

13 THE COURT: All right, sir.

14 In a moment I'm going to ask my courtroom deputy
15 to place you under oath. I tell you that because it's
16 important that you understand the consequences of the oath.
17 If in responding to my questions you should provide any
18 false or misleading answers, you could be charged with
19 additional crimes, such as perjury or obstruction of
20 justice. Those crimes would carry additional penalties
21 beyond any of the penalties you are facing in this case.
22 Do you understand that?

23 THE DEFENDANT: Yes.

24 THE COURT: All right. Madam Deputy.

25 COURTROOM DEPUTY: Please rise. Raise your right

1 hand.

2 Do you solemnly swear the testimony you're about
3 to give this Court will be the truth, the whole truth and
4 nothing but the truth?

5 THE DEFENDANT: Yes.

6 COURTROOM DEPUTY: Thank you. Have a seat,
7 please.

8 I'll ask you to please state your name for the
9 record.

10 THE DEFENDANT: Jorge Martin Martinez Mendoza.

11 COURTROOM DEPUTY: Thank you.

12 THE COURT: Mr. Martinez, I want you to understand
13 that if at the end of this hearing you do decide to enter a
14 plea of guilt and your plea is accepted by the Court, it
15 will become very difficult if not impossible for you later
16 to change your mind. Do you understand that, sir?

17 THE DEFENDANT: Yes.

18 THE COURT: I need to ask you some questions you
19 may consider to be somewhat personal in nature. I want you
20 to understand that the purpose for these questions is in
21 order for me to ensure that you are competent to enter a
22 plea of guilt. Do you understand what I mean by that, sir?

23 THE DEFENDANT: Yes.

24 THE COURT: All right, sir. How old are you?

25 THE DEFENDANT: I am 41 years old.

1 THE COURT: And how far did you go in school?

2 THE DEFENDANT: I didn't finish high school.

3 THE COURT: Is Spanish your primary language?

4 THE DEFENDANT: Yes.

5 THE COURT: Can you read and write in the Spanish
6 language?

7 THE DEFENDANT: Yes.

8 THE COURT: What you have been charged with in
9 this case, were the charges translated for you or read to
10 you in the Spanish language?

11 THE DEFENDANT: Yes.

12 THE COURT: And after they were translated for you
13 did you feel that you understood the charges against you?

14 THE DEFENDANT: Yes.

15 THE COURT: To your knowledge, have you ever
16 suffered from any mental disease or defect of any kind.

17 THE DEFENDANT: No.

18 THE COURT: In the past 24 hours have you taken
19 any drugs or medication of any kind?

20 THE DEFENDANT: No.

21 THE COURT: Is there anything at all impacting
22 your ability to think clearly here today?

23 THE DEFENDANT: No.

24 THE COURT: And do you feel you understand the
25 purpose of this hearing?

1 THE DEFENDANT: Yes.

2 THE COURT: Mr. Lykes, for the record, any
3 concerns regarding competency?

4 MR. LYKES: No, sir, I have no such concerns.

5 THE COURT: Thank you.

6 I'm going to note for the record, based upon
7 Mr. Martinez' responses to my questions as well as his
8 demeanor, I do find that he's fully competent to enter a
9 plea of guilt if he chooses to do so.

10 Therefore, sir, I'm going to go forward with your
11 plea hearing, but before I proceed I must also inform you
12 that you have the right to have your plea heard by the
13 District Judge assigned to your case. The District Judge
14 assigned to your case is Judge James Moody. Judge Moody's
15 authority is different from my authority. Judge Moody not
16 only has the authority to hear your plea, but it is
17 Judge Moody who will decide whether to accept your plea and
18 adjudicate you guilty. If you are adjudicated guilty in the
19 case it would then be Judge Moody who would impose sentence
20 upon you. If you decided not to enter a plea of guilty but
21 rather take your case to trial, it would be Judge Moody who
22 would preside over your trial.

23 My authority, on the other hand, is just limited
24 to conducting this hearing to determine whether you are
25 entering your plea knowingly and voluntarily. If I do make

1 such a recommendation -- or decision, I will then make a
2 recommendation to Judge Moody that your plea be accepted.

3 Now, having stated that, do you feel you
4 understand the difference in my authority as compared to
5 Judge Moody's authorities?

6 THE DEFENDANT: Yes.

7 THE COURT: And knowing those differences, do you
8 wish to waive your right to have the plea before Judge Moody
9 and have your plea in front of me today?

10 THE DEFENDANT: Yes.

11 THE COURT: Has anyone forced you or threatened
12 you in any way in order for you to waive your right to have
13 the plea before Judge Moody?

14 THE DEFENDANT: No.

15 THE COURT: Has anyone promised you anything at
16 all in order for you to waive that right?

17 THE DEFENDANT: No.

18 THE COURT: All right. Mr. Martinez, I find that
19 your waiver is appropriate, and based upon your waiver I'm
20 going to go forward with your plea.

21 What I'd like to do first for you is to summarize
22 Count 1 of the indictment, since that is the charge you
23 agree to plead guilty to. Count 1 alleges, in summary, that
24 beginning on an unknown date, going through on or about
25 August 31st of 2015, while aboard a vessel subject to the

1 jurisdiction of the United States, you and other named
2 defendants, each of whom were first brought into the
3 United States at a point in the Middle District of Florida,
4 did knowingly and wilfully conspire and agree with each
5 other and with other persons unknown to possess with intent
6 to distribute 5 kilograms or more of a detectable amount of
7 cocaine. This conspiracy is alleged to be in violation of
8 Title 46 United States Code Sections 7506(a) and (b) and
9 Title 21 United States Code Section 960(b)(1)(B)(ii).

10 I'll ask you again, sir, do you feel you
11 understand those charges against you?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you feel you've had a full and fair
14 opportunity to review all the facts and the evidence in your
15 case regarding the charges against you, in consultation with
16 your attorney?

17 THE DEFENDANT: Yes.

18 THE COURT: And has Mr. Lykes done everything that
19 you have asked him to do for you in the case?

20 THE DEFENDANT: Yes.

21 THE COURT: And are you fully satisfied with the
22 advice and representation you have received in the case?

23 THE DEFENDANT: Yes.

24 THE COURT: Did you discuss with Mr. Lykes all
25 your options in your case, to specifically include your

1 option to take your case to trial if you wanted a trial?

2 Mr. Martinez, I understand you do not want to go
3 to trial in your case. What I'm asking you, sir, did you at
4 least discuss with Mr. Lykes that if you wanted to have a
5 trial in this case you could take this case to trial?

6 THE DEFENDANT: Yes.

7 THE COURT: And after your conversations with
8 Mr. Lykes regarding the potential for a trial, are you
9 satisfied with your decision to plead guilty in your case
10 pursuant to the plea agreement?

11 THE DEFENDANT: Yes.

12 THE COURT: Mr. Martinez, if you can confirm for
13 me your initials and your signature in the plea agreement.

14 Sir, are those your initials on each of the pages
15 and your signature on the last page?

16 MR. LYKES: Your Honor, I don't -- I just have --

17 THE COURT: An unsigned one?

18 MR. LYKES: Well, it's signed, but I don't have
19 the initials on the first 16 pages.

20 THE COURT: Okay. Mr. Preston?

21 MR. PRESTON: I have the original, Your Honor.

22 THE DEFENDANT: Yes.

23 THE COURT: All right, sir.

24 THE DEFENDANT: Yes.

25 THE COURT: Do your initials and your signature in

1 the plea agreement indicate that you reviewed it in its
2 entirety in consultation with Mr. Lykes?

