No. 16-___

IN THE

Supreme Court of the United States

ISHMAEL AVIVE SANTIAGO,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Before accepting a guilty plea, a U.S. district court is required to advise the criminal defendant of any applicable statutory maximum or minimum sentence. Fed. R. Crim. P. 11(b)(1). Here, it is undisputed that the district court violated Rule 11. It advised Petitioner of a five-year statutory maximum sentence when Petitioner faced a minimum of either five or seven years and a maximum of life. Appointed counsel failed to object in the district court and failed to raise the Rule 11 error on direct appeal.

Petitioner filed a § 2255 petition claiming ineffective assistance of appointed counsel and averred in an unchallenged affidavit that he would not have gone to trial had he been aware of the seven-year statutory minimum on a charge of brandishing a firearm, given that he had not himself brandished, used or possessed the gun during the charged crime. The U.S. Court of Appeals for the Fourth Circuit "readily acknowledge[d]" the Rule 11 error and that appointed counsel should have "moved to correct it." Pet.App. 10a

The Fourth Circuit affirmed the denial of Petitioner's § 2255 petition, holding only that there was no prejudice. The Fourth Circuit applied an objective test and looked solely to evidence from the plea and sentencing hearing, such as its perceived strength of the Government's case on the gun charge. Petitioner submits that this Court's plain error prejudice standard applies and requires a subjective test that must be based on the entire record and that determines whether the defendant has established

that he genuinely believes that he would have gone to trial if he had been provided with the legally required information about the sentence he was facing.

Accordingly, the question presented is whether a clear Rule 11 violation is prejudicial under the plain error test and for the purposes of *Strickland* when the defendant demonstrates based on the "entire record," including the record created in his § 2255 proceeding, that he subjectively would not have pleaded guilty if the violation had not occurred.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ishmael Avive Santiago respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit is reported at 632 F. App'x 769. Pet.App. 1a–13a.

JURISDICTION

The judgment of the Fourth Circuit was entered on December 22, 2015. On March 14, 2016, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including May 20, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 11(b)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: . . .
>
> > (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
> >
> > (I) any mandatory minimum penalty;

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. The Charges And Appointed Counsel's Role In Mr. Santiago's Guilty Pleas

1. The criminal complaint filed against Mr. Santiago alleged that he was involved in an armed robbery of a Walgreens in Clayton, North Carolina on July 28, 2011. (4th Cir. JA 012–15). Mr. Santiago participated in the armed robbery but he did not possess or brandish a gun during the robbery. (Pet.App. 3a–4a; 4th Cir. JA 217). The criminal complaint alleges that Mr. Santiago and his co-defendant—his cousin Rhaim Santiago—purchased a rifle on the day of the robbery and took turns carrying it before the robbery. (*Id.* 014). The criminal complaint also alleges that when they were contemplating the robbery, Mr. Santiago "stated that if the clerk does not hurry up and hand over the money then it would be okay to hit the clerk." (*Id.*).

When they entered the Walgreens, Rhaim was carrying the firearm and later hit the clerk in the back of the head with it. (Pet.App. 3a–4a). There is no allegation that Mr. Santiago handled or brandished the firearm at any point after entering the Walgreens to conduct the robbery. The next day, Mr. Santiago turned himself in to the police. (4th Cir. JA 217). He was twenty years old at the time. (*Id.* 216).

A grand jury subsequently charged Mr. Santiago with three counts: (I) conspiracy to interfere with interstate commerce by robbery, (II) aiding and abetting interference with interstate commerce by robbery and (III) aiding and abetting use and carry of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) and 2. (Pet.App. 3a). Mr. Santiago was promptly appointed counsel. (4th Cir. JA 016–17).

As a result of Mr. Santiago's psychological disorders and relatively low intelligence quotient, he was particularly dependent on counsel. A psychological assessment determined in 2007 that Mr. Santiago suffers from several psychological disorders: bipolar disorder, a form of schizophrenia, psychotic disorder, and disruptive behavior. (Pet.App. 33a–34a; 4th Cir. JA 220–21). Psychiatric hospitalization was recommended for these disorders "but the recommendation was ignored and no therapeutic action was ever offered." (Pet.App. 33a–34a; 4th Cir. JA 221, 226). Additionally, he has a "well-documented low intelligence quotient" of 73 on the Wechsler Adult Intelligence Scale, "which falls in the borderline range of intelligence." (Pet.App. 33a–34a; 4th Cir. JA 221, 226).

2. When appointed counsel, Ms. Leza Lee Driscoll, visited Mr. Santiago with a plea agreement and he saw the § 924 "gun" count, he insisted that he did not possess the gun. (Pet.App. 35a–36a). Ms. Driscoll initially assured Mr. Santiago that the Government would drop that count if he entered a plea. (*Id.*). She later informed him that the Government would not drop that charge, "so [he] would be looking at five years for the gun." (*Id.*). At that time, he did not

sign the plea agreement. He "kept telling her [that he] didn't have a gun." (*Id.*).

Ms. Driscoll visited again to present Mr. Santiago with a plea agreement. (*Id.*). According to his affidavit, Mr. Santiago was convinced to sign the plea agreement after Ms. Driscoll told him that if he signed the plea agreement she "would work on the gun charge, and get them to drop it." (*Id.*). Mr. Santiago "took her word and signed" the plea agreement on November 7, 2011. (*Id.*; 4th Cir. JA 208–14). In the signed plea agreement, the Government agreed to drop Count II, and Mr. Santiago agreed to plead guilty to Counts I and III. (*Id.* 210–12).

The signed plea agreement listed the statutory maximum and minimum sentences for each count, including a minimum of five years and maximum of life for Count III.[1] (*Id.*). It did not, however, mention a potential seven-year statutory minimum for brandishing a firearm. *See* 18 U.S.C. § 924(c)(1)(A)(ii).

B. Rule 11 Requires The District Court To Address The Maximum And Minimum Sentences At The Plea Hearing

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[1] The plea agreement contained an appeal waiver provision in which Mr. Santiago agreed to waive his right to appeal "any issues that relate to the establishment of the advisory Guideline range." (4th Cir. JA 208). But, the agreement expressly preserved Mr. Santiago's right to bring a 28 U.S.C. § 2255 motion "based upon grounds of ineffective assistance of counsel." (*Id.*).

Federal Rule of Criminal Procedure 11 requires the district court to ensure that a criminal defendant understands the consequences of a guilty plea, including any maximum and minimum sentence, before the plea can be accepted. Rule 11 "requires a judge to address a defendant about to enter a plea of guilty, to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal defendant." *United States v. Vonn*, 535 U.S. 55, 62 (2002).

The court must address with the defendant "any maximum possible penalty, including imprisonment, fine, and term of supervised release" and "any mandatory minimum penalty." Fed. R. Crim. P. 11 (b)(1)(H)–(I). When there are multiple potential minimums or maximums, the district court must address all of them. *Id.*; *United States v. Hairston*, 522 F.3d 336, 340 (4th Cir. 2008) (holding Rule 11 requires "district courts to inform defendants of all potentially applicable *statutory* minimum and maximum sentences.").

C. Rule 11 Errors By The District Court And Appointed Counsel's Failures During The Plea Hearing, Sentencing Hearing, And Direct Appeal

1. In December 2011, the district court held a Rule 11 plea hearing. (4th Cir. JA 23–32; *see also* Pet.App. 25a–30a (excerpt)). According to Mr. Santiago's affidavit, around the time of the plea hearing, Ms. Driscoll told Mr. Santiago not to worry about the gun charge because she would appeal it. (*Id.* 35a–36a).

At the plea hearing, the district court was required under Rule 11 to explain the statutory maximum and minimum sentences. For Count III, the court was required to explain the statutory maximum of life imprisonment and the alternative statutory *minimums* of five or seven years. Fed. R. Crim. P. 11(b)(1)(H)–(I). *See also supra* Part B. Yet, the district court incorrectly described five years as the maximum sentence, saying only that Count III "carries *up to five years* in prison." (Pet.App. 27a) (emphasis added). It also "[d]id not inform [Mr.] Santiago of the potential for an enhanced mandatory minimum under § 924(c)(1)(A)." (*Id*. 5a). From Mr. Santiago's perspective, the five-year maximum described by the district court was consistent with appointed counsel telling Mr. Santiago that he was "looking at five years" on this count. (*Id*. 35a–36a).

The district court then asked the Government whether Mr. Santiago was "charged with anything else?" (4th Cir. JA 028:3–4). Counsel for the Government agreed those were the only charges. (Pet.App. 27a). He did not correct the district court's errors, inform Mr. Santiago that five years was a potential minimum not the maximum, nor inform Mr. Santiago that he could be subject to a potential seven-year minimum for brandishing. Similarly, Mr. Santiago's appointed counsel did not correct or object to the Rule 11 deficiencies.

Immediately after the exchange with counsel for the Government, the district court asked Mr. Santiago if he understood the charges, was going to plead guilty, had signed the written plea agreement (which also did not mention the seven-year minimum for brandishing), had read it, had it explained by

counsel, and understood what he was agreeing to. (*Id.* 27a–30a). Mr. Santiago responded affirmatively. (*Id.*).

2**.** The April 2012 Presentence Report ("PSR") was the first indication in the record that Mr. Santiago could be subject to a seven-year mandatory minimum for brandishing. (*Id.* 5a; 4th Cir. JA 215). Appointed counsel objected to a separate enhancement in the PSR for abducting the clerk. (*Id.* 227). She did not, however, object to the seven-year minimum, object to the Rule 11 errors, or raise withdrawal of the guilty plea. (*Id.*).

During the sentencing hearing, Mr. Santiago did not expressly agree to the PSR. Instead, he directed appointed counsel to speak on his behalf:

> THE COURT: Do you want to say anything about the [PSR]?
>
> THE DEFENDANT: Just my lawyer here.
>
> THE COURT: You'll let your lawyer talk for you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you don't want to say anything about your sentence? You don't have to say anything but you can speak if you want.
>
> THE DEFENDANT: No, sir.

(Pet.App. 31a–32a). Once again, appointed counsel objected to the abduction enhancement. (4th Cir. JA 034:23–035:8, 036:21–040:24). Appointed counsel also requested a variance due to Mr. Santiago's psychological disorders and "borderline IQ." (Pet.App. 33a–34a). But appointed counsel did not

object to the Rule 11 errors, including the undisclosed seven-year statutory minimum.

The district court overruled the objection to the abduction enhancement (*Id.* 32a–33a) and denied a variance. (4th Cir. JA 043). It then sentenced Mr. Santiago to 51 months in prison for Count I and seven years in prison for Count III, running consecutively. (*Id.* 043–44).

