

United States of America
First Circuit Court of Appeals

NOs. 2014-1514, 1515, 1516

UNITED STATES OF AMERICA

Appellee,

v.

ANGEL ABNER BETANCOURT-PÉREZ

Defendant/Appellant.

APPEAL FROM PUERTO RICO FEDERAL DISTRICT COURT
BRIEF OF CRIMINAL DEFENDANT, ANGEL ABNER BETANCOURT-PÉREZ

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On October 18, 2013 Angel Abner Betancourt-Pérez was found guilty after pleading guilty in the United States District Court for the District of Puerto Rico of: conspiracy to distribute a variety of drugs, contrary to 21 U.S.C. §§ 841(a)(1), 846 & 860; aiding and abetting with another person to possess with intent to distribute cocaine, contrary to 21 U.S.C. §§ 841(a)(1), (b)(1)(B) & 18 U.S.C. §2; possession of a firearm in furtherance of a drug trafficking crime, contrary to 18 U.S.C. § 924(c)(1)(A); and possession with intent to distribute marijuana, contrary to 21 U.S.C. 841(a)(1) & (b)(1)(A).

On April 11, 2014, the court (*Juan M. Pérez-Gimenez, J.*) sentenced Mr. Betancourt-Pérez to 108 months on each of the drug charges to be served concurrently, plus 60 months on the gun charge to be served consecutively, for a total of 168 months, or 14 years. Mr. Betancourt-Pérez was also subject to forfeiture of his property.

Notices of appeal were filed on May 14, 2014.

STATEMENT OF ISSUES

- I. Did the government breach the parties' plea agreement, or did the court err in sentencing Mr. Betancourt-Pérez outside of the provisions of the plea agreement?
- II. Should Mr. Betancourt-Pérez's case be remanded for re-sentencing for retroactive Amendment 782?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Summary of Indictments and Sentence

The United States charged Angel Abner Betancourt-Pérez in three indictments alleging multiple crimes. He pleaded, in total, to four counts.

Indictment 10-175 alleged a conspiracy from 2002 to 2010 to distribute a variety of drugs, in which Mr. Betancourt-Pérez was a runner for a distribution network at a public housing project in Puerto Rico. PRE-SENT.INVSTG.RPT. ¶ 39 (Apr. 21, 2014), *Sealed Appx.* at 154.

Indictment 11-181 alleged aiding and abetting in the distribution of cocaine in 2011, and also alleged possession of a firearm in furtherance of drug trafficking. This indictment stemmed from a search of Mr. Betancourt-Pérez's apartment upon his arrest, while he was wanted on the first indictment.¹ PRE-SENT.INVSTG.RPT. ¶¶ 44-46.

Indictment 11-367 alleged a conspiracy during 2010 involving sourcing of marijuana from Mexico, California and Florida, to Puerto Rico. PRE-SENT.INVSTG.RPT. ¶¶ 47-60.

On October 18, 2013 Mr. Betancourt-Pérez entered an agreement pleading guilty to these four crimes, and the government dropped the remaining charges in the three indictments. On the same day, the United States District Court for the District of Puerto Rico (*Juan M. Pérez-Gimenez, J.*) accepted Mr. Betancourt-Pérez's change of plea on the four counts. In April 2014, after several revisions, a pre-sentence investigation report was

¹This incident also gave rise to a civil forfeiture, a separate brief addressing issues related to which is being filed herewith.

completed.

The court then sentenced Mr. Betancourt-Pérez to 108 months on each of the drug charges to be served concurrently, plus 60 months on the gun charge to be served consecutively, for a total of 168 months, or 14 years. *Sent.Hrg.* at 17; MINUTES OF PROCEEDINGS (Apr. 11, 2014), *Appx.* at 43; JUDGMENT IN A CRIMINAL CASE (3:10-cr-0175) (Apr. 14, 2014), *Appx.* at 45; JUDGMENT IN A CRIMINAL CASE (3:11-cr-0181) (Apr. 14, 2014), *Appx.* at 50; JUDGMENT IN A CRIMINAL CASE (3:11-cr-0367) (Apr. 14, 2014), *Appx.* at 55.

II. Stipulation to Facts and Calculations in Plea Agreement and at Plea Hearing

The plea agreement and plea hearing resolved the four crimes in the three indictments to which Mr. Betancourt-Pérez pleaded guilty. Several issues were addressed in the agreement and the hearing.

A. Drug Quantities

Regarding indictment 10-175, Mr. Betancourt-Pérez stipulated to between 3.5 and 5 kilograms of cocaine. PLEA AGREEMENT (Oct. 18, 2013) at 4, 7, *Appx.* at 1 ; *Plea Hrg.* at 24.

Regarding indictment 11-181, he stipulated to between 2 and 3.5 kilograms of cocaine. PLEA AGREEMENT at 8; *Plea Hrg.* at 25-26.

Regarding indictment 11-367, he stipulated to between 100 and 400 kilograms of marijuana. PLEA AGREEMENT at 5, 9; *Plea Hrg.* at 27.