3 THE DEFENDANT: Yes.

4 THE COURT: And did Mr. Lykes answer for you all
5 your questions about the plea agreement?

6 THE DEFENDANT: Yes.

7 THE COURT: As such, do you feel that you
8 understand all the provisions of the plea agreement?

9 THE DEFENDANT: Yes.

10 THE COURT: And to confirm, sir, was the plea
11 agreement read to you in its entirety in the Spanish
12 language?

13 THE DEFENDANT: Yes.

14 THE COURT: Mr. Martinez, what I intend to do is
15 to discuss with you a number of the provisions in some
16 detail. I'm not going to cover every provision in detail.
17 That is not to say that I think one provision is more
18 important than another. If you have any questions about
19 anything in the plea agreement, just let me know and we will
20 discuss it further.

21 All right. Sir, looking at page 1, paragraph
22 A(1), this provision simply memorializes what we have just
23 discussed, that is you've agreed to plead guilty to Count 1
24 of the indictment, which charges you with a conspiracy to
25 possess with intent to distribute 5 kilograms or more of

1 cocaine while on board a vessel subject to the jurisdiction
2 of the United States.

3 THE DEFENDANT: Yes.

4 THE COURT: All right. Sir, is that the charge
5 you've agreed to plead guilty to?

6 THE DEFENDANT: Yes.

7 THE COURT: All right. If we turn to page 2, look
8 at paragraph A(5), in return for your agreement to plead
9 guilty to Count 1 by this provision the United States has
10 agreed to dismiss the remaining count against you, that is
11 at your sentencing hearing the United States has agreed to
12 move to dismiss Count 2 against you.

13 Do you understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: Mr. Martinez, let me emphasize for you
16 that your plea agreement is in essence like a contract, a
17 contract between you and the United States Attorney for the
18 Middle District of Florida. The reason why I put it to you
19 in those terms is because it's important you understand that
20 there were no other parties to the plea agreement, and as
21 such the plea agreement is only binding upon yourself and
22 the United States Attorney for the Middle District of
23 Florida.

24 In this regard, let me draw your attention to
25 page 15 paragraph B(8) of the plea agreement, as you were

1 specifically put on notice of this issue in that provision.
2 It reads, in summary, that you understand that the plea
3 agreement is limited only to the office of the United States
4 Attorney for the Middle District of Florida and it cannot
5 bind any other Federal, State or local prosecuting
6 authorities. Do you understand that, sir?

7 THE DEFENDANT: Yes.

8 THE COURT: All right, sir. There are certain
9 provisions in your plea agreement that have been negotiated
10 on your behalf in an effort to mitigate any potential
11 sentence you may receive. If we go back to page 3 and look
12 at paragraph A(6) there is one such provision there.
13 By this provision the United States has agreed it will
14 recommend to the Court that you be sentenced within the
15 applicable advisory guideline range as calculated by the
16 Court pursuant to the United States Sentencing Guidelines as
17 adjusted by any departure the United States has agreed to
18 recommend in your plea agreement. I'm going to explain that
19 a little more for you.

20 At your sentencing hearing Judge Moody will
21 utilize the United States Sentencing Guidelines to perform a
22 type of calculation in order to determine an appropriate
23 advisory guideline range for your case. Calculation of the
24 advisory guideline range is very important to you because
25 the Court will use that range as a guide to determine your

1 sentence. The advisory guideline range will consist of a
2 high end as well as a low end in terms of months of
3 imprisonment. Once the Court has calculated the appropriate
4 advisory guideline range, by this provision the Government
5 will recommend you be sentenced within that range; in other
6 words, that the Court not depart or vary above or beyond the
7 range. Do you understand that, sir?

8 THE DEFENDANT: Yes.

9 THE COURT: All right. Let's move on to
10 paragraph A(7). By this provision, absent any adverse
11 information which may be received suggesting such a
12 recommendation to be unwarranted, the United States has
13 agreed to recommend to the Court that you receive a
14 two level downward adjustment based upon your acceptance of
15 responsibility. Additionally, if it is applicable, at the
16 time of your sentencing, the United States has agreed to
17 file a motion with the Court requesting an additional
18 one level downward adjustment based upon your acceptance.
19 So, in other words, by this provision there is a total
20 potential for a three level downward adjustment in the
21 advisory guideline range calculation based upon your
22 acceptance of responsibility in the case. Do you understand
23 that?

24 THE DEFENDANT: Yes.

25 THE COURT: Let's go on to page 4, paragraph A(8).

1 Again, absent any adverse information which may be
2 received suggesting such a recommendation to be unwarranted,
3 by this provision the United States has agreed it will not
4 oppose your request to the Court that you receive a sentence
5 at the low end of the applicable advisory guideline range as
6 calculated by the Court. Simply stated, the Government will
7 not object to your request that you be sentenced at the
8 bottom of the advisory guideline range. Do you understand
9 that, sir?

10 THE DEFENDANT: Yes.

11 THE COURT: I'm going to remind you of what we
12 spoke about earlier, that is, your plea agreement is only
13 binding upon yourself and the United States Attorney for the
14 Middle District of Florida. The reason why I remind you of
15 this is to remind you that the Court is not a party to the
16 plea agreement and as such the Court cannot be bound by any
17 of the provisions of the plea agreement. If we jump ahead
18 for a moment to page 14 and look at paragraph B(6), in the
19 middle of this provision you are specifically put on notice
20 of this issue.

21 It reads, in summary, that you further understand
22 and acknowledge that any discussions between you or your
23 attorney and the attorney or other agents for the Government
24 regarding any recommendations by the Government are not
25 binding on the Court and that should any recommendations be

1 rejected, you will not be permitted to withdraw your plea
2 pursuant to the plea agreement.

3 So, again, Mr. Martinez, simply stated, the Court
4 does not need to follow any of the provisions of your plea
5 agreement, and if the Court does not follow any of the
6 provisions of your plea agreement, you cannot later complain
7 and ask to withdraw from your plea of guilt. Do you
8 understand that, sir?

9 THE DEFENDANT: Yes.

10 THE COURT: All right, sir. Going back on page 4
11 and continuing on through page 8, paragraph A(9) through
12 A(11), there are certain provisions there that deal with any
13 potential cooperation that you may provide to the
14 Government. It's not my intent to discuss with you each of
15 those provisions in detail unless you have a specific
16 question, but what I do want to do for you is highlight the
17 last sentence of paragraph A(9), which is on page 5 of the
18 plea agreement.

19 This sentence reads that in any case you
20 understand that the determination as to whether substantial
21 assistance has been provided or what type of motion related
22 thereto will be filed, if any, rests solely with the
23 United States Attorney for the Middle District of Florida,
24 and you agree that you cannot and will not challenge that
25 determination, whether by appeal, collateral attack or

1 otherwise, so I want to explain that a little more for you.