Mr. Santiago's affidavit explains that, after the sentencing hearing, he wanted to discuss with appointed counsel that he was sentenced to seven years for the gun charge even though "she told me that I was looking at five years." (Pet.App. 35a–36a). He did not have the opportunity, though, before he was removed from the courtroom. (*Id.*). Mr. Santiago's affidavit also attests that, although he tried to contact appointed counsel numerous times after the hearing, he never heard from her again. (*Id.*).

3. On direct appeal, appointed counsel did not fulfill her prior assurance to appeal the gun charge. Instead, she filed only an *Anders* brief, stating that she "has carefully reviewed the record and has concluded that there are no meritorious grounds for appeal." (4th Cir. JA 142). The *Anders* brief did not mention the Rule 11 errors, including the undisclosed seven-year mandatory minimum.

On September 12, 2012, the Government moved to dismiss the appeal based on the appellate waiver in the plea agreement.[2] (*Id.* 152). The next day, notice

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[2] At the same time, the Government also filed a Motion to Suspend the Briefing Schedule, including noting that it has

was issued to Mr. Santiago's appointed counsel to respond by September 27, 2012. (*Id.* 161).

When no response was filed, on September 28, 2012, the Fourth Circuit issued a second notice to appointed counsel to respond by October 5, 2012. (*Id.* 130). On September 30, 2012, appointed counsel responded to the motion to dismiss by stating that the court "generally ha[d] upheld" such appellate waivers and she was "constrained" to submit an *Anders* brief. (*Id.* 165). She also argued that the motion was premature until the court could review the record under *Anders*. (*Id.* 166).

Two days later, on October 1, 2012, Mr. Santiago filed a pro se "Letter Motion for Status of Case" with the Fourth Circuit. (Pet.App. 38a–39a). He asked "where or what steps he need[s] to take in this matter and has this Honorable Court schedule[d] a date to review this matter. Petitioner's attorney filed this appeal on August 8, 2012 and [I] ask this court to give an update." (*Id.*). He also stated that he "has been unable to contact his attorney to find out any information pertaining to his case." (*Id.*).

On November 29, 2012, the Fourth Circuit issued an unpublished opinion dismissing Mr. Santiago's appeal in part and affirming his convictions. (4th Cir. JA 054–58). It held the appellate waiver in the plea agreement applied to the enhancement for abducting the clerk. (*Id.* 056–57). It also held there was no

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(continued…)

"attempted to contact the defendant's attorney . . . regarding her position on this motion, but [it] has been unsuccessful in our attempts in contacting her." (4th Cir. JA 159).

plain error in the Rule 11 hearing that warranted consideration. (*Id.* 056–58).

D. The Proceedings Below

On November 15, 2013, Mr. Santiago timely filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence due to ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. (*Id.* 060, 062). The motion claimed ineffective assistance for counsel's failures to: (1) object to the district court's Rule 11 errors, (2) object to a seven-year minimum sentence for brandishment, and (3) raise the Rule 11 violations on appeal. (*Id.* 063–70). He alleged that, had he known "he faced a seven year mandatory minimum sentence during the Rule 11 hearing, he would have not pled guilty to the 924(c) charge, and would have proceeded to trial on Count Three." (*Id.* 067; Pet.App. 7a).

He also attached an affidavit attesting to several facts (many of which are described above). (*Id.* 35a–37a). Most significantly, he attested that his appointed counsel said he would be sentenced to five years for the gun charge, and "[i]f I had known I was going to receive seven years for the gun charge I would have told the [sic] my attorney and the judge I want to go to trial for the gun charge because like I told my attorney, I didn't have a gun." (*Id.*).

On January 31, 2014, the Government filed a motion to dismiss or, in the alternative, for summary judgment. (4th Cir. JA 096–104). It argued that any Rule 11 violations were harmless and that counsel's failures did not fall "below an objective standard of reasonableness." (*Id.*). It did not, however, contest

Mr. Santiago's factual averments, including those in his affidavit. (*Id.*).

On March 17, 2014, the district court granted the Government's motion and dismissed Mr. Santiago's § 2255 motion. (Pet.App. 18a–19a). It found that "[b]ecause the plea agreement correctly listed the statutory minimum and maximum punishments for count three, and because petitioner, under oath,[] affirmed that he understood the contents of the plea agreement, the Court's error was harmless." (*Id.* 20a–21a). The district court refused to grant a certificate of appealability, and Mr. Santiago filed a timely notice of appeal. (*Id.* 21a–22a; 4th Cir. JA 123). The Fourth Circuit granted a certificate of appealability for Mr. Santiago to proceed with his ineffective assistance claim that appointed counsel failed "to object to or raise a claim concerning the district court's failure to advise Santiago of the correct mandatory minimum and maximum penalties he was facing for a violation of 18 U.S.C. § 924(c)." (*Id.* 125).

In February 2015, the Fourth Circuit appointed the undersigned law firm and legal clinic to represent Mr. Santiago in this appeal. In the § 2255 appeal, Mr. Santiago argued that appointed trial court counsel's errors both in the district court and on direct appeal—separately and independently—satisfied the *Strickland* standards that apply to each such failure. (Appellant's 4th Cir. Br. at 20–45).

On December 22, 2015, the Fourth Circuit affirmed. (Pet.App. 1a–13a). As background, the court noted that Mr. Santiago's § 2255 motion "alleged that, had the district court's error not occurred, he would have pleaded not guilty on Count

[III] and gone to trial and 'likely would have received the 60 month sentence' for Count [III]." (*Id*. 7a (quoting 4th Cir. JA 067)). It also held that the district court committed an undeniable plain error that appointed counsel should have moved to correct:

> We readily acknowledge as a preliminary matter that *the district court committed error* when it stated that Santiago faced a maximum of five years imprisonment rather than a minimum of five years and that *Santiago's counsel should have noticed this error and moved to correct it.* Santiago's counsel also failed to recognize that the court did not inform Santiago of the potential for enhanced mandatory minimums under § 924(c).

(*Id*. 10a) (emphases added).

But, it also determined that there was no prejudice in this entire § 2255 proceeding for three reasons. *First*, it applied circuit precedent holding that, in order to show prejudice, Mr. "Santiago must show both subjectively that he would have gone to trial and that it would have been *objectively reasonable* to do so." (*Id*. 9a–10a (citing *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012))). Based on that rule, the Fourth Circuit concluded that it would not have been "rational" to go to trial, in light of its interpretation of the merits of the Government's case and that Mr. Santiago's defense was not "rational." (*Id*. 11a–12a (citing 4th Circuit cases)). Significantly, it applied this test to both of Mr. Santiago's claims.

Second, the Fourth Circuit found that "there is no record evidence from Santiago's *plea or sentencing*

hearings suggesting that Santiago would have moved to withdraw his plea if the correct information was provided." (*Id*. 12a) (emphasis added). Critically, it did not analyze the only direct evidence on this issue: Mr. Santiago's undisputed allegations and affidavit. Instead, it relied on the plea agreement discussed at the plea hearing and the PSR discussed with counsel at the sentencing hearing. (*Id.*). The district court even noted that "the PSR 'cannot cure the Rule 11 violation,'" but relied on it anyway. (Pet.App. 12a (quoting *United States v. Massenburg*, 564 F.3d 337, 344 (4th Cir. 2009))).

Finally, although Mr. Santiago is challenging his guilty plea to *Count III*, the Fourth Circuit concluded that, without the guilty plea, Mr. Santiago "would have been looking at a longer sentence on *Count I*." (*Id*. 12a–13a) (emphasis added). It reasoned that Mr. Santiago's Guidelines range was reduced three levels on Count I for acceptance of responsibility due to his plea. (*Id.*). The court's holding and reasoning did not analyze Mr. Santiago's undisputed allegations and affidavit, nor did it consider the impact that ineffective assistance of counsel had on the plea and sentencing hearings.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted on this fundamental and recurring issue. The lower court's opinion is contrary to this Court's precedent and furthers several circuit splits.

1. Mr. Santiago's Sixth Amendment right to counsel was violated by the ineffective assistance of appointed counsel here. During the plea hearing, the district court improperly characterized the five-year

minimum sentence as a maximum, and never described the potential seven-year statutory minimum sentence for brandishing. Despite these clear violations of Rule 11, appointed counsel failed to object in the district court and again failed to raise the issue on appeal. The Fourth Circuit acknowledges that, at a minimum, appointed counsel "should have noticed this error and moved to correct it." (*Id*. 10a).

The key issue here is prejudice. Mr. Santiago raised two separate and distinct errors: (1) appointed trial counsel's failure to object to the Rule 11 violations in the district court, and (2) her failure to raise them on direct appeal. To succeed on either claim, he must show "prejudice" under *Strickland v. Washington*, 466 U.S. 668, 693–94 (1984). Such prejudice requires a showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

This petition focuses on counsel's failure to raise the Rule 11 errors on direct appeal. The standard for prejudice from appointed counsel's error on direct appeal, requires "a reasonable probability that . . . [defendant] would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Because the Rule 11 error was not raised in the district court, the standard on that direct appeal would have been "plain error." *United States v. Dominguez Benitez*, 542 U.S. 74, 84–85 (2004); *see also, e.g., Hill v. United States*, 317 F. App'x 910, 914–15 (11th Cir. 2009) (applying plain error standard to *Strickland* analysis of counsel's failure to raise Rule 11 error on direct appeal).

The Fourth Circuit's opinion is contrary to this Court's decisions in two ways. *First*, this Court has established that even a "foolish," subjective desire to go to trial can satisfy the plain error prejudice standard for a Rule 11 violation. *Dominguez Benitez*, 542 U.S. at 85. Yet, the Fourth Circuit denied all of Mr. Santiago's § 2255 claims, holding he must show that it would have been "objectively reasonable" or "rational" to go to trial. (Pet.App. 9a–12a (citing cases)). By definition, a requirement of an "objectively reasonable" or "rational" decision is contrary to a rule that permits a "foolish" decision to satisfy the applicable standard.

Second, the Court has established for plain error review that "a reviewing court must look to the entire record, not to the plea proceedings alone" to determine prejudice. *Dominguez Benitez*, 542 U.S. at 80. Yet, the Fourth Circuit concluded that there was insufficient evidence of prejudice, based solely on the evidence from the "plea or sentencing hearings." (Pet.App. 12a). Again, that is, by definition, less than the "entire record." It also completely ignored Mr. Santiago's undisputed allegations and affidavit.