B. Maximum Penalties

Regarding indictment 10-175, Mr. Betancourt-Perez agreed and the court confirmed that while the maximum statutory penalty was 10 years to life, PLEA AGREEMENT at 3-4; *Plea Hrg.* at 5, 17-18, for the quantity to which he stipulated, his maximum exposure was 5 to 40 years. PLEA AGREEMENT at 3-4; 21 U.S.C. § 841(b)(1)(B)(ii).

Regarding indictment 11-181, Mr. Betancourt-Pérez agreed and the court confirmed that the maximum exposure for the drug quantity to which he stipulated was 5 to 40 years. PLEA AGREEMENT at 4; *Plea Hrg.* at 18-19; 21 U.S.C. § 841(b)(1)(B)(ii).

Regarding indictment 11-367, Mr. Betancourt-Pérez agreed and the court

confirmed that while the maximum statutory penalty was 10 years to life, PLEA AGREEMENT at 5; *Plea Hrg.* at 5, 19, for the quantity to which he stipulated, his maximum exposure was 5 to 40 years. PLEA AGREEMENT at 5; 21 U.S.C. § 841(b)(1)(B)(vii).

As to the firearm charge in indictment 11-181, Mr. Betancourt-Pérez agreed and the court confirmed that the statutory penalty was 5 years to life, *Plea Hrg.* at 19, but that given his plea agreement his maximum exposure was 5 years, PLEA AGREEMENT at 4, and that because it is a statutory minimum the 5 years must be served consecutively. *Plea Hrg.* at 20. 18 U.S.C. § 924(c)(1)(A).

C. Calculation of Penalties

At Mr. Betancourt-Pérez's plea hearing, the court walked the defendant through each guideline calculation presented in the parties' plea agreement.

Regarding indictment 10-175, Mr. Betancourt-Pérez agreed, and the court confirmed, that the base offense level was 30, plus 2 points for involving a protected location, minus 3 points for acceptance of responsibility, yielding a total offense level of 29. Because Mr. Betancourt-Pérez had no criminal history, he was liable under the guidelines for 87 to 108 months. PLEA AGREEMENT ¶7A at 7-8; *Plea Hrg.* at 24-25.

Regarding indictment 11-181, Mr. Betancourt-Pérez agreed, and the court confirmed, that the base offense level was 28, minus 3 points for acceptance of responsibility, yielding a total offense level of 25. Because Mr. Betancourt-Pérez had no criminal history, he was liable under the guidelines for 57 to 71 months. PLEA AGREEMENT ¶7B at 8-9; *Plea Hrg.* at 25-26.

Regarding indictment 11-367, Mr. Betancourt-Pérez agreed, and the court confirmed, that the base offense level was 26, minus 3 points for acceptance of responsibility, yielding a total offense level of 23. Because Mr. Betancourt-Pérez had no criminal history, he was liable under the guidelines for 46 to 57 months. PLEA AGREEMENT ¶7C at 9-10; *Plea Hrg.* at 27.

As to the firearm charge in indictment 11-181, Mr. Betancourt-Pérez agreed, and the court confirmed, that he was liable for 60 months (5 years) mandatory minimum which must be served consecutive to the period of incarceration for the drug crimes. PLEA AGREEMENT ¶7B at 9, 11; *Plea Hrg.* at 25-26, 28.

D. Grouping Calculation

Because of the relatedness of the drug crimes, Mr. Betancourt-Pérez's plea agreement contained a grouping calculation. It provided for a base offense level of 26, plus 1 point for a protected location, minus 3 points for acceptance of responsibility, yielding a total offense level of 24. Because Mr. Betancourt-Pérez had no criminal history, the agreement provided that his total liability under the grouping guidelines for all three drug crimes was 51 to 63 months. PLEA AGREEMENT ¶7D at 10-11.

At the change-of-plea hearing, the court restated this calculation, ensured that Mr. Betancourt-Pérez had been apprised of it by his attorney, *Plea Hrg.* at 17; *see also, Sent.Hrg.* at 4, 22-27, 28-29 and confirmed Mr. Betancourt-Pérez understood it. *Plea Hrg.* at 27; FED. R. CRIM. P. 11.

In the plea agreement, the grouping calculation says it was done pursuant to USSG §2D1.1(c)(4), and reflected 100 to 400 kilograms of marijuana. PLEA AGREEMENT

¶7D at 10. It is apparent however, that the grouping calculation in the plea agreement either does not accurately comport with the drug quantity table or misstates the drug quantity; and also that it significantly advantages Mr. Betancourt-Pérez.

Nonetheless, the grouping calculation in the plea agreement was that which Mr. Betancourt-Pérez plead to, the one he was apprized of by his attorney, and the one which was confirmed by the court.

E. Parties' Recommendations

The plea agreement obligated the parties to allowable sentencing recommendations.²

The defendant may request a sentence of sixty (60) months of imprisonment and the United States reserve [sic] the right to request a sentence of up to one hundred and twenty (120) months of imprisonment to be served concurrently with each other. ... The parties agree that any recommendation for a term of imprisonment of less than one hundred and twenty (120) months, will constitute a breach of the plea agreement.