2 If you do decide to cooperate with the Government
3 and you feel your cooperation is worthy of a motion for a
4 reduction in your sentence but the Government disagrees with
5 your assessment and does not file such a motion, you cannot
6 later complain and ask to withdraw from the plea of guilt.
7 Additionally, as we just discussed, nothing in the plea
8 agreement is binding upon the Court, and the same applies
9 for any motions that may be filed, so in the event the
10 Government does file a motion on your behalf seeking a
11 reduction in your sentence based upon your cooperation, the
12 Court does not have to grant the motion, and if the Court
13 does not grant the motion, you cannot later complain and ask
14 to withdraw from your plea of guilt. Do you understand
15 that?

16 THE DEFENDANT: Yes.

17 THE COURT: Do you have any questions about any of
18 these provisions related to cooperation?

19 THE DEFENDANT: No.

20 THE COURT: All right, sir. It's very important
21 you understand that absent your plea agreement in this case
22 you would have the right to appeal any sentence that you
23 would receive, that is by a specific provision in paragraph
24 B(8) starting on page 15 -- or, excuse me, B(7) on page 15,
25 by this provision you have specifically agreed to waive your

1 right to appeal the sentence, that is to waive your right to
2 complain to a higher court about your sentence, unless
3 certain events occur. Those events include: One, the
4 ground that the sentence exceeds the applicable advisory
5 guideline range as calculated by the Court pursuant to the
6 United States Sentencing Guidelines; two, the ground that
7 the sentence exceeds the statutory maximum penalty; three,
8 the ground that the sentence violates the Eighth Amendment
9 to the Constitution, which is cruel or unusual punishment;
10 or four, in the event that the Government files an appeal in
11 your case, you would then be free from the waiver and you
12 could appeal your sentence as well.

13 Do you understand that, sir, that by this
14 provision of your plea agreement you have expressly waived
15 your right to appeal the sentence unless one of those events
16 occurs as I've just described them?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you have any questions about this
19 provision?

20 THE DEFENDANT: No.

21 THE COURT: Has anyone forced you or threatened
22 you in any way in order for you to waive your right to
23 appeal the sentence?

24 THE DEFENDANT: No.

25 THE COURT: Other than what's in your plea

1 agreement, has anyone promised you anything else of value in
2 order for you to waive that right?

3 THE DEFENDANT: No.

4 THE COURT: Sir, as to your decision to plead
5 guilty, has anyone forced you or threatened you, or anyone
6 you may know for that matter, in order to induce you to
7 plead guilty in this case?

8 THE DEFENDANT: No.

9 THE COURT: Outside of what's in your plea
10 agreement, has anyone promised you anything else of value in
11 order to induce you to plead guilty?

12 THE DEFENDANT: No.

13 THE COURT: Mr. Lykes, are you aware of any
14 outside promises?

15 MR. LYKES: No, sir.

16 THE COURT: Mr. Preston?

17 MR. PRESTON: No, Your Honor.

18 THE COURT: Mr. Martinez, by entering a plea of
19 guilt in this case there will be collateral consequences to
20 your plea. Given your status in this country, you need to
21 understand that after serving any term of imprisonment you
22 will then be deported back to your home country, you will be
23 denied reentry into the United States and denied citizenship
24 to the United States. Do you understand that, sir?

25 THE DEFENDANT: Yes.

1 THE COURT: All right. Let me explain to you then
2 the penalties associated with Count 1 of the indictment.
3 The penalties are outlined for you in paragraph A(2)
4 starting on page 1 of the plea agreement.

5 Count 1 is punishable by a mandatory minimum term
6 of imprisonment of 10 years up to a maximum term of
7 imprisonment of life, a maximum fine of up to \$10 million, a
8 term of supervised release of at least five years up to a
9 maximum of life, and a special assessment of \$100 which will
10 be due on the date of sentencing. Having stated that, do
11 you feel you understand the penalties associated with
12 Count 1 of the indictment against you?

13 THE DEFENDANT: Yes.

14 THE COURT: Do you have any questions about any of
15 those penalties?

16 THE DEFENDANT: No.

17 THE COURT: Let me explain to you what a term of
18 supervised release is. After you are released from prison
19 the Court will place you on a term of supervision, and that
20 will place upon you certain conditions on your liberties.
21 If you violate any of the Court's conditions while on
22 supervised release, the Court, after conducting a hearing,
23 could order you back to jail for an additional period of
24 time. Having stated that, do you feel you understand the
25 potential consequence for a violation of supervised release?

1 THE DEFENDANT: Yes.

2 THE COURT: I need to also explain to you that
3 parole has been abolished. This simply means whatever term
4 of imprisonment you receive in your case, you will serve all
5 that time incarcerated and not be released on early parole.
6 Do you understand that?

7 THE DEFENDANT: Yes.

8 THE COURT: Is there any applicable restitution or
9 forfeiture, Mr. Preston?

10 MR. PRESTON: No, Your Honor.

11 THE COURT: Mr. Martinez, have you discussed the
12 United States Sentencing Guidelines with Mr. Lykes and how
13 they might apply in your case?

14 THE DEFENDANT: Yes.

15 THE COURT: All right, sir. It is not perfectly
16 appropriate, but it is anticipated you would do that;
17 however, I must emphasize for you and it's important you
18 understand that no one, and by "no one" that includes
19 Mr. Lykes, no one can tell you with any certainty what your
20 advisory guideline range will be. That cannot be done for a
21 number of reasons. One specific reason is because the
22 United States Probation Office has to prepare an important
23 document called a presentence investigative report. This is
24 an important document to you because the Court will use it
25 as an aid to determine your sentence. You will have the

1 opportunity to review the report in consultation with
2 Mr. Lykes prior to the sentencing hearing. You will be
3 allowed to make any objections to the report you deem
4 necessary. If your objections go unresolved prior to the
5 sentencing hearing, the objections then will be resolved at
6 the sentencing hearing by the Court. Therefore, again,
7 I must emphasize for you that no one can tell you with any
8 certainty what your advisory guideline range will be.
9 Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: Mr. Martinez, what this really means,
12 sir, is if after consulting with Mr. Lykes you attempted to
13 estimate a potential guideline range, you need to understand
14 that your estimation could be wrong and if it is wrong you
15 cannot later complain and ask to withdraw from the plea of
16 guilt. Do you understand that, sir?

17 THE DEFENDANT: Yes.

18 THE COURT: I must also emphasize for you that the
19 United States Sentencing Guidelines are not binding on the
20 Court, that is, they are only advisory. What this means is
21 once the Court has calculated the appropriate advisory
22 guideline range for your case, the Court in some
23 circumstances could depart or vary above or beyond the
24 guideline range up to the statutory maximum sentence or in
25 other circumstances depart or vary below the guideline range

1 to the statutory minimum sentence. Do you understand that,
2 sir?

3 THE DEFENDANT: Yes.

4 THE COURT: Mr. Martinez, it's very important you
5 understand that by pleading guilty you are giving up very
6 valuable Constitutional rights. Those rights include your
7 right to persist in a plea of not guilty and take your case
8 to trial. At trial it would be the Government who would
9 always bear the burden of proof to establish your guilt as
10 charged beyond a reasonable doubt. At the trial you'd be
11 presumed innocent and you would never be required to prove
12 anything at all.