Fundamentally, the Fourth Circuit's approach penalizes Mr. Santiago for the exact ineffective assistance of counsel that is the basis of his § 2255 motion. Appointed defense counsel failed to object to the Rule 11 violation and failed to raise it on direct appeal. And the record at the sentencing hearing is similarly inadequate because that counsel failed to address the issue. Yet, the Fourth Circuit barred Mr. Santiago's Sixth Amendment claim for those same inadequacies. This double hardship is prevented by following the Court's plain error

standard. Examining the entire record provides a defendant the opportunity to demonstrate that he subjectively would not have entered the guilty plea had he been aware of the seven-year statutory minimum. *See Dominguez Benitez*, 542 U.S. at 83 n.9 (post-conviction proceedings like Mr. Santiago's § 2255 motion "permit greater development of the record" than ordinary Rule 11 claims). With the undisputed record in this § 2255 proceeding, Mr. Santiago has met that burden.

2. The Fourth Circuit's approach also entrenches three circuit splits. *First*, the Fourth Circuit held that prejudice is reviewed both subjectively and objectively. (Pet.App. 9a–12a). But, applying *Dominguez Benitez*, the First Circuit holds that plain error prejudice is reviewed solely subjectively, not objectively. *See United States v. Ortiz-Garcia*, 665 F.3d 279, 285–86 (1st Cir. 2011) (citing *Dominguez Benitez*).

Second, the Second Circuit holds that when the PSR lists the correct maximum or minimum sentences, the defendant is categorically and automatically precluded from showing prejudice. *See, e.g.*, *United States v. Vaval*, 404 F.3d 144, 152 (2d Cir. 2005). In contrast, in the First, Fourth, Fifth, Seventh, and Eighth Circuits, such notice from the PSR is merely one factor for consideration but is not determinative. *See, e.g.*, *Ortiz-Garcia*, 665 F.3d at 286–87; (Pet.App. 12a) (citing *Massenburg*, 564 F.3d at 344)); *United States v. Alvarado-Casas*, 715 F.3d 945, 954 (5th Cir. 2013); *United States v. Munoz-Reyes*, 286 F. App'x 950, 952 (7th Cir. 2008); *United States v. Thompson*, 770 F.3d 689, 697–98 (8th Cir. 2014). Indeed, the Fourth Circuit held here that "the

PSR 'cannot cure the Rule 11 violation.'" (Pet.App. 12a (quoting *Massenburg*, 564 F.3d at 344)).

Third, the circuits that consider the PSR as a factor are also split over whether failure to object to the PSR is a factor against finding prejudice on its own, or whether there must be some additional relevant discussion at the sentencing hearing. The Eighth Circuit considers failure to object to the PSR on its own a factor against finding prejudice. *Thompson*, 770 F.3d at 697–98; *United States v. Garcia*, 604 F.3d 575, 578–79 (8th Cir. 2010). In contrast, the First Circuit holds that the PSR is only relevant when "the record clearly established that [defendant] had reviewed the PSR with his attorney prior to the sentencing hearing." *Ortiz-Garcia*, 665 F.3d at 286–87. Similarly, the Fourth, and Fifth Circuits have only considered the PSR as a factor against prejudice in light of statements from the defendant about it at the sentencing hearing. (Pet.App. 12a) (citing *Massenburg*, 564 F.3d at 344)); *Alvarado-Casas*, 715 F.3d at 954.

Finally, the circuits are inconsistent regarding whether to apply a specific set of factors or whether to apply factors on an ad hoc basis, depending on the facts of the particular case. The Eleventh and D.C. Circuits each consider a specific set of factors. *United States v. Davila*, 749 F.3d 982, 995–96 (11th Cir. 2014); *In re Sealed Case*, 488 F.3d 1011, 1017 (D.C. Cir. 2007). In contrast, the First and Eighth Circuits apply ad hoc factors based on the facts before them. *See, e.g., Thompson*, 770 F.3d at 697; *Garcia*, 604 F.3d at 578; *United States v. Urbina-Robles*, 817 F.3d 838 (1st Cir. 2016); *United States v. Hernandez-Maldonado*, 793 F.3d 223 (1st Cir. 2015).

As a middle ground, the Sixth Circuit has found the Eleventh Circuit's factors are "helpful" but not "exhaustive." *United States v. Ushery*, 785 F.3d 210 (6th Cir. 2015).

3. These fundamental and recurring questions warrant this Court's attention. Because the vast majority of federal criminal cases end in guilty pleas, *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), the Rule 11 plea colloquy has become a critical—and in many cases, final—safeguard of criminal defendants' rights. As a result, errors in that process—especially errors that go to the important variables in the plea decisions, such as mandatory sentences—are particularly important. And the cases show that such Rule 11 errors prejudice criminal defendants and deprive them of a fair plea bargaining process. Ruling on the Question Presented will clarify the limited circumstances under which those challenges can succeed. Importantly, it could also provide guidance to district courts regarding plea and sentencing hearings and incentivize them to proactively address Rule 11 errors before a defendant is sentenced.

I. THE FOURTH CIRCUIT'S RULING IS CONTRARY TO THIS COURT'S "PLAIN ERROR" PRECEDENTS

A. Plain Error Review Applies To Mr. Santiago's Claim That Appointed Counsel Failed To Raise The Rule 11 Errors On Direct Appeal

Mr. Santiago's § 2255 claim argued that counsel failed (1) to object to the district court's Rule 11 errors and (2) to raise the Rule 11 violation on appeal.

To succeed on his claim, Mr. Santiago must satisfy both prongs of the *Strickland* test: (1) counsel's representation fell below an "objective standard of reasonableness," and (2) that deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 693–94.

During Mr. Santiago's plea hearing, the district court improperly characterized the five-year minimum sentence as a maximum, and never described the potential seven-year statutory minimum sentence for brandishing. Despite these clear violations of Rule 11, appointed counsel failed to object in the district court and again failed to raise the issue on appeal. The Fourth Circuit acknowledged that, at a minimum, appointed counsel "should have noticed this error and moved to correct it." (Pet.App. 10a).

Nevertheless, the Fourth Circuit held that Mr. Santiago did not suffer prejudice. (*Id.* 8a–13a). To succeed on his § 2255 claim, Mr. Santiago must show "prejudice" under *Strickland*, 466 U.S. at 693–94. Such prejudice requires a showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

This petition focuses on counsel's failure to raise the Rule 11 errors on direct appeal. The standard for prejudice from appointed counsel's error on direct appeal, requires "a reasonable probability that . . . [defendant] would have prevailed on his appeal." *Smith*, 528 U.S. at 285. Because the Rule 11 error was not raised in the district court, the standard on that direct appeal would have been "plain error." *Dominguez Benitez*, 542 U.S. at 85; *see also, e.g., Hill v. United States*, 317 F. App'x at 914–15 (applying

plain error standard to *Strickland* analysis of counsel's failure to raise Rule 11 error on direct appeal).

B. The Fourth Circuit's Approach Conflicts With This Court's Plain Error Decisions

Given the current prominence of guilty pleas, adherence to Rule 11 is more important than ever. "The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all." Fed. R. Crim. P. 11 advisory committee's note to 1966 amendments. Plea agreements are a central part of the criminal justice system. *See Frye*, 132 S. Ct. at 1407 (guilty pleas account for 97 percent of federal criminal convictions).

Recognizing the importance of the Rule, the Court has issued three opinions in the past fourteen years clarifying and establishing the "prejudice" standard for plain error review of Rule 11 errors. *United States v. Davila*, 133 S. Ct. 2139 (2013) (no automatic reversal); *Dominguez Benitez*, 542 U.S. at 76 (defendant has the burden to show "a reasonable probability that, but for the error, he would not have entered the plea"); *Vonn*, 535 U.S. at 59 (plain error applies when there was no objection in the trial court and the court must review the "entire record"). Despite this Court's holdings, the Fourth Circuit ruled against Mr. Santiago based on a contrary standard.

For plain error review of Rule 11 violations, this Court has established that the prejudice inquiry is subjective to the defendant and must be based on the

"entire record." The Fourth Circuit's opinion in this case, however, is contrary to both.

1. The Court has established that the prejudice inquiry is subjective to the defendant under plain error review of a Rule 11 violation. As the Court explained, the factual inquiry is "not to second-guess a defendant's actual decision; if it is reasonably probable *he* would have gone to trial absent the error, it is no matter that the choice may have been *foolish*." *Dominguez Benitez*, 542 U.S. at 85 (emphases added). This inquiry is focused solely on what this particular defendant would have chosen. Indeed, the decision to go to trial can both satisfy the "reasonably probable" standard and be "foolish."

This Court's *Davila* and *Dominguez Benitez* decisions repeatedly define the plain error prejudice standard based on the decision or choice of the particular defendant. As the Court explained in *Dominguez Benitez*: "we hold that a defendant is obliged to show a reasonable probability that, but for the error, *he* would not have entered the plea."[3] 542 U.S. at 76 (emphasis added); *see also id.* at 83 ("We hold, therefore, that a defendant who seeks reversal of his conviction after a guilty plea, on the ground

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[3] That standard mirrors the Question Presented by the Government in that case: "[w]hether in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible error, a defendant must demonstrate that *he* would not have pleaded guilty if the violation had not occurred." *Dominguez Benitez*, 542 U.S. at 80 (alteration in original) (emphasis added) (quoting Petition for Certiorari, *United States v. Dominguez Benitez*, No. 03-167, 2003 WL 22428680, at *I (2003)).

that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, *he* would not have entered the plea."). [4] And this articulation is consistent throughout *Davila*: "Under the inquiry that Rule [11(h)] instructs, vacatur of the plea is not in order if the record shows no prejudice *to Davila's decision* to plead guilty." 133 S. Ct. at 2143 (emphasis added).[5]

Yet, the Fourth Circuit denied all of Mr. Santiago's claims based on an objective standard. It held that to show prejudice the defendant "must show both subjectively that he would have gone to trial and that it would have been *objectively reasonable* to do so." (Pet.App. 9a–10a (citing *Fugit*, 703 F.3d at 260).

Applying that incorrect standard, the Fourth Circuit held that Mr. Santiago could not show

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[4] *See also id.* at 84 (faulting the Court of Appeals for not considering evidence regarding whether the "misunderstanding was inconsequential to *a defendant's decision*" or the significance *"on his choice*") (emphases added); *id.* at 84–85 ("Relevant evidence . . . included Dominguez's statement to the District Court that *he did not intend* to go to trial[.]" (emphasis added)).

