

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

DAMON ANTONIO GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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Northern District of Texas

APPENDIX A

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

No. 17-10762
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

March 16, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAMON ANTONIO GONZALEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-20-1

Before KING, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Damon Antonio Gonzalez appeals his conviction and sentence for conspiracy to possess with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine. He argues that his guilty plea was involuntary because he did not know when he pleaded guilty that the presentence report would take into account relevant conduct from 2014 that was not presented to the grand jury. He further contends that use of the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

evidence from 2014 violated his Sixth Amendment right to the effective assistance of counsel in deciding whether to plead guilty, his Fifth Amendment rights to due process and indictment by a grand jury, and his Sixth Amendment right to a jury trial requiring proof beyond a reasonable doubt.

Asserting that his arguments are foreclosed by circuit precedent, Gonzalez has filed an unopposed motion for summary affirmance. However, his motion is insufficient to show that summary affirmance is appropriate. *See United States v. Houston*, 625 F.3d 871, 873 n.2 (5th Cir. 2010) (noting that denial of summary affirmance is appropriate where cases cited do not directly address the issues presented). While the cases cited in Gonzalez’s motion demonstrate that his arguments regarding the voluntariness of his plea and ineffective assistance of counsel are squarely foreclosed by Fifth Circuit law, *see, e.g., United States v. Rivera*, 898 F.2d 442, 447 (5th Cir. 1990), those cases do not address the remaining Fifth and Sixth Amendment issues he raises. Nevertheless, we affirm the judgment for the reasons below.

Under the advisory Guidelines regime in effect after *United States v. Booker*, 543 U.S. 220 (2005), the Fifth and Sixth Amendments do not prevent a sentencing judge from finding all facts relevant to sentencing (except those that increase the applicable statutory maximum) under the standard of preponderance of the evidence. *United States v. Hebert*, 813 F.3d 551, 564 (5th Cir. 2015). Furthermore, a “defendant need not have been convicted of, or even charged with, the other offenses for them to be considered relevant conduct for sentencing purposes.” *United States v. Rhine*, 583 F.3d 878, 885 (5th Cir. 2009). Accordingly, though not addressed by the cases cited in his motion, Gonzalez’s remaining arguments are squarely foreclosed by Fifth Circuit law.

The district court’s judgment is AFFIRMED, and Gonzalez’s motion for summary disposition is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

MARK MACEYRA

Case Number: 4:17-CR-00020-O(02)
U.S. Marshal's No.: 55269-177
Shawn Smith, Assistant U.S. Attorney
Mark R. Danielson, Attorney for the Defendant

On March 8, 2017 the defendant, MARK MACEYRA, entered a plea of guilty as to Count One of the Superseding Information filed on March 2, 2017. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 846	Conspiracy to Possess with Intent to Distribute a Controlled Substance	December 2016	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Superseding Information filed on March 2, 2017.

The defendant shall notify the United States Attorney for this district within thirty 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.

Sentence imposed June 26, 2017.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed June 26, 2017.

Judgment in a Criminal Case

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Defendant: MARK MACEYRA

Case Number: 4:17-CR-00020-O(2)

IMPRISONMENT

The defendant, MARK MACEYRA, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Eighty-Seven (87) months** as to Count One of the Superseding Information filed on March 2, 2017.

The Court recommends to the BOP that the defendant be allowed to participate in the Residential Drug Treatment Program, if eligible. The Court further recommends that the defendant be housed at an FCI facility within the Northern District of Texas area, if possible.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Four (4) years** as to Count One of the Superseding Information filed on March 2, 2017.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

- (1) not leave the judicial district without the permission of the Court or probation officer;
- (2) report to the probation officer as directed by the Court or probation officer and submit a truthful and complete written report within the first five (5) days of each month;
- (3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) support the defendant's dependents and meet other family responsibilities;
- (5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;
- (7) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- (8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- (9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;
- (11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
- (12) 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; and,
- (13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to

Judgment in a Criminal Case

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Defendant: MARK MACEYRA

Case Number: 4:17-CR-00020-O(2)

confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the U.S. probation officer;

report in person to the U.S. Probation Office in the district to which the defendant is released from the custody of the Federal Bureau of Prisons within 72 hours of release;

refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill; and,

participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$20 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

Judgment in a Criminal Case

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Defendant: MARK MACEYRA

Case Number: 4:17-CR-00020-O(2)

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 Marshal