13 Now, at the trial you'd have a jury of 12 persons
14 who would be selected at random from the community and who
15 could not find you guilty unless each and every member of
16 the jury unanimously agreed beyond a reasonable doubt that
17 you had committed each of the essential elements of the
18 charged offenses.

19 Additionally, as you know, you have the right to
20 effective assistance of counsel at all stages in the case,
21 and if you could not afford to hire a lawyer, the Court
22 would appoint one to you at no cost to you to represent you
23 throughout the entirety of the case.

24 Now, at the trial you would have the right to hear
25 and see all the witnesses called by the Government against

1 you and the right to confront and cross-examine those
2 witnesses in your defense. Additionally, you would have the
3 right to challenge any evidence the Government sought to use
4 against you. Now, I stated you would never be required to
5 prove anything at all at the trial, but if you decided to do
6 so you would have the right to present a defense on your own
7 behalf, that is, to call any witnesses you deem necessary or
8 present any evidence you thought important.

9 If your witnesses would not come to the Court
10 voluntarily or if you could not afford to pay for your
11 witnesses, you would have the right to have the Court to
12 order those witnesses to come testify for you at no cost to
13 you. Additionally, if you could not afford to pay for your
14 evidence, you would have the right to have the Court order
15 that your evidence be produced at no cost to you.

16 Also, if you decide to do so, you would have the
17 right to testify in your own defense, but, again, to be
18 clear, sir, at the trial you would never be required to
19 prove anything, so if you decided not to present a defense,
20 the jury would be specifically instructed that it could not
21 draw any unfavorable conclusion from your silence.

22 Do you understand, sir, that by pleading guilty in
23 this case you're giving up all these valuable Constitutional
24 rights as I've just described them?

25 THE DEFENDANT: Yes.

1 THE COURT: Do you have any questions about any of
2 those rights?

3 THE DEFENDANT: No.

4 THE COURT: Let me also explain that if you have
5 any objections as to how the charges were brought against
6 you or as to how the evidence was gathered in your case, you
7 are waiving any objections to those matters by entering a
8 plea of guilt. Do you understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: All right. Let me explain to you then
11 what the Government would have to prove in order to
12 establish your guilt for Count 1 of the indictment, that is
13 the essential elements of Count 1 of the indictment. These
14 elements are outlined in paragraphs A(4) and A(3) of your
15 plea agreement on page 2.

16 The elements for Count 1 are, first, that two or
17 more persons in some way or manner agreed to try to
18 accomplish a common and unlawful plan as charged in the
19 indictment, the plan being, as alleged, to possess with the
20 intent to distribute 5 kilograms or more of cocaine while
21 on board a vessel subject to the jurisdiction of the United
22 States; and, second, that you, knowing the unlawful purpose
23 of the plan, willfully joined in it. Additionally, in order
24 for a minimum mandatory sentence of ten years imprisonment
25 as well as a maximum sentence of life imprisonment to be

1 applicable as to Count 1, the United States would also have
2 to establish that the quantity of cocaine that was agreed to
3 be possessed with intent to distribute was a quantity of
4 5 kilograms or more of cocaine.

5 Having stated that, do you feel you understand
6 what the Government would have to prove in order to
7 establish your guilt for Count 1 of the indictment?

8 THE DEFENDANT: Yes.

9 THE COURT: Do you have any questions about these
10 elements?

11 THE DEFENDANT: No.

12 THE COURT: All right, sir. In a moment I'm going
13 to ask the prosecutor to give me a factual basis in support
14 of each of these elements. I expect the prosecutor is
15 largely going to read or summarize from the facts of your
16 plea agreement.

17 I want you to listen carefully to these facts,
18 because they're not only important as to the essential
19 elements, but the Court could rely upon them to determine
20 your sentence.

21 All right. Mr. Preston.

22 MR. PRESTON: Thank you, Your Honor.

23 If this case were to go to trial, the Government
24 would prove at least that the defendant and three other
25 individuals were transporting cocaine for delivery to others

1 aboard a self-propelled semi-submersible vessel (SPSS) when
2 they were intercepted by the United States Coast Guard in
3 international waters in the eastern Pacific Ocean, on or
4 about August 31st of 2015. During that encounter the master
5 of the vessel made no claim of nationality for the vessel,
6 and pursuant to United States law this rendered the vessel
7 subject to the jurisdiction of the United States.

8 During search of the vessel, over 6,000 kilograms
9 of cocaine, samples of which tested positive for cocaine,
10 were recovered before the SPSS became unstable and the
11 search was terminated. After the vessel was sunk as a
12 hazard to navigation, additional cocaine rose to the surface
13 and was also recovered by the Coast Guard.

14 As part of the agreement the defendants were to
15 deliver this cocaine to others.

16 The defendant first entered the United States in
17 the Middle District of Florida.

18 THE COURT: Mr. Martinez, did you hear the facts
19 as stated by the prosecutor?

20 THE DEFENDANT: Yes.

21 THE COURT: Do you have any disagreement with any
22 of those facts?

23 THE DEFENDANT: No.

24 THE COURT: And are those facts true, sir?

25 THE DEFENDANT: Yes.

1 THE COURT: Mr. Martinez, I want you to understand
2 that it does not matter to the Court whether you enter a
3 plea of guilt in your case or decide to take your case to
4 trial. That important decision is for you and you alone.

5 Having stated that, do you feel you are prepared
6 to make that decision today?

7 THE DEFENDANT: Yes.

8 THE COURT: All right, sir. Please rise.

9 Jorge Martin Martinez Mendoza, how do you plead to
10 Count 1 of the indictment which charges you with the
11 conspiracy to possess with intent to distribute 5 kilograms
12 or more of cocaine while on board a vessel subject to the
13 jurisdiction of the United States, in violation of Title 46
14 United States Code Sections 7506(a) and (b) and Title 21
15 United States Code Section 960(b)(1)(B)(ii), guilty or not
16 guilty?

17 THE DEFENDANT: Guilty.

18 THE COURT: Are you pleading guilty to this
19 offense because you are in fact guilty of this crime?

20 THE DEFENDANT: Yes.

21 THE COURT: Mr. Lykes, is there anything you want
22 to put on the record, sir.

23 MR. LYKES: No, Your Honor.

24 THE COURT: Thank you. You may be seated, sir.
25 Thank you.

1 Mr. Preston, any other suggested questions or
2 anything you want on the record?

3 MR. PRESTON: No, Your Honor. Thank you.

4 MR. LYKES: Your Honor, if I may approach, I have
5 the waivers.

6 THE COURT: We will get them at the end of the
7 hearing. Thank you, Mr. Lykes.

8 Mr. Martinez, let me ask you, sir, do you have any
9 questions about anything that we have discussed or, for that
10 matter, anything that I did not cover with you today?

11 THE DEFENDANT: No.

12 THE COURT: All right. Let me note then for the
13 record that based upon my review of the indictment and plea
14 agreement, my discussions with Mr. Martinez and the factual
15 basis as provided by the Government, I am fully satisfied
16 that Mr. Martinez is competent to enter a plea of guilt, his
17 plea is being entered knowingly, intelligently and
18 voluntarily, and it is supported by an independent factual
19 basis for each of the essential elements of Count 1 of the
20 indictment. Therefore, Mr. Martinez, I am going to issue a
21 report recommending that your plea be accepted. You will
22 have 14 days to object to my report. If you do not object
23 to my report, in all likely event your plea will be accepted
24 and your case will be scheduled for sentencing, which
25 typically takes place around 70 to 90 days from the date of

1 your plea.