[5] *See also Davila*, 133 S. Ct. at 2148 ("Did that misconduct in itself demand vacatur of Davila's plea, as the Eleventh Circuit held, or, as the Government urges, must a reviewing court consider all that transpired in the trial court in order to assess the impact of the error on the *defendant's decision* to plead guilty? We hold that the latter inquiry is the one the Rules and our precedent require.") (emphasis added); *id.* at 2150 ("[T]he Court of Appeals should have considered whether it was reasonably probable that, but for the Magistrate Judge's exhortations, *Davila would have* exercised his right to go to trial.") (emphasis added).

prejudice because it would not be objectively "rational," based on an ad hoc analysis of the Government's evidence and Mr. Santiago's defenses. (*Id*. 11a ("We have repeatedly noted that when the Government's case is strong, a defendant faces a nearly insurmountable obstacle to showing that it would have been *rational* to go to trial.") (emphasis added); *id*. 12a ("Santiago's defense that his cousin, with whom he committed the robbery, had actual possession of the gun is not a '*rational* defense' against an aiding and abetting § 942(c) charge.") (emphasis added).

2. The Court has also established that the prejudice inquiry is based on the "entire record." It expressly held that "in assessing the effect of Rule 11 error, a reviewing court *must* look to the *entire record*, not to the plea proceedings alone." *Dominguez Benitez*, 542 U.S. at 80 (emphasis added); *see also Davila*, 133 S. Ct. at 2150 (holding the lower court's assessment of prejudice should have been "in light of the *full record*") (emphasis added). That is consistent with the Court's emphasis that the specific facts matter in these cases: "Our essential point is that particular facts and circumstances matter." *Davila*, 133 S. Ct. at 2149.

Yet, the Fourth Circuit did not analyze the "entire record." For evidence that Mr. "Santiago would have moved to withdraw his plea if the correct information was provided," the Fourth Circuit looked solely at the "record evidence from [Mr.] Santiago's plea or sentencing hearings." (Pet.App. 12a). On the central issue of what Mr. Santiago would have done, the Fourth Circuit artificially limited its review. It completely ignored the undisputed evidence in the

record that is directly on-point, including Mr. Santiago's affidavit. (*Id*. 35a–37a).

3. Under this Court's test, Mr. Santiago demonstrated prejudice. Indeed, it is undisputed and unrebutted that he would not have pleaded guilty to Count III if he had been aware of the seven-year mandatory minimum.

The undisputed record evidence demonstrates that Mr. Santiago thought his sentence on Count III had to be five years. The district court said at the plea hearing that five years was the statutory maximum. (*Id*. 26a–27a). That was consistent with appointed counsel telling Mr. Santiago that he was "looking at five years" on this count. (*Id*. 35a–36a). Although the plea agreement said the *minimum* was five years, that at best created confusion for this unschooled twenty-year-old man with an IQ of 73. All signs pointed to a 5-year requirement. No signs pointed to a seven-year requirement before Mr. Santiago pleaded guilty.

To be sure, the PSR mentioned the seven-year minimum, however, the Fourth Circuit misinterpreted the significance of that fact. The PSR is a central component of Mr. Santiago's ineffective assistance claim. During the sentencing hearing, Mr. Santiago did not agree to the terms of the PSR and did not say he had no objections. Instead, he referred the court to counsel, who then failed to object. (*Id*. 31a–32a). It is manifestly unfair and improper for the Fourth Circuit to turn counsel's ineffective assistance during and after the

sentencing hearing into supposed evidence of Mr. Santiago's willingness to plead guilty. (*Cf. id.* 12a).[6]

Moreover, Mr. Santiago's undisputed affidavit demonstrates that he was not willing to plead guilty to Count III if it had a seven-year minimum. That is expressly averred and undisputed in this record. (*Id.* 35a–37a). It did not, however, play any role in the Fourth Circuit's analysis.

Additionally, no objection or motion was filed after the sentencing hearing only because of the ineffectiveness of Mr. Santiago's previously appointed counsel. Mr. Santiago tried repeatedly to contact counsel to discuss the issue but "she never wrote back." (*Id.*). Indeed, during his direct appeal Mr. Santiago filed a notice with the Fourth Circuit indicating he was unable to contact appointed counsel for information on the case. (*Id.* 38a-39a). And appointed counsel did not respond to opposing counsel (*Id.*) or to a court order. (4th Cir. JA 130). This silence is particularly egregious because counsel told Mr. Santiago that she would appeal Count III. (Pet.App. 35a–36a).

For these reasons, the Fourth Circuit's statement that there is a lack of evidence from his sentencing hearing that Mr. Santiago would not have plead guilty to the gun charge if he had been properly

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[6] Similarly, Mr. Santiago agrees with the Fourth Circuit that the seven-year minimum should have been "apparent" during the plea hearing. (Pet.App. 10a n.5). But he is claiming ineffective assistance for a Rule 11 violation because it should also have been "apparent" to the district court and officers of the court. That they all overlooked this demonstrates the plain error in the Rule 11 proceeding.

informed (*Id*. 12a) is inaccurate and legally irrelevant.

4. The final part of the Fourth Circuit's discussion unfairly speculates that Mr. Santiago would have received a longer sentence if he had not pleaded guilty. (*Id*. 12a–13a). On this record, it is not clear at all that Mr. Santiago had anything to lose by going to trial. Particularly, he had nothing to lose if he went to trial solely on Count III and lost. There is no indication that the district court or Government would have or could have pursued anything more than the seven-year minimum on Count III, in light of Mr. Santiago's age and criminal history. He had everything to gain and nothing to lose by going to trial on Count III.

Moreover, there is nothing in the record indicating Mr. Santiago had anything to lose on his guilty plea with regard to Count I. (*Cf. id*.). Mr. Santiago always took responsibility for his role in Count I, even turning himself in to police promptly after the crime. (4th Cir. JA 217). There is nothing in the record substantiating that the Government would have refused a plea on Count I or that Mr. Santiago would have been facing a longer sentence on Count I had he gone to trial on Count III.

Ultimately, the inquiry here is supposed to be into whether Mr. Santiago would have pleaded guilty had he been properly informed, and all of the undisputed evidence shows he would not have. There is no evidentiary basis for denying Mr. Santiago's motion. Indeed, the Government chose to seek dismissal of this § 2255 proceeding without an evidentiary hearing, chose not to contest Mr. Santiago's facts, and chose not to raise any facts of its own. Given the

Government's waiver of further factual development, Mr. Santiago's unchallenged allegations and averments should carry the day. *Cf. United States v. Dung Bui*, 795 F.3d 363 (3d Cir. 2015) (allowing withdrawal where defendant stated he would not have pleaded guilty without the error and there was no benefit from pleading guilty because it could not have reduced his sentence).

II. THE FOURTH CIRCUIT'S APPROACH CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

Review is also warranted to resolve direct, entrenched circuit splits on issues implicated by the question presented.

1. The federal appellate courts are split regarding whether the prejudice analysis for a Rule 11 violation includes objective reasonableness. As discussed *supra*, the Fourth Circuit in this case entrenched its holding that the inquiry is both objective and subjective. (Pet.App. 9a–12a) (citing Fourth Circuit cases). Indeed, its decision here is based on its "objective[]" analysis of the merits of the Government's case and Mr. Santiago's defense. (*Id.* 11a–12a).

In contrast, the First Circuit, following this Court's precedent, holds that this inquiry is only subjective. *Ortiz-Garcia*, 665 F.3d at 285–86 (citing *Dominguez Benitez*). Specifically, the First Circuit finds prejudice based on evidence of the defendant's subjective choice to plead guilty, even when the defendant's case is objectively weak on the merits. *Id.* at 286. In *Ortiz-Garcia*, the defendant argued that he would have withdrawn his guilty plea and

pursued a specific defense, but the Government argued that defense was weak because it had failed for a co-defendant, and so there was no prejudice. *Id.* The First Circuit rejected the Government's argument, holding that courts cannot "assess whether a defendant would likely have succeeded at trial, had he elected not to plead guilty in the absence of a Rule 11 error. If the defendant can show a reasonable probability that, but for the error, he would not have entered the plea, we must accept that showing without judging its merits." *Id.* (citing *Dominguez Benitez*, 542 U.S. at 85).[7]

2. The circuit courts are also split over whether withdrawal of a guilty plea is categorically precluded when the defendant does not object after the correct statutory maximum or minimum appears in the PSR. Taking the most extreme position, the Second Circuit treats such notice from the PSR as categorically and automatically precluding prejudice. *See, e.g.*, *United States v. Vaval*, 404 F.3d 144, 152 (2d Cir. 2005) ("Where a defendant, before sentencing, learns of information erroneously omitted in violation of Rule 11 but fails to attempt to withdraw his plea based on that violation, *there can be no reasonable probability* that, but for the Rule 11 violation, he would not have entered the plea, and the plain error standard is not met." (alteration omitted) (emphasis added)). In contrast, in the First, Fourth, Fifth, Seventh, and

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[7] Similar reasoning was cited by the dissent in. *Ushery*, 785 F.3d at 230 (Clay, J., dissenting) ("Whether a trial was in Ushery's best interest is not a subject for appellate review under these circumstances." (citing *Dominguez Benitez*, 542 U.S. at 85)).

Eighth Circuits, such notice from the PSR is merely one factor for consideration but is not determinative. *See, e.g.*, *Ortiz-Garcia*, 665 F.3d at 286–87; (Pet.App. 12a) (citing *Massenburg*, 564 F.3d at 344); *Alvarado-Casas*, 715 F.3d at 954; *Munoz-Reyes*, 286 F. App'x at 952; *Thompson*, 770 F.3d at 697–98. Indeed, the Fourth Circuit held here that "the PSR 'cannot cure the Rule 11 violation.'" (Pet.App. 12a (quoting *Massenburg*, 564 F.3d at 344.

3. The circuits that consider the PSR a factor are also split over whether failure to object to the PSR—on its own—is a factor against finding prejudice or whether there must be some additional relevant discussion at the sentencing hearing. The Eighth Circuit considers failure to object to the PSR on its own a factor against finding prejudice. *Thompson*, 770 F.3d at 697–98 (the PSR "put him on notice" of the maximum sentence and he failed to object); *Garcia*, 604 F.3d at 578–79 (same). In contrast, the First Circuit holds that the PSR is only relevant when "the record clearly established that [defendant] had reviewed the PSR with his attorney prior to the sentencing hearing." *Ortiz-Garcia*, 665 F.3d at 286–87. Similarly, the Fourth and Fifth Circuits have only considered the PSR as a factor against prejudice in light of statements from the defendant about it at the sentencing hearing. (Pet.App. 12a) (defendant acknowledged reading the PSR and did not object) (citing *Massenburg*, 564 F.3d at 344); *Alvarado-Casas*, 715 F.3d at 954 (defendant acknowledged reading the PSR and discussing it with counsel and then did not object).