2 During the interim period the probation office
3 will want to conduct an interview with you. It's your
4 decision on whether to participate in that interview. If
5 you do decide to participate in the interview, you could
6 have Mr. Lykes present with you for the interview. Do you
7 understand, sir?

8 THE DEFENDANT: Yes.

9 THE COURT: Anything else, Mr. Preston?

10 MR. PRESTON: No, Your Honor.

11 THE COURT: Anything else, Mr. Lykes?

12 MR. LYKES: No, sir.

13 THE COURT: All right. Good luck to you,
14 Mr. Martinez.

15 We'll be in recess.

16 - - - - -

17 (Proceedings concluded at 2:45 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript of proceedings taken in a change of plea hearing in the United States District Court is a true and accurate transcript of the proceedings taken by me in machine shorthand from a digital audio recording and transcribed by computer under my supervision, this the 23rd day of November, 2017.

/S/ DAVID J. COLLIER

DAVID J. COLLIER

OFFICIAL COURT REPORTER

AF Approval MP

Chief Approval JTC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 2:14-cr-18-FtM-29DNF

JOHN J. HANLON, JR.

PLEA AGREEMENT

Pursuant to Fed. R. Crim. P. 11(c), the United States of America, by A. Lee Bentley, III, United States Attorney for the Middle District of Florida, and the defendant, JOHN J. HANLON, JR., and the attorney for the defendant, Joseph Viacava, mutually agree as follows:

A. Particularized Terms

1. Count(s) Pleading To

The defendant shall enter a plea of guilty to Count One and Two of the Indictment. Count One charges the defendant with Distribution of Child Pornography in violation of 18 U.S.C. §§ 2252(a)(2), (b)(1), and Count Two charges the defendant with Possession of Child Pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B), and (b)(1).

2. Minimum and Maximum Penalties

Count One is punishable by a mandatory minimum term of imprisonment of five (5) years, but not more than twenty (20) years, a fine of \$250,000.00, a term of supervised release of at least five (5) years up to life, and a special assessment of \$100. Count Two carries a maximum sentence of not more than ten (10) years' imprisonment, a fine of \$250,000.00, a term of supervised release of at least five (5)

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years up to life, and a special assessment of \$100. With respect to certain offenses, the Court shall order the defendant to make restitution to any victim of the offense(s).

3. Elements of the Offense(s)

The defendant acknowledges understanding the nature and elements of the offense(s) with which defendant has been charged and to which defendant is pleading guilty. The elements of Count One are:

- 1) The Defendant knowingly distributed material that contained an image of child pornography, as defined in Title 18, United States Code, Section 2256(8); and
- 2) That such child pornography has been shipped or transported in or affecting interstate or foreign commerce; and
- 3) The Defendant knew that such items contained child pornography.

The elements of Count Two are:

- 1) That the Defendant knowingly possessed one or more matters containing visual depictions;
- 2) That such visual depictions were produced using materials which have been shipped and transported in or affecting interstate or foreign commerce;
- 3) That the production of such visual depictions involved the use of a minor engaged in sexually explicit conduct;
- 4) That such visual depictions are of a minor engaged in sexually explicit conduct; and
- 5) That the Defendant knew that at least one of the performers in such visual depiction was a minor and knew that the visual depictions were of such minor engaged in sexually explicit conduct.

4. No Further Charges

If the Court accepts this plea agreement, the United States Attorney's Office for the Middle District of Florida agrees not to charge defendant with committing

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any other federal criminal offenses known to the United States Attorney's Office at the time of the execution of this agreement, related to the conduct giving rise to this plea agreement.

5. Mandatory Restitution to Victims of Offense of Conviction

Pursuant to 18 U.S.C. § 2259, defendant agrees to make restitution to known victims of the offense for the full amount of the victims' losses as determined by the Court. Further, pursuant to 18 U.S.C. § 3364(d)(5), the defendant agrees not to oppose bifurcation of the sentencing hearing if the victims' losses are not ascertainable prior to sentencing.

6. Acceptance of Responsibility - Three Levels

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will not oppose the defendant's request to the Court that the defendant receive a two-level downward adjustment for acceptance of responsibility, pursuant to USSG §3E1.1(a). The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

Further, at the time of sentencing, if the defendant's offense level prior to operation of subsection (a) is level 16 or greater, and if the defendant complies with the provisions of USSG §3E1.1(b) and all terms of this Plea Agreement, including but not limited to, the timely submission of the financial affidavit referenced in Paragraph B.5., the United States agrees to file a motion pursuant to USSG §3E1.1(b) for a downward adjustment of one additional level. The defendant understands that the determination

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as to whether the defendant has qualified for a downward adjustment of a third level for acceptance of responsibility rests solely with the United States Attorney for the Middle District of Florida, and the defendant agrees that the defendant cannot and will not challenge that determination, whether by appeal, collateral attack, or otherwise.

7. Forfeiture of Assets

The defendant agrees to forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, pursuant to 18 U.S.C. § 2428 and 2253, whether in the possession or control of the United States, the defendant or defendant's nominees. The assets to be forfeited specifically include, but are not limited to, the following: a) Dell XPS red and silver with two (2) Hitachi 1TB hard drives, serial number BKMF5G1; b) Alienware P18G red with Seagate hard drive, serial number 7K79HV1; and c) Nook tablet, serial number 2014050112672012, which contain contraband.

The defendant agrees and consents to the forfeiture of these assets pursuant to any federal criminal, civil judicial or administrative forfeiture action. The defendant also hereby agrees to waive all constitutional, statutory and procedural challenges in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture described herein constitutes an excessive fine, was not properly noticed in the charging instrument, addressed by the Court at the time of the guilty plea, announced at sentencing, or incorporated into the judgment.

The defendant admits and agrees that the conduct described in the Factual Basis below provides a sufficient factual and statutory basis for the forfeiture of

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the property sought by the government. Pursuant to the provisions of Rule 32.2(b)(1)(A), the United States and the defendant request that promptly after accepting this Plea Agreement, the Court make a determination that the government has established the requisite nexus between the property subject to forfeiture and the offense(s) to which defendant is pleading guilty and enter a preliminary order of forfeiture. Pursuant to Rule 32.2(b)(4), the defendant agrees that the preliminary order of forfeiture will satisfy the notice requirement and will be final as to the defendant at the time it is entered. In the event the forfeiture is omitted from the judgment, the defendant agrees that the forfeiture order may be incorporated into the written judgment at any time pursuant to Rule 36.

The defendant agrees to take all steps necessary to identify and locate all property subject to forfeiture and to transfer custody of such property to the United States before the defendant's sentencing. The defendant agrees to be interviewed by the government, prior to and after sentencing, regarding such assets and their connection to criminal conduct. The defendant further agrees to be polygraphed on the issue of assets, if it is deemed necessary by the United States. The defendant agrees that Federal Rule of Criminal Procedure 11 and USSG §1B1.8 will not protect from forfeiture assets disclosed by the defendant as part of his cooperation.

The defendant agrees to take all steps necessary to assist the government in obtaining clear title to the forfeitable assets before the defendant's sentencing. In addition to providing full and complete information about forfeitable assets, these steps include, but are not limited to, the surrender of title, the signing of a

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consent decree of forfeiture, and signing of any other documents necessary to effectuate such transfers.

The defendant agrees that the United States is not limited to forfeiture of the property specifically identified for forfeiture in this Plea Agreement. If the United States determines that property of the defendant identified for forfeiture cannot be located upon the exercise of due diligence; has been transferred or sold to, or deposited with, a third party; has been placed beyond the jurisdiction of the Court; has been substantially diminished in value; or has been commingled with other property which cannot be divided without difficulty; then the United States shall, at its option, be entitled to forfeiture of any other property (substitute assets) of the defendant up to the value of any property described above. The Court shall retain jurisdiction to settle any disputes arising from application of this clause. The defendant agrees that forfeiture of substitute assets as authorized herein shall not be deemed an alteration of the defendant's sentence.

Forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon the defendant in addition to forfeiture.

The defendant agrees that, in the event the Court determines that the defendant has breached this section of the Plea Agreement, the defendant may be found ineligible for a reduction in the Guidelines calculation for acceptance of responsibility and substantial assistance, and may be eligible for an obstruction of justice enhancement.

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Forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon the defendant in addition to forfeiture.

8. Abandonment of Property - Computer Equipment

The United States of America and defendant hereby agree that any computer equipment as defined in 18 U.S.C. § 2256, seized from the defendant and currently in the custody and/or control of the Federal Bureau of Investigation or other appropriate agency, were properly seized and are subject to forfeiture to the government according to 18 U.S.C. §§ 2253 or 2254, and/or that the computer equipment and peripherals constitute evidence, contraband, or fruits of the crime for which he has pled guilty. As such, defendant hereby relinquishes all claim, title and interest he has in the computer equipment and peripherals to the United States of America with the understanding and consent that the Court, upon approval of this agreement, hereby directs the Federal Bureau of Investigation, or other appropriate agency, to cause the computer equipment described above to be destroyed forthwith without further obligation or duty whatsoever owing to defendant or any other person.

As part of the plea agreement in this case, defendant hereby states under penalty of perjury that he is the sole and rightful owner of the property, and that defendant hereby voluntarily abandons all right and claim to and consents to the destruction of: a) Dell XPS red and silver with two (2) Hitachi 1TB hard drives, serial number BKMF5G1; b) Alienware P18G red with Seagate hard drive, serial number 7K79HV1; and c) Nook tablet, serial number 2014050112672012.

9. Sex Offender Registration and Notification

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The defendant has been advised and understands, that under the Sex Offender Registration and Notification Act, a federal law, the defendant must register and keep the registration current in each of the following jurisdictions: the location of the defendant's residence, the location of the defendant's employment; and, if the defendant is a student, the location of the defendant's school. Registration will require that the defendant provide information that includes name, residence address, and the names and addresses of any places at which the defendant is or will be an employee or a student. The defendant understands that he must update his registrations not later than three business days after any change of name, residence, employment, or student status. The defendant understands that failure to comply with these obligations subjects the defendant to prosecution for failure to register under federal law, 18 U.S.C. § 2250, which is punishable by a fine or imprisonment, or both.

B. Standard Terms and Conditions

1. Restitution, Special Assessment and Fine

The defendant understands and agrees that the Court, in addition to or in lieu of any other penalty, shall order the defendant to make restitution to any victim of the offense(s), pursuant to 18 U.S.C. § 3663A, for all offenses described in 18 U.S.C. § 3663A(c)(1); and the Court may order the defendant to make restitution to any victim of the offense(s), pursuant to 18 U.S.C. § 3663, including restitution as to all counts charged, whether or not the defendant enters a plea of guilty to such counts, and whether or not such counts are dismissed pursuant to this agreement. The defendant further understands that compliance with any restitution payment plan imposed by the Court in no way precludes the United States from simultaneously pursuing other

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statutory remedies for collecting restitution (18 U.S.C. § 3003(b)(2)), including, but not limited to, garnishment and execution, pursuant to the Mandatory Victims Restitution Act, in order to ensure that the defendant's restitution obligation is satisfied.

On each count to which a plea of guilty is entered, the Court shall impose a special assessment pursuant to 18 U.S.C. § 3013. To ensure that this obligation is satisfied, the Defendant agrees to deliver a check or money order to the Clerk of the Court in the amount of \$100.00, payable to "Clerk, U.S. District Court" within ten days of the change of plea hearing.

The defendant understands that this agreement imposes no limitation as to fine.

2. Supervised Release

The defendant understands that the offense(s) to which the defendant is pleading provide(s) for imposition of a term of supervised release upon release from imprisonment, and that, if the defendant should violate the conditions of release, the defendant would be subject to a further term of imprisonment.

3. Immigration Consequences of Pleading Guilty

The defendant has been advised and understands that, upon conviction, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

4. Sentencing Information

The United States reserves its right and obligation to report to the Court and the United States Probation Office all information concerning the background, character, and conduct of the defendant, to provide relevant factual information,

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including the totality of the defendant's criminal activities, if any, not limited to the count(s) to which defendant pleads, to respond to comments made by the defendant or defendant's counsel, and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject to any limitations set forth herein, if any.

5. Financial Disclosures

Pursuant to 18 U.S.C. § 3664(d)(3) and Fed. R. Crim. P. 32(d)(2)(A)(ii), the defendant agrees to complete and submit to the United States Attorney's Office within 30 days of execution of this agreement an affidavit reflecting the defendant's financial condition. The defendant promises that his financial statement and disclosures will be complete, accurate and truthful and will include all assets in which he has any interest or over which the defendant exercises control, directly or indirectly, including those held by a spouse, dependent, nominee or other third party. The defendant further agrees to execute any documents requested by the United States needed to obtain from any third parties any records of assets owned by the defendant, directly or through a nominee, and, by the execution of this Plea Agreement, consents to the release of the defendant's tax returns for the previous five years. The defendant similarly agrees and authorizes the United States Attorney's Office to provide to, and obtain from, the United States Probation Office, the financial affidavit, any of the defendant's federal, state, and local tax returns, bank records and any other financial information concerning the defendant, for the purpose of making any recommendations to the Court and for collecting any assessments, fines, restitution, or forfeiture ordered by the Court. The defendant expressly authorizes the United States Attorney's Office to obtain current

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credit reports in order to evaluate the defendant's ability to satisfy any financial obligation imposed by the Court.

6. Sentencing Recommendations

It is understood by the parties that the Court is neither a party to nor bound by this agreement. The Court may accept or reject the agreement, or defer a decision until it has had an opportunity to consider the presentence report prepared by the United States Probation Office. The defendant understands and acknowledges that, although the parties are permitted to make recommendations and present arguments to the Court, the sentence will be determined solely by the Court, with the assistance of the United States Probation Office. Defendant further understands and acknowledges that any discussions between defendant or defendant's attorney and the attorney or other agents for the government regarding any recommendations by the government are not binding on the Court and that, should any recommendations be rejected, defendant will not be permitted to withdraw defendant's plea pursuant to this plea agreement. The government expressly reserves the right to support and defend any decision that the Court may make with regard to the defendant's sentence, whether or not such decision is consistent with the government's recommendations contained herein.