4. The circuits are also inconsistent regarding whether to apply a specific set of factors or whether

to apply factors on an ad hoc basis, depending on the facts of the particular case. The Eleventh and D.C. Circuits consider a specific set of factors. *Davila*, 749 F.3d at 995–96 (no prejudice where defendant "acknowledged that the Government could prove the conduct underlying his offense" (applying factors set forth in *United States v. Castro*, 736 F.3d 1308, 1314 (11th Cir. 2013)); *In re Sealed Case*, 488 F.3d at 1016–18 (citing and applying four factors first identified in *United States v. Hanson*, 339 F.3d 983, 990–91 (D.C. Cir. 2003)). In contrast, the First and Eighth Circuits apply ad hoc factors based on the facts before them. *See, e.g., Thompson*, 770 F.3d at 696–98 (assessing 4 factors that weigh in favor of prejudice and 3 that weigh against it); *Garcia*, 604 F.3d at 578 (analyzing 2 factors, only 1 overlaps with *Thompson*).[8] As a middle ground, the Sixth Circuit has found the Eleventh Circuit's factors are "helpful" but not "exhaustive." *Ushery*, 785 F.3d at 221.

This Court's review is warranted to resolve these circuit splits and could help resolve the circuits' inconsistent approach to whether to apply a consistent set of factors or an ad hoc analysis in determining plain error.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

Without this Court's intervention, the Fourth Circuit's conflicts with this Court's precedent and with its sister circuits will continue to affect a

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[8] *Urbina-Robles*, 817 F.3d 838 (analyzing three factors); *Hernandez-Maldonado*, 793 F.3d 223 (analyzing three factors, only one overlapping with the factors from *Urbina-Robles*).

substantial number of cases. Indeed, guilty pleas account for 97 percent of federal criminal convictions. *Frye*, 132 S. Ct. at 1407. Ruling on the Question Presented will establish when those guilty pleas can be challenged. It will also guide district courts in plea and sentencing hearings, including incentivizing them to proactively address Rule 11 errors at the sentencing hearing before issuing a sentence.

1. As this Court recognizes, the current federal criminal justice system is overwhelmingly plea-driven. "[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012). And "mandatory minimum sentences" are widely regarded as one of the reasons for the proliferation of guilty pleas. *See, e.g.,* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 12 (2010) ("In fact, ninety-five percent of all federal prosecutions terminate by guilty plea, with mandatory minimum sentences helping to keep that figure extremely high.").

The increase in guilty pleas has made the procedural rules governing the pleading process more important than ever. The Rule 11 colloquy is the critical, fundamental safeguard for criminal defendants' right to enter only knowing and voluntary guilty pleas and to the integrity of the judicial process. *See Halliday v. United States*, 394 U.S. 831, 832 (1969) (per curiam) (Rule 11's "procedural safeguards . . . are designed to facilitate the determination of the voluntariness of [a criminal defendant's] plea"); *see also Strickland*, 466 U.S. at 683–84 (1984) (properly informing defendants at

Rule 11 hearings is critical to the fair operation of the criminal justice system).

Because of those increases, Rule 11 errors are a significant front in the battle to balance criminal justice, individual liberties, judicial economy, and judicial integrity. The federal appellate courts have been inundated with cases requesting that they diagnose and correct Rule 11 errors. And they have found troubling errors that prejudiced criminal defendants and deprived them of a fair plea-bargaining process. *See, e.g.*, *United States v. Sanya*, 774 F.3d 812, 822 (4th Cir. 2014) (vacating sentence because district court improperly participated in plea negotiations); *United States v. Morales Heredia*, 768 F.3d 1220, 1236–37 (9th Cir. 2014); *United States v. Gonzalez-Lemus*, 495 F. App'x 751, 754 (8th Cir. 2012) (declining to enforce appellate waiver in plea agreement on the grounds that it was not knowing, intelligent, and voluntary where court failed to conduct Rule 11 colloquy, and prosecutor's summary of plea agreement was an insufficient substitute); *Ortiz-Garcia*, 665 F.3d at 286–88 (vacating judgment and guilty plea where court failed to inform defendant of maximum sentence of life imprisonment).

One common, misleading, and easily correctible error is the failure to inform—or even worse, as here, to actively *misinform*—a criminal defendant of the consequences of the specific guilty plea before it is entered. *See, e.g.*, *Ortiz-Garcia*, 665 F.3d at 285-88 (finding plain error where defendant was not notified of the maximum penalty of life imprisonment, either at the change-of-plea hearing or in the plea agreement); *United States v. Rivera-Maldonado*, 560

F.3d 16, 17 (1st Cir. 2009) (vacating after finding plain error where the plea agreement and change-of-plea hearing failed to inform the defendant about the possibility of a lifetime of supervised release, instead stating that supervised release would not exceed three years); *Hairston*, 522 F.3d at 338–39, 343 (vacating plea due to court's failure to inform defendant of the possibility that a an enhancement would raise the mandatory minimum sentence). Because they inherently define the degree of risk involved, statutory maximums and minimums are among the most important variables a criminal defendant must consider when making the potentially life-altering decision to plead guilty rather than risk the uncertainty of trial. *See* Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 Am. J. Trial Advoc. 103, 106, 127–33 (2005).

2. District courts should be incentivized to proactively address these issues so they are resolved conclusively before sentencing. That would serve the purpose of "concentrat[ing] plea litigation in the trial courts, where genuine mistakes can be corrected easily, and promotes the finality required in a system as heavily dependent on guilty pleas as ours." *Vonn*, 535 U.S. at 72.

In a recent case, a district court in the Eleventh Circuit achieved a notable balance. At the plea hearing, the prosecutor and district court advised a criminal defendant that his statutory maximum was 10 years, which was accurate under then-binding Eleventh Circuit precedent interpreting the Armed Career Criminal Act ("ACCA"). *United States v. Gandy*, 710 F.3d 1234, 1240 (11th Cir. 2013).

Between entry of the plea and the sentencing hearing, the Eleventh Circuit reversed that ACCA precedent based on recent precedent from this Court. *Id.* As a result, the statutory minimum became 15 years imprisonment, an increase of 5 years from the maximum stated at the plea hearing. *Id.*

At the sentencing hearing, the district court proactively explained to the criminal defendant the difference between the mandatory minimum sentence at the time of the plea and at the time of sentencing. *Id.* The district court then asked if he wanted to withdraw his guilty plea, offering a break to consider and to discuss with counsel. *Id.* The criminal defendant responded on the record that he had already discussed the issue with counsel and did not wish to withdraw his guilty plea. *Id.* As a result, the Eleventh Circuit did not allow a subsequent attempt to withdraw that guilty plea. *Id.* at 1240–41. This is a good example of an appropriate colloquy when the minimum or maximum to be applied at the sentencing hearing is different from the maximum or minimum discussed at the plea colloquy.[9]

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[9] This is also consistent with "the object of Rule 32(e), which governs withdrawing a plea of guilty by creating an incentive to file withdrawal motions before sentence, not afterward." *Vonn*, 535 U.S. at 72 ("This is only good sense; in acting as an incentive to think through a guilty plea before sentence is imposed, the Rule tends to separate meritorious second thoughts (say, a defendant's doubts about his understanding) and mere sour grapes over a sentence once pronounced.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 20, 2016

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-6449

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

ISHMAEL AVIVE SANTIAGO,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:11-cr-00287-BO-2; 5:13-cv-00796-BO)

Argued: October 27, 2015 Decided: December 22, 2015

Before NIEMEYER and SHEDD, Circuit Judges, and M. Hannah LAUCK, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Christopher D. Smith, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, Morgantown, West Virginia, for Appellant. Seth Morgan Wood, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF**: Lawrence David Rosenberg, Washington, D.C., Stephanie D. Taylor, JONES DAY, Pittsburgh, Pennsylvania, for Appellant. Thomas G. Walker, United States Attorney, Jenifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ishmael Avive Santiago appeals the denial of his 28 U.S.C. § 2255 motion, arguing that his counsel rendered ineffective assistance at his Rule 11 hearing, at sentencing, and on appeal. *See Strickland v. Washington*, 466 U.S. 668 (1984). Because Santiago fails to show *Strickland* prejudice, we affirm.

I.

Santiago was charged in a three-count indictment with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count 1); Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951 and 2 (Count 2); and using and carrying a firearm and possessing a firearm in furtherance of a crime of violence and aiding and abetting, in violation of 18 U.S.C. §§ 924(c) and 2 (Count 3). These charges stem from the robbery of a Walgreens in Clayton, North Carolina, carried out by Santiago and his cousin, Rhaim.

As the two men entered the store, they wore bandanas over the lower portion of their faces and Rhaim was armed with an SKS rifle[1]. After they entered the store, Rhaim accosted a store clerk who was stocking merchandise, pointed his rifle at her, and demanded that she open the cash register. Upset that the clerk was taking too long, Rhaim struck her in the back of the head with the rifle and walked her to the cash register. Santiago and Rhaim absconded with less than $500. The store clerk

[1] Although not necessary for our decision, we note that Rhaim and Santiago both confessed to authorities that they mutually agreed, along with an unnamed juvenile male, to purchase a rifle and commit an armed robbery.

suffered a laceration on the back of her head and was treated at the local hospital. Santiago turned himself in several days later and confessed his involvement in the robbery. In addition, authorities recovered a cell phone with images of Santiago and Rhaim posing with the gun and money after the robbery[2].

At Santiago's initial hearing before a magistrate judge, he was told that the § 924(c) count subjected him to "a penalty of not less than [five] years, no more than life imprisonment consecutive to any other sentence imposed." (S.J.A. 231). The magistrate judge asked if Santiago understood and Santiago responded affirmatively.

Prior to trial, Santiago decided to plead guilty to Counts 1 and 3 pursuant to a plea agreement. Relevant here, regarding Count 1, the plea agreement provided that Santiago would be entitled to a three-level reduction of his offense level due to acceptance of responsibility. As to Count 3, the plea agreement explained that Santiago faced a maximum term of imprisonment of "life, consecutive to any other term of imprisonment" and a minimum term of imprisonment of "[five] years, consecutive to any other term of imprisonment." (J.A. 212). Santiago also agreed, as part of the plea agreement, that:

> the Court will take into account, but is not bound by, the applicable United States Sentencing Guidelines, that the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is not a promise, and that even if a

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[2] The robbery was also caught on video surveillance.

> sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty.

(J.A. 212).

The district court conducted a Rule 11 colloquy prior to accepting Santiago's plea. During the colloquy, the court mistakenly stated that Count 3 "carries *up to* five years in prison . . . consecutive to any other prison time." (J.A. 27-28) (emphasis added). Neither the Government nor Santiago's attorney objected to this statement. The court also did not inform Santiago of the potential for an enhanced mandatory minimum under § 924(c)(1)(A).[3] After the court's misstatement, Santiago affirmed that he read and understood the *plea agreement* and that he had no additional questions. Santiago also affirmed that his counsel had explained the plea agreement and that his plea was voluntary. At the end of the hearing, the court accepted the plea.