7. Defendant's Waiver of Right to Appeal the Sentence

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's sentence on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing

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Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

8. Middle District of Florida Agreement

It is further understood that this agreement is limited to the Office of the United States Attorney for the Middle District of Florida and cannot bind other federal, state, or local prosecuting authorities, although this office will bring defendant's cooperation, if any, to the attention of other prosecuting officers or others, if requested.

9. Filing of Agreement

This agreement shall be presented to the Court, in open court or in camera, in whole or in part, upon a showing of good cause, and filed in this cause, at the time of defendant's entry of a plea of guilty pursuant hereto.

10. Voluntariness

The defendant acknowledges that defendant is entering into this agreement and is pleading guilty freely and voluntarily without reliance upon any discussions between the attorney for the government and the defendant and defendant's attorney and without promise of benefit of any kind (other than the concessions contained herein), and without threats, force, intimidation, or coercion of any kind. The defendant further acknowledges defendant's understanding of the nature

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of the offense or offenses to which defendant is pleading guilty and the elements thereof, including the penalties provided by law, and defendant's complete satisfaction with the representation and advice received from defendant's undersigned counsel (if any). The defendant also understands that defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that defendant has the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against defendant, the right against compulsory self-incrimination, and the right to compulsory process for the attendance of witnesses to testify in defendant's defense; but, by pleading guilty, defendant waives or gives up those rights and there will be no trial. The defendant further understands that if defendant pleads guilty, the Court may ask defendant questions about the offense or offenses to which defendant pleaded, and if defendant answers those questions under oath, on the record, and in the presence of counsel (if any), defendant's answers may later be used against defendant in a prosecution for perjury or false statement. The defendant also understands that defendant will be adjudicated guilty of the offenses to which defendant has pleaded and, if any of such offenses are felonies, may thereby be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to have possession of firearms.

11. Factual Basis

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove those specific facts and others beyond a reasonable doubt.

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FACTS

On June 12, 2013, FBI Task Force Agent (TFO) Christopher Tissot accessed a peer-to-peer network via an internet connected FBI undercover computer. Tissot observed a computer system with the unique Internet protocol (IP) address of 76.101.167.161 which geo-located to the Fort Myers, Florida area and owned by internet service provider Comcast Cable. This IP address was advertising files available for direct download. The files advertised had names indicative of child pornography. A browse was completed of the suspect's "shared folder" and 100 files were located which were child pornography notable.

Between the dates of June 12, 2013 and June 27, 2013, TFO Tissot was able to obtain 32 direct downloads from the suspect IP address. 30 of the files were videos and 2 were still images.

An administrative subpoena was issued to Comcast Cable to obtain subscriber information for the listed IP address during the date and times of the direct connection and downloads of child pornography. The residence the IP address was assigned to was listed as 14815 Laguna Drive, Apt. 601, Ft. Myers, Florida 33908 with a billing address in New Jersey.

Between the dates of July 5, 2013 and July 14, 2013, Tissot received additional partial downloads from the same IP address.

On July 14, 2013, Tissot contacted New Jersey investigator Jason Anderson with the Passaic County Sheriff's Department. Anderson advised he was investigating a JOHN J. HANLON, Jr. in reference to child pornography in New Jersey when HANLON resided there. Anderson was able to browse and obtain downloads of

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child pornography from a New Jersey IP address assigned to Hanlon in May and June of 2013.

A federal search warrant was obtained for the Fort Myers residence of 14815 Laguna Avenue, Apartment 601, which was executed on July 15, 2013. JOHN HANLON, Jr., DOB: XX/XX/92, was the only occupant home during the execution of the warrant. HANLON agreed to be interviewed after he was advised of the nature and circumstances of the warrant. HANLON provided the following non-inclusive statements. HANLON stated he utilized Comcast to access the Internet via a password protected router in his residence. He stated he primarily utilized the computers, however, occasionally his father, John Hanlon, used the desktop computer using a password protected profile. HANLON admitted that he downloads child pornography. He stated he uses the peer-to-peer program Lemonwire to download child pornography. HANLON admitted he was aware he was downloading child pornography and knew it was illegal. HANLON stated he used the desktop computer in his bedroom to download child pornography and does not use any other computer in the home for child pornography purposes. HANLON stated he is not sexually attracted to children and the only reason he downloads child pornography is to locate a pedophile and seek revenge on them. HANLON was deceptive at first as to how long he has been downloading child pornography, but later admitted he has been downloading child pornography for approximately a year and a half.

A forensic review of the computer evidence seized from the home, a) Dell XPS red and silver with 2 Hitachi 1TB hard drives, serial number BKMF5G1; b) Alienware P18G red with Seagate hard drive, serial number 7K79HV1; and c) Nook

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tablet, serial number 2014050112672012; was completed which revealed 389 child pornography images and videos, 32 of which are consistent with the downloads TFO Tissot received from HANLON's IP address in June and July 2013. Also located within HANLON's computer were 38 child nudity images, five (5) child other images (example: adult male touching toddler male's underwear and rubbing back of toddler), and 110 other images (example: adult male engaging in sexual intercourse with a dog).

12. Entire Agreement

This plea agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements, or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea.

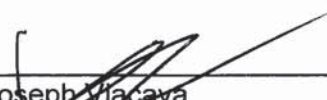
13. Certification

The defendant and defendant's counsel certify that this plea agreement has been read in its entirety by (or has been read to) the defendant and that defendant fully understands its terms.

DATED this 29 day of September, 2014.



John J. Hanlon, Jr.
Defendant



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IN THE SUPREME COURT OF THE UNITED STATES

JORGE MARTIN MENDOZA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX F

Response

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

v.

Case:

16-11382-GG

DC:

8:15-cr-363-T-30AEP-4

JORGE MENDOZA,

Appellant.

RESPONSE

Appellant, JORGE MENDOZA, responds to the motion to dismiss filed by Appellee, UNITED STATES OF AMERICA, as follows:

1. In the *Initial Brief*, Mr. Mendoza substantively argues that it is evident from the face of the record that defense counsel deprived Mr. Mendoza of effective assistance when the Presentence Report (PSR) identified at least nine mitigating factors yet defense counsel failed to ask the district court for a downward variance based on those Section 3553(a) factors identified in the PSR. Procedurally, Appellant argues that the appeal waiver does not bar collateral claims of ineffective assistance of counsel on direct appeal. See IB.12-26.

2. The government moves to dismiss the instant appeal on the basis that (1) the appeal waiver contained in the plea agreement bars the claim of ineffective assistance of counsel on direct appeal, and (2) in the alternative, the record is insufficiently developed to resolve the claim on direct appeal.

Appeal Waiver as Applied to Ineffective Assistance of Counsel

3. Procedurally, the government argues that the instant appeal is barred because claims of ineffective assistance of counsel “do not fall within any exception to the waiver.” See Motion p.5. The government goes on to claim that Appellant is not actually claiming ineffective assistance of counsel, but is rather directly challenging his sentence. See Motion p.6.