Following the Rule 11 hearing, the probation office prepared Santiago's Presentence Report (PSR). On Count 3, the PSR found that because the firearm was brandished during the robbery, § 924(c)(1)(A)(ii) applied. That statute provides for a mandatory minimum of seven years imprisonment (rather than five) if the firearm was brandished. Thus, the PSR recommended a guidelines range of 84 months on Count 3 consecutive to any sentence for Count 1. For

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[3] Section 924(c) provides a mandatory minimum of five years if the defendant used and carried a firearm during a crime of violence, but also provides for an enhanced penalty of seven years if the firearm was brandished and ten years if the firearm was discharged. 18 U.S.C. § 924(c)(1)(A)(i-iii).

Count 1, the PSR recommended a base offense level of 20, with a three-level enhancement for causing bodily injury, a four-level enhancement for abduction, and a three-level reduction for acceptance of responsibility. This calculation yielded a total offense level of 24 and a guidelines range of 51-63 months imprisonment. Without the three-level reduction for acceptance of responsibility provided by the plea agreement, Santiago faced an offense level of 27 and a corresponding guidelines range of 70-87 months imprisonment.

At sentencing, Santiago confirmed that he had received the PSR and had an opportunity to review it prior to the hearing. When asked twice if he had any comment on the PSR, Santiago deferred to counsel, who objected to the four-level abduction enhancement on Count 1. Neither Santiago nor his counsel mentioned the increase in the mandatory minimum from five years to seven years and at no point did Santiago move to withdraw his plea. The district court overruled the objection to the abduction enhancement and sentenced Santiago to 51 months imprisonment on Count 1 and 84 months imprisonment on Count 3, to run consecutively.

Santiago filed a timely notice of appeal. Counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), but did ask us to review the four-level abduction enhancement. We issued a per curiam opinion affirming in part and dismissing in part. *United States v. Santiago*, 498 Fed. App'x 222 (4th Cir. 2012). In reviewing Santiago's guilty plea, we concluded that the district court "substantially complied with Rule 11's requirements, and

committed no error warranting correction on plain error review." *Id.* at *224.

In November 2013, Santiago filed a motion to vacate his conviction under 28 U.S.C. § 2255. Santiago attached an affidavit alleging that his counsel was ineffective for failing to object to the district court's misstatement about the sentence and, consequently, his plea was unknowing as to Count 3. Santiago alleged that, had the district court's error not occurred, he would have pleaded not guilty on Count 3 and gone to trial and "likely would have received the 60 month sentence" for Count 3. (J.A. 67). The Government moved to dismiss, arguing that any error by the district court was cured by the plea agreement, which correctly stated that five years was the statutory minimum, not the statutory maximum. The district court granted the motion to dismiss, concluding that counsel was not ineffective in failing to object at the Rule 11 hearing because the plea agreement had the proper terms. The court explained, "[Santiago] cannot meet the *Strickland* standard to show ineffective assistance of counsel as it is not objectively unreasonable to refuse to object to harmless error or pursue such a claim on appeal." (J.A. 119).

Santiago filed a timely appeal and this court issued the following certificate of appealability:

> We grant a certificate of appealability on Santiago's claim that his counsel, Leza Lee Driscoll, rendered ineffective assistance of counsel at the Fed. R. Crim. P. 11 hearing, at sentencing and on direct appeal for failing to object to or raise a claim concerning the district court's failure to advise Santiago of the correct

> mandatory minimum and maximum penalties he was facing for a violation of 18 U.S.C. § 924(c) (2012).

(J.A. 125).

II.

We review de novo the district court's decision on a motion to vacate under § 2255. *United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007). "We are entitled to affirm on any ground appearing in the record, including theories not relied upon or rejected by the district court." *United States v. Flores-Granados*, 783 F.3d 487, 491 (4th Cir. 2015) (internal quotation marks omitted).

To prevail on an ineffective assistance claim under *Strickland*, Santiago must satisfy "two necessary components." *Jones v. Clarke*, 783 F.3d 987, 991 (4th Cir. 2015). First, Santiago "must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Second, Santiago "must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The *Strickland* Court also made clear that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed," and we do so here. *Id.* at 697.

To establish *Strickland* prejudice, Santiago "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "*Strickland* asks whether it is 'reasonably likely' the result would have been different," and the "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011).

This prejudice analysis contains another layer in the context of a guilty plea. Because a guilty plea is a "solemn declaration[ ] in open court," it has "strong presumption of verity" that we will not set aside on "subsequent presentation of conclusory allegations unsupported by specifics." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Because "a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea," *id*. at 71, "strict adherence to the *Strickland* standard [is] all the more essential when reviewing the choices an attorney made at the plea bargain stage," *Premo v. Moore*, 562 U.S. 115, 125 (2011).

Thus, to establish a "reasonable likelihood" under *Strickland* in this context,[4] Santiago must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 129 (internal quotation marks omitted). Importantly, Santiago must show both subjectively that he would have gone to trial and that it would have been *objectively*

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[4] Santiago has three claims of ineffective assistance: at the Rule 11 hearing; at sentencing once the seven year mandatory minimum was adopted; and on appeal for failing to raise the Rule 11 violation. However, all three ultimately turn on Santiago's contention that he would have gone to trial if he had been aware of the seven year mandatory minimum.

reasonable to do so. *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012) (holding "what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts"). Santiago's "subjective preferences, therefore, are not dispositive." *Id.* As we recently explained:

> The challenger "cannot make that showing merely by telling [the court] now that [he] would have gone to trial then if [he] had gotten different advice." *Pilla v. United States*, 668 F.3d 368, 372 (6th Cir. 2012). In other words, to obtain relief from a guilty plea, the defendant must do more than allege he would have insisted on going to trial if counsel had not misadvised him as to the consequences of that decision. The "petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

Christian v. Ballard, 792 F.3d 427, 452 (4th Cir. 2015).

We readily acknowledge as a preliminary matter that the district court committed error when it stated that Santiago faced a maximum of five years imprisonment rather than a minimum of five years and that Santiago's counsel should have noticed this error and moved to correct it. Santiago's counsel also failed to recognize that the court did not inform Santiago of the potential for enhanced mandatory minimums under § 924(c).[5] It is pellucid that "a

[5] At the very least, it became apparent that Santiago faced a possible seven year mandatory minimum for brandishing when

district court's failure to alert a criminal defendant to a potential mandatory minimum sentence is a serious omission that strikes at the core of Rule 11." *United States v. Massenburg*, 564 F.3d 337, 346 (4th Cir. 2009); *see also United States v. Hairston*, 522 F.3d 336, 341-42 (4th Cir. 2008) (same). That Santiago's counsel failed to notice these errors, however, does not mean that Santiago was prejudiced by his counsel's failure.

"Pleading guilty generally involves a conscious decision to accept both the benefits and burdens of a bargain. That decision may not be lightly undone by buyer's remorse on the part of one who has reaped advantage from the purchase." *Fugit*, 703 F.3d at 260. Moreover, "[d]efendants plead guilty for various reasons, many of which are wholly unrelated to the length of a potential sentence." *Massenburg*, 564 F.3d at 344. Here, it would not have been rational for Santiago to go to trial given the strength of the Government's case against him and the benefits Santiago derived from the plea agreement. We have repeatedly noted that when the Government's case is strong, a defendant faces a nearly insurmountable obstacle to showing that it would have been rational to go to trial. *Christian*, 792 F.3d at 453 (noting not rational to reject plea when guilt was overwhelming), *Fugit*, 703 F.3d at 260 (same); *Massenburg*, 564 F.3d at 344 (noting when case was a "strong one" the court "can legitimately question what Massenburg would have to gain by going to trial").

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the Government, in putting the factual basis for the plea on the record, stated that Santiago's co-defendant struck the clerk in the back of the head with the gun.

The Government presented overwhelming evidence of Santiago's guilt. The robbery was on videotape, Santiago confessed to robbing the Walgreens with his cousin, and images depicted the two men posing with the gun and the money following the robbery. Santiago argues that he did not possess the gun that was brandished, but Count 3 charged Santiago with the § 924(c) violation and aiding and abetting. Santiago's defense that his cousin, with whom he committed the robbery, had actual possession of the gun is not a "rational defense" against an aiding and abetting § 924(c) charge. *Pilla*, 668 F.3d at 373.

In addition, there is no record evidence from Santiago's plea or sentencing hearings suggesting that Santiago would have moved to withdraw his plea if the correct information was provided. While the district court called the five-year term a maximum rather than a minimum, the plea agreement—which Santiago affirmed multiple times he had read—correctly referred to the five-year term as a mandatory minimum. Regarding the seven-year minimum recommended by the PSR, the district court specifically asked Santiago if he read the PSR and had any objections or comments on it. While the PSR "cannot cure the Rule 11 violation in his case," Santiago's failure to take any action after learning of the seven year mandatory minimum provides "some evidence that he would have entered the plea regardless." *Massenburg*, 564 F.3d at 344.

Finally, as recounted above, the low-end of Santiago's guidelines range on Count 1 dropped from 70 months to 51 months as a result of the three-level reduction for acceptance of responsibility provided by the plea agreement. If Santiago had gone to trial, he

would have faced the same mandatory minimum of seven years on Count 3, and, without the three-level reduction for acceptance of responsibility, he would have been looking at a longer sentence on Count 1. In effect, then, the "only consequence" of Santiago's decision to plead guilty rather than going to trial "is that [Santiago] got a shorter prison term than otherwise." *Pilla*, 668 F.3d at 373. That decision certainly did not *prejudice* Santiago.

Santiago's argument amounts to a presumption of *Strickland* prejudice in mandatory-minimum cases. We have rejected this position in the context of plain error, and we reject it again here. *See Massenburg*, 564 F.3d at 345 (noting "[a]bsent a presumption of prejudice, *Massenburg* is left only to appeal to our desire for an adjudicatory process that is free from error," and "[e]rrors are commonplace, . . . and our affection for procedural perfection cannot operate to the detriment of our commitment to other, equally important, principles of adjudication").

III.

Because Santiago cannot show *Strickland* prejudice, we affirm the district court's dismissal of his § 2255 motion.