4. To the contrary, the difference lies in the remedy. A challenge of sentence asks this Court to invalidate the sentence imposed as substantively or procedurally unreasonable; in this instance, the remedy for a successful appeal is for resentencing where the judge may not impose the same sentence.¹ But a challenge of effective assistance of counsel asks this Court to invalidate the proceeding itself (not necessarily the sentence) because Appellant did not receive the effective assistance of counsel the Sixth Amendment requires; in this instance, the remedy for a successful appeal is for a de novo sentencing proceeding where the district court is free to impose the same sentence if the facts and circumstances so warrant.²

¹ Rita v. United States, 551 U.S. 338, 354 (2007) (“In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur.”)

² See IB.13 (citing United States v. Soto, 132 F.3d 56 (D.C. 1997) (finding ineffective assistance of counsel on the face of the appellate record where the appellant clearly qualified for a sentencing reduction based on minor participation yet defense counsel failed to request the reduction)).

5. As argued in the *Initial Brief*, a claim of ineffective assistance of counsel on direct appeal is not prohibited by the appeal waiver. The agreement contained a waiver of the right to directly appeal the sentence only as follows:

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's **sentence** on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the **sentence** exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the **sentence** exceeds the statutory maximum penalty; or (c) the ground that the **sentence** violates the Eighth Amendment to the Constitution...

See Dkt.40 p.15. (Emphasis added).

6. According to the agreement, Mr. Mendoza is only prohibited from directly appealing the sentence. The plain language of the agreement does not prohibit Mr. Mendoza from challenging the performance of counsel during sentencing—and thus asserting his constitutional right to effective assistance of counsel at all critical stages of the proceeding.³

³ See “Notes of the Advisory Committee 1993”, Fed. R. Crim. P. 32 (“We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the ‘bottom-line’ for the defendant, particularly where the defendant has pled guilty.”)

7. Indeed, it is in the interest of judicial economy to permit Mr. Mendoza to challenge the effectiveness of his counsel now, rather than in a separate habeas corpus proceeding, as the record is already fully developed on the issue.

8. Mr. Mendoza notes that this Court previously reasoned that, where an appeal waiver bars **both direct and collateral challenges of sentence**, this also waives a claim of ineffective assistance of counsel during sentencing, because “a contrary result would permit a defendant to circumvent the terms of the sentence-appeal waiver **simply by recasting a challenge to his sentence as a claim of ineffective assistance**, thus rendering the waiver meaningless.” Williams, 396 F.3d at 1342. (Emphasis added.) While the waiver in this case does not prevent collateral challenges to sentence, the undersigned counsel urges this Court to recede from the position in Williams. Rather than “rendering the waiver meaningless”, this position operates to the opposite effect, instead trivializing Mr. Mendoza’s Sixth Amendment right to effective assistance of counsel at “the most critical stage of criminal proceedings”⁴ as explicitly guaranteed by the Constitution. See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence.”)

9. Because the appeal waiver in this case does not expressly prohibit collateral challenges on direct appeal, and because the remedy sought differs from a

⁴ See id.

challenge to sentence on direct appeal, Mr. Mendoza's claim of ineffective assistance of counsel on direct appeal is not barred by the appeal waiver.

The Record is Fully Developed

10. Substantively, the government contends that the record is insufficiently developed for this Court to resolve Mr. Mendoza's claim on direct appeal. See Motion p.6-8. However, the deficiency and prejudice are evident from the face of the record without need for further fact-finding. See United States v. Andrews, 953 F.2d 1312, 1340 (11th Cir. 1992).

11. Although the PSR identified at least nine recognized mitigating grounds, defense counsel never requested a downward variance based on those nine Section 3553(a) factors identified by the PSR. Further, the government did not dispute the PSR findings at sentencing.

12. These nine grounds for a Section 5K2.0 departure were supported by existing law at the time of sentencing:

- a. A lack of criminal history;
- b. Consequences of deportation;
- c. Prison has a greater significance for those imprisoned for the first time;
- d. Aberrant behavior;
- e. Excellent employment history;

- f. Age reduces the risk of recidivism;
- g. Disparity in sentencing amongst co-defendants;
- h. Lack of knowledge of drugs; and
- i. Totality of the circumstances. (See IB.18-25)

13. It is inconceivable that counsel had a strategic reason for not asking for a downward variance based on these nine identified factors at the sentencing hearing. See generally Soto, 132 F.3d at 58 (finding ineffective assistance of counsel, in part, because “counsel cannot properly invoke a particular Guidelines provision ‘merely by reciting to the court a list of mitigating facts.’”); United States v. Sergio, 934 F.3d 875, 881 (7th Cir. 1991).

14. Because the deficiency and prejudice are evident from the face of the record without need for further fact-finding, Mr. Mendoza requests that this Court deny the government’s motion to dismiss.

WHEREFORE, Mr. Mendoza requests that this Court deny the motion to dismiss, order the government to answer the *Initial Brief*, and award Mr. Mendoza any and all further relief to which he is entitled.

CERTIFICATE OF COMPLIANCE

This motion, which contains 1,438 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P 32(a)(5), (6).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to HOLLY L. GERSHOW, United States Attorney's Office, Appellate Division, via electronic case mail delivery on this 3d day of October 2017:

/s/ Valarie Linnen
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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1 (2017), counsel for Appellant, JORGE MENDOZA, hereby files this Certificate of Interested Persons:

- 1) ARAGON, Marcos Gamboa – Co-defendant
- 2) BENTLEY, Arthur Lee III – U.S. Attorney
- 3) BIOJO, Paulino Jimnez – Co-defendant
- 4) JENKINS, Elizabeth – U.S. Magistrate Judge
- 5) KRIGSMEN, Cherie – Assistant U.S. Attorney
- 6) LINNEN, Valarie – Appointed CJA Appellate Counsel
- 7) LYKES, Charles – Defense Counsel
- 8) McNAMARA, Linda Julin – Assistant U.S. Attorney
- 9) MENDOZA, Jorge Martinez – Defendant
- 10) MOODY, James S. – U.S. District Court Judge
- 11) PORCELLI, Anthony – U.S. Magistrate Judge
- 12) PRESTON, James – Assistant U.S. Attorney
- 13) VELASCO, Segundo Boya – Co-defendant

/s/ Valarie Linnen
Valarie Linnen, Esq.

IN THE SUPREME COURT OF THE UNITED STATES

JORGE MARTIN MENDOZA,
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UNITED STATES OF AMERICA,
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On Petition For a Writ of Certiorari to the
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APPENDIX G

Order

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11382
Non-Argument Calendar

D.C. Docket No. 8:15-cr-00363-JSM-AEP-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JORGE MARTIN MARTINEZ MENDOZA,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(November 30, 2017)

Before MARCUS, ROSENBAUM and ANDERSON, Circuit Judges.

PER CURIAM:

The Government's motion to dismiss this appeal pursuant to the appeal waiver in Appellant's plea agreement is GRANTED. *See United States v. Bushert*,

997 F.2d 1343, 1350-51 (11th Cir. 1993) (sentence appeal waiver will be enforced if it was made knowingly and voluntarily).