AFFIRMED

APPENDIX B

FILED: December 22, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-6449, *US v. Ishmael Santiago*
5:11-cr-00287-BO-2, 5:13-cv-00796-BO

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. (www.supremecourt.gov)

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs

from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available from the clerk's office or from the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a *Bill of Costs* within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition to identify the cases to which

the petition applies and to avoid companion cases proceeding to mandate during the pendency of a petition for rehearing in the lead case. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 15 pages. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: December 22, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-6449
(5:11-cr-00287-BO-2)
(5:13-cv-00796-BO)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ISHMAEL AVIVE SANTIAGO

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

NO. 5:11-CR-287-BO-2
NO. 5:13-CV-796-BO

ISHMAEL AVIVE SANTIAGO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ORDER

This matter is before the Court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 [DE 100], petitioner's motion for leave to amend his § 2255 petition [DE 104], petitioner's corrected motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 [DE 105], and respondent's motion to dismiss or, in the alternative motion for summary judgment [DE 110]. For the reasons stated herein, respondent's motion is GRANTED, and petitioner's motions are DISMISSED.

BACKGROUND

On December 1, 2011, petitioner pled guilty pursuant to a written plea agreement to one count of conspiracy to interfere with interstate commerce by

robbery in violation of 18 U.S.C. § 1951 (count one); and one count of using and carrying a firearm during and in relation to a crime of violence and aiding and abetting same in violation of 18 U.S.C. §§ 924(c) and 2 (count three). On April 25, 2012, the court sentenced petitioner to 51 months' imprisonment as to count one and 84 months' imprisonment as to count three with the sentences to run consecutively to each other. [DE 78; 82]. Petitioner appealed his sentence and the Fourth Circuit affirmed the Court's judgment in part and dismissed petitioner's appeal in part in an order issued on November 29, 2012. [DE 97; 98]. On November 15, 2013, petitioner timely filed the instant motion.

Petitioner alleges ineffective assistance of counsel at the trial and appellate levels. Specifically, petitioner alleges both counsel should have argued that his plea was unknowing and involuntary because of the Court's description of the applicable penalty for count three during petitioner's Rule 11 hearing. [DE 100 at 7-11]. Petitioner then filed a motion for leave to amend his § 2255 petition in order to include the claim that petitioner's Rule 32 rights were violated because the Court did not allow petitioner to allocate during his sentencing hearing. [DE 1041. Petitioner included this claim in his correct § 2255 motion. [DE 105].

DISCUSSION

Because petitioner included the claim for which he filed a motion for leave to amend in his corrected § 2255 motion, petitioner's motion for leave to amend is denied as moot.

To state a claim of ineffective assistance of counsel, a petitioner must satisfy a two-pronged test. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). First, a petitioner must show that the representation he received fell below an objective standard of reasonableness. *Id*. at 688. This Court must be "highly deferential" of counsel's performance and must make every effort to "eliminate the distorting effects of hindsight." *Id* at 689. Therefore, the Court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*: The second prong is met where there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

To establish prejudice in the context of a guilty plea, a petitioner must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Petitioner alleges that his counsel's performance fell below an objective standard of reasonableness when his counsel failed to object to the Court's statement that petitioner faced "up to five years in prison" for count three, consecutive to any other penalty. [DE 95 at 5-6]. He argues that his counsel's failure to raise this issue on appeal also constitutes ineffective assistance of counsel. The government concedes that the Court's statement was inaccurate. [DE 110 at 5]. In fact petitioner faced a minimum term of imprisonment of 5 years and a maximum of life. [DE 56 at 4-5]. However, petitioner's plea

agreement correctly listed this as the potential punishment for count three. At his Rule 11 hearing, petitioner stated that he went over the plea agreement with his counsel and that he understood the contents of the plea agreement. [DE 95 at 6-7]. Because the plea agreement correctly listed the statutory minimum and maximum punishments for count three, and because petitioner, under oath,[1] affirmed that he understood the contents of the plea agreement, the Court's error was harmless. See United States v. Francis, 539 F. App'x 231, 232 (4th Cir. 2013) (unpublished) (per curiae) (noting "most of the omissions Francis complains of were set forth in Francis' plea agreement") (citing United States v. DeFusco, 949 F.2d 114, 117 (4th Cir. 1991)). Accordingly, plaintiff cannot meet the Strickland standard to show ineffective assistance of counsel as it is not objectively unreasonable to refuse to object to harmless error or pursue such a claim on appeal.

Petitioner, in his response claims that because the government did not address his Rule 32 claim in its motion to dismiss, the Court should rule in favor of petitioner's motion. However, a cursory review of the record shows petitioner's claim that he was not

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[1] "A defendant's solemn declarations in open court affirming a plea agreement carry a strong presumption of verity because courts must be able to rely on the defendant's statements made under oath during a properly conducted Rule 11 plea colloquy." United States v. Lernaster, 403 F.3d 216, 221 (4th Cir. 2005). Consequently, "in the absence of extraordinary circumstances, allegations in a § 2255 motion that directly contradict the petitioner's sworn statements made during a properly conducted Rule 11 colloquy are always palpably incredible, and patently frivolous or false." *Id.*

afforded the opportunity to speak at sentencing to be false. The Court began the hearing by addressing the petitioner and on page one of the sentencing transcript asks the petitioner if he wants to say anything about his sentence and informs him that he does not have to speak, but can if he would like to. [DE 90 at 2]. The petitioner responds that he does not wish to speak. [*Id*]. Therefore, it is clear that petitioner's claim of a Rule 32 violation is patently frivolous and false. Accordingly his claim is dismissed.

CERTIFICATE OF APPEALABLITY

Rule 11 of the Rules Governing Section 2255 Cases ("Habeas Rules") provides "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Having determined that petitioner is not entitled to relief and the government is entitled to dismissal of the petition, the Court considers whether petitioner is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in his habeas petition. After reviewing the claims presented in the petition in light of the applicable standard, the Court finds that the petitioner's claims are not deserving of encouragement to proceed further. This Court hereby DENIES petitioner a certificate of appealability.

CONCLUSION

For the foregoing reasons, respondent's motion to dismiss is GRANTED and petitioner's §2255 petition is DISMISSED in its entirety. Petitioner's motion for leave to amend DENIED AS MOOT. The Court

hereby DENIES petitioner a certificate of appealability.

SO ORDERED.

This the __ day of March, 2014.

/s/ Terrence W. Boyle

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

USHMAEL AVIVE SANTIAGO, Petitioner,
v.
UNITED STATES OF AMERICA, Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:11-CR-287-BO-2

Civil Case No. 5:13-CV-796-BO

Decision by Court.

This action came before the Honorable Terrence W. Boyle, United States District Judge, for consideration of the respondent's motion to dismiss, or in the alternative, for summary judgment.

IT IS ORDERED AND ADJUDGED that respondent's motion to dismiss is granted and this action is hereby dismissed.

This Judgment Filed and Entered on March 17, 2014, with service on:

Ishmael Avive Santiago 55679-056 FCI - Williamsburg P.O. Box 340 Salters, SC 29590 (via U.S. Mail)
Seth Morgan Wood (via CM/ECF Notice of Electronic Filing)

March 17, 2014 */s/ Julie A. Richards*
Clerk

Raleigh, North Carolina

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO.: 5:11-CR-287-BO-2

UNITED STATES OF AMERICA v. ISHMAEL AVIVE SANTIAGO, DEFENDANT	December 1, 2011 Elizabeth City, NC

RULE 11 HEARING
BEFORE THE HONORABLE TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	RUDY E. RENFER, ASSISTANT UNITED STATES ATTORNEY UNITED STATES ATTORNEY'S OFFICE 310 NEW BERN AVENUE SUITE 800, FEDERAL BUILDING RALEIGH, NC 27601-1461
For the Defendant:	LEZA LEE DRISCOLL, ESQUIRE FIVE WEST HARGETT STREET, SUITE 807 RALEIGH, NC 27601

Court Reporter: STACY SCHWINN, CCR, CVR
P.O. BOX 1611
WILMINGTON, NC 28402
(910) 431-4502

Proceedings recorded by stenomask, transcript produced from dictation.

* * *

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WHEN YOU PLEAD GUILTY YOU GIVE THOSE RIGHTS UP. THERE WON'T BE A TRIAL AND THE CASE WILL BE DECIDED ON YOUR ADMISSION OF GUILT. DO YOU UNDERSTAND ALL THOSE RIGHTS?

DEFENDANT: YES, SIR.

THE COURT: ARE YOU WILLING TO WAIVE THOSE BY ENTERING A PLEA OF GUILTY?

(DEFENDANT CONFERS WITH MS. DRISCOLL.) (PAUSE.)

DEFENDANT: YES, SIR.

THE COURT: OKAY. HAVE YOU SEEN A COPY OF YOUR CHARGES?

DEFENDANT: YES, SIR.

THE COURT: YOU'RE CHARGED IN COUNT ONE WITH CONSPIRACY TO COMMIT A HOBBS ACT COMMERCE VIOLATION BY THREATS AND VIOLENCE.

THAT CARRIES UP TO 20 YEARS IN PRISON, A $250,000 FINE, AND THREE YEARS OF SUPERVISED RELEASE.

YOU'RE CHARGED IN COUNT TWO WITH INTERFERING WITH COMMERCE BY THREATS

AND VIOLENCE IN THE HOBBS ACT AND AIDING AND ABETTING IN THAT. AGAIN, THAT CARRIES THE SAME LEVEL OF PUNISHMENT; 20 YEARS, THREE YEARS OF SUPERVISED RELEASE, AND A FINE.

IN COUNT THREE YOU'RE CHARGED WITH POSSESSION OF A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE AND AIDING AND ABETTING IN THAT.

THAT CARRIES UP TO FIVE YEARS IN PRISON ADDITIONALLY

TO ANY OTHER PRISON — CONSECUTIVE TO ANY OTHER PRISON TIME, A $250,000 FINE AND FIVE YEARS OF SUPERVISED RELEASE.

THOSE ARE THE — IS HE CHARGED WITH ANYTHING ELSE? NO.

MR. RENFER: NO, YOUR HONOR.

THE COURT: JUST THAT, OKAY.

MR. RENFER: CORRECT.

THE COURT: THOSE ARE THE CHARGES AGAINST YOU. DO YOU UNDERSTAND THAT?

DEFENDANT: YES, SIR.

THE COURT: AND YOU'RE GOING TO PLEAD GUILTY TO COUNTS ONE AND THREE; IS THAT RIGHT?

DEFENDANT: YES, SIR.

THE COURT: THE HOBBS ACT AND THE GUN CHARGE?

DEFENDANT: YES, SIR.

THE COURT: AND YOU'VE ENTERED INTO A WRITTEN PLEA AGREEMENT. DID YOU SIGN THAT AGREEMENT?

DEFENDANT: YES, SIR.

THE COURT: SIR?

DEFENDANT: YES, SIR.

THE COURT: DID YOU READ IT?

DEFENDANT: (NODS HEAD.)

THE COURT: DID YOU LAWYER EXPLAIN IT TO YOU?

DEFENDANT: YES, SIR.

THE COURT: DO YOU UNDERSTAND WHAT YOU'VE AGREED TO?

DEFENDANT: YES, SIR.

THE COURT: HAS ANYONE THREATENED YOU OR FORCED YOU OR MADE YOU AGREE TO THIS IN ANY WAY?

DEFENDANT: NO, SIR.

THE COURT: ARE YOU DOING IT VOLUNTARILY?

DEFENDANT: (NO RESPONSE.)

THE COURT: ARE YOU AGREEING TO THIS VOLUNTARILY? I MEAN, IS THIS WHAT YOU WANT TO DO?

DEFENDANT: YES, SIR.

THE COURT: OKAY. THE PLEA AGREEMENT SAYS YOU'RE GOING TO PLEAD GUILTY TO COUNTS ONE AND THREE, YOU WAIVE YOUR RIGHT TO APPEAL, RESERVING THE RIGHT TO

APPEAL ONLY FROM A SENTENCE IN EXCESS OF YOUR GUIDELINE RANGE. YOU'VE AGREED TO ASSIST THE GOVERNMENT IN THE RECOVERY AND FORFEITURE OF ANY ILLEGAL ASSETS. YOU'VE AGREED TO TESTIFY TRUTHFULLY IF YOU'RE CALLED ON. IF YOU GIVE FALSE TESTIMONY THAT WOULD BE A BREACH OF THE AGREEMENT. YOU'VE WAIVED YOUR RIGHT TO HAVE A JURY DECIDE ANY OF THE FACTS. THE ELEMENTS OF COUNT ONE ARE SET OUT IN PARAGRAPH THREE AS IS THE PUNISHMENT AND THE ELEMENTS OF COUNT THREE ARE ALSO SET OUT THERE AS IS THE PUNISHMENT.

THE GOVERNMENT AGREES TO DISMISS COUNT TWO. IT RESERVES THE RIGHT TO MAKE A SENTENCING RECOMMENDATION, TO MAKE KNOWN THE EXTENT OF YOUR COOPERATION. SELF-INCRIMINATING INFORMATION WON'T BE USED AGAINST YOU EXCEPT AS PROVIDED BY THE GUIDELINES OR BY THIS AGREEMENT. AND THE GOVERNMENT

AGREES TO NOT USE ANY INFORMATION PROVIDED BY YOU PURSUANT TO THIS AGREEMENT TO PROSECUTE YOU FOR OTHER CRIMES EXCEPT CRIMES OF VIOLENCE AND YOU GET A DOWNWARD ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY. IS THAT WHAT YOU'VE AGREED TO?

DEFENDANT: YES, SIR.

THE COURT: HOW DO YOU PLEAD THEN TO COUNTS ONE AND THREE; GUILTY OR NOT GUILTY?

DEFENDANT: GUILTY.

THE COURT: ARE YOU GUILTY OF THESE?

DEFENDANT: YES, SIR. I WANT TO SAY I'M TRULY SORRY.

THE COURT: MA'AM — SIR?

DEFENDANT: I'M TRULY SORRY.

THE COURT: OKAY. THANK YOU. ALL RIGHT, YOU CAN HAVE A SEAT. MR. RENFER.

MR. RENFER: YOUR HONOR, THE EVIDENCE WILL TEND TO SHOW THAT ON OR ABOUT JULY 28TH, 2011, THIS DEFENDANT, THE CO-DEFENDANT AND A JUVENILE CO-CONSPIRATOR OBTAINED A FIREARM, SPECIFICALLY A RIFLE.

THEY BEGAN WALKING AROUND CLAYTON WITH IT AND THEY APPROACHED THE WALGREEN'S LOCATED ON HIGHWAY 70 IN CLAYTON, WHICH IS A BUSINESS ENGAGED IN INTERSTATE COMMERCE. THE JUVENILE CO-CONSPIRATOR STAYED OUTSIDE. THIS DEFENDANT AND CO-DEFENDANT ENTERED THE STORE. THE CO-DEFENDANT HAD THE FIREARM. THEY APPROACHED THE CLERK, DEMANDED THAT THE CLERK

December 1, 2011

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA vs. ISHMAEL SANTIAGO	5:11-CR-287-B0-2

Sentencing Hearing
April 25, 2012
Before the Honorable Terrence W. Boyle
U.S. District Judge

Appearances:

For the Government:
Mr. Rudy Renfer
Assistant U.S. Attorney
310 New Bern Avenue
Raleigh, NC 27601

For the Defendant:
Ms. Leza Driscoll
5 W. Hargett St.
Suite 807
Raleigh, NC 27601

Marianna Burnette, Probation Officer

* * *

Court Reporter: Diane M. Pressley, Notary Public

Wednesday, April 25, 2012

THE COURT: Good morning, Ms. Driscoll and Mr. Santiago.

Mr. Santiago, have you received your presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had a chance to read it over?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want to say anything about the report?

THE DEFENDANT: Just my lawyer here.

THE COURT: You'll let your lawyer talk for you?

THE DEFENDANT: Yes.

THE COURT: Do you don't want to say anything about your sentence? You don't have to say anything but you can speak if you want.

THE DEFENDANT: No, sir.

THE COURT: Ms. Driscoll, the offense level is a 24, criminal history category 1, do you have any objections

* * *

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went to the clerk who was stocking the batteries about 25 feet away from the cash register and that's when he said go get the money. She looked up at him, she didn't move fast enough that's when Raheem struck her on the head with the firearm and escorted her to the cash register.

That is abduction, he escorted her. And I think even defense counsel's statement is he made her

move. And that certainly qualifies for a four level increase. And, you know, she's at one location and she has to move being escorted by an armed individual to a different location the four point level abduction should apply.

THE COURT: Yeah, I think that by preponderance of the evidence the government has established both the abduction and the injury. So the adjusted offense level would be 24, category 1. The guideline range is 51 to 63 months.

Do you want to say anything else

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about the case?

MS. DRISCOLL: There's one other issue that I'd like to bring to the court's attention regarding this and it would be in lines with a variance. In the presentence report in paragraphs 22 and 24, it discusses how Mr. Santiago here was diagnosed with a bipolar disorder and some sort of schizophrenia form of disorder and that it was when he was diagnosed with this at the age of about 17 he was about 17-years-old when he was diagnosed with this. The diagnosis recommended that he received in-patient treatment or therapy of some sort. He did not receive any in-patient treatment or therapy.

It's further put out in a presentence report that he had some intelligent quotient test and he was found to have a borderline IQ.

Your Honor, we would submit that taking a 17-year-old kid that has these types of significant mental health disorders and receiving absolutely no

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treatment is a rather — is unusual for many people that are in front of the court and that a variance pursuant to the U.S. Sentencing Guideline 5H1.3 could be appropriate because of the unusual characteristics and the unusual degree that this case presents itself to the court.

THE COURT: Okay. Anything from the government?

MR. RENFER: Your Honor, we would object to the variance. Respectfully there's no evidence that whatever diagnoses were made when he was 17 played any role in his decision to carry a gun through Clayton and participate in a robbery where a clerk was assaulted and then flee on foot and split the proceeds with two other coconspirators while taking pictures of themselves throwing gang signs, firearm in hand. That doesn't sound like no one is suffering from a mental disorder to the extent that it would justify a variance in this case.

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

ISHMAEL AVIVE SANTIAGO v. UNITED STATES OF AMERICA	Case No. 5:1l-cr-287-BO-2

Affidavit of Ishmael Avive Santiago

Ishmael Avive Santiageo, having first hand knowledge of the following facts and under 28 U.S.C. § 1746, says:

1. Affiant is the Defendant/Movant in the above action and makes this affidavit based upon personal knowledge.

2. Affiant has personally reviewed the 28 U.S.C. § 2255 motion and memorandum of law in support filed in the above action and is familiar with its content.

3. After the Court appointed the Federal Public Office to my case, specific date unknown, Ms. Leza Lee Driscoll came to see me at the County jail in Raleigh, NC.

4. The first time Ms. Driscoll came to see me she just asked me questions about the case. The second time she came she wanted to make sure she had the story

right, but tried to get me to change my story of what happen. I told her the same thing I told her the first time.

5. The third time she came with a plea agreement. When I saw the gun charge, I told her I didn't have a gun. First she said they(the government) would drop the gun if I plea guilty. Then she came back and said they don't want to drop the gun, so I would be looking at five years for the gun. But I kept telling her I didn't have a gun.

6. When she came back with the plea again, she told me to go ahead and sign the plea and she would work on the gun charge, and get them to drop it. I took her word and signed it.

7. When I went to plea guilty in front of the judge, Ms. Driscoll told me she would appeal the gun charge to the appeal court, so don't worry about it.

8. At sentencing when the judge sentenced me to seven year to the gun charge I wanted to talk to her about she told me that I was looking at five years for the gun charge, but I didn't get a chance to talk to her because the marshals took me out so fast, so I didn't get a chance to talk to her.

9. When I got back to the county jail she didn't come to see me. Everytime I write her she never wrote back. After I left the jail she still didn't write me back when I got to this Institution at williamsburg.

10. When I finally received the appeal motion from her it was a Anders brief, and it didn't have the gun charge in the motion.

11. If I had known I was going to receive seven years for the gun charge I would have told the my attorney and the judge I want to go to trial for the gun charge

because like I told my attorney, I didn't have a gun. It was my codefendant who had the gun.

12. Affiant, if called to testify as a witness will give sworn testimony to the points raised in paragraphs numbered 1-11.

Done this the 13th day of November, 2013.

/s/ Ishmael Avive Santiago
Ishmael Avive Santiago
Reg. No.#55679-056
FCI Williamsburg
PO Box 340
Salters, SC 29590

APPENDIX G

Appeals Number: 12-4335

IN THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

Case Number: 5:11-CR-287-BO-2

ISHMAEL AVIV SANTIAGO, Petitioner, Vs. *IN THE UNITED STATES OF AMERICA*, Respondent,	*LETTER MOTION FOR STATUS OF CASE*

NOW COMES, Petitioner, *Mr. Santiago*, hereinand-through, in a *Pro-Se*, manner moving this honorable court. to give a status or update on the case and individual in this matter. Petitioner understand that his attorney has filed *Anders V. California*, 386 U.S. 738 (1967), montion. Mr. Santiago, has been unable to contact his attorney to find out any information pretaining to his case.

Petitioner would like to know where or what steps he need to take in this matter and has this Honorable Court schedule a date to review this matter. Petitioner's attorney filed this appeal on August 8, 2012 and ask this court to give an update.

On this day of September __, 2012.

Respectfully Submitted,

Signature: */s/ Mr. Ishmael A. Santiago*

Mr. Ishmael A. Santiago,
Reg. No.55679-056
FCI-Williamsburg
P.O. Box 340
Salters, SC, 29590

Pro-Se-Action