PLEA AGREEMENT ¶7E at 11; *Plea Hrg.* at 6. Mr. Betancourt-Pérez and the government also agreed they would mutually recommend that the sentence on the firearms charge would be “sixty (60) months of imprisonment, consecutive to any term of imprisonment imposed” for the drug crimes. *Id.*

The court confirmed these were the terms of the agreement. *Plea Hrg.* at 27-28.

²Rule 11 provides:

If the defendant pleads guilty ..., the plea agreement may specify that ... the government will ... recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate ... (such a recommendation or request does not bind the court).”

FED. R. CRIM. P. 11(c)(1)(B).

F. Appeal Waiver

Finally, Mr. Betancourt-Pérez agreed he would waive his right to appeal both the judgment and the sentence, “provided that the defendant is sentenced in accordance with the terms and conditions set forth in the Sentence Recommendation provisions of this Plea Agreement.” PLEA AGREEMENT ¶8 at 11.

III. Sentencing – Differing Grouping Methodologies

After the court accepted his pleas and a Pre-Sentence Investigation report was prepared, on April 21, 2014 the court sentenced Mr. Betancourt-Pérez. Discrepancies between the terms of Mr. Betancourt-Pérez's plea and the content of the PSI³ arose at the sentencing hearing.⁴

The PSI calculated Mr. Betancourt-Pérez's sentence differently than the parties' method in their plea agreement.

In the plea agreement, the grouping calculation is a separate chart from the individual charge calculations, and without explanation begins with a base offense level of 26. The plea agreement says its method is based on the drug quantity table in USSG §2D1.1.

In the PSI, however, the individual charges are not reflected in individual calculations. Rather, the PSI simply arrives at a specified marijuana equivalency, and from it assigns a base offence level of 32. The PSI says its method also is based on the drug quantity table in USSG §2D1.1.

The court rejected Mr. Betancourt-Pérez's entreaties that despite its inaccuracies, the grouping calculation appearing in the plea agreement is the one that should be

³This brief refers, unless otherwise specified, to the April 21, 2014 amended version of the PSI. Because they are not otherwise relevant, prior versions are not included in the sealed appendix.

⁴During the sentencing hearing, the court made an adjustment to the total drug quantity, such that the total marijuana equivalency should be 2050 kilograms, and ordered that the PSI be amended to reflect it. *Sent.Hrg.* at 3-4. Despite this order, in what is a probably a scrivener's error, the PSI says 2059 kilograms. *Compare* PRE-SENT.INVSTG.RPT. (Mar. 19, 2014) (not included in appendix) *with* PRE-SENT.INVSTG.RPT. (Apr. 21, 2014). It is believed the error is harmless in this context.

employed. Instead, the court adopted the calculation methodology in the PSI as its own. *Sent.Hrg.* at 15-16, 27.

The court justified its position by referring to the portion of the agreement saying the government could recommend up to 120 months incarceration . PLEA AGREEMENT ¶7E at 11. The court suggested that the agreed 120-month recommendation applied only to the underlying drug cases but not to the mandatory consecutive 60 months on the gun charge. *Sent.Hrg.* at 16, 21-29.⁵

Mr. Betancourt-Perez argued that his understanding of the 120-month recommendation was in accord with the specifics in the agreement's grouping calculation. That is, the allowable 120-month recommendation was inclusive of the 60-month consecutive gun incarceration. Thus, the 51 to 63 months in the grouping agreement, plus

⁵There is a prior unsigned draft plea agreement covering the same counts to which Mr. Betancourt-Pérez ultimately pleaded, and stipulating to the same quantities. DRAFT PLEA AGREEMENT, *Appx.* at 22.

Its grouping methodology, however is quite different. It specifies Mr. Betancourt-Pérez would accept responsibility for between 1000 and 3000 kilograms of marijuana equivalent, a range inclusive of the 2050 kilograms the PSI noted and the court calculated.

Significantly, the draft provided for a base offense level of 32, identical to the calculation in the PSI and ultimately adopted by the court, plus 1 point for a protected location, minus 3 points for acceptance of responsibility, yielding a total offense level of 30. Because Mr. Betancourt-Pérez's had no criminal history, the draft agreement provided that his total liability under the grouping guidelines for all three drug crimes was 97 to 121 months. It then specifies 60 additional months consecutive for the gun, thus totaling 157 to 181 months, or 13 to 15 years.

The draft contains the same stipulations as the final agreement regarding what the parties could recommend, except that the government would be allowed to recommend 180 months in the draft rather than 120 in the final. The draft also contains a waiver-of-appeal provision.

It is apparent that the parties did not reach agreement on this version.

The draft agreement is the subject of a pending FRAP 10(e) motion, and is contained in the appendix to this brief.

60 months for the gun, yields a total range of 111 to 123 months. This would allow the government to recommend between 120 and 123 months and also maintain all terms of the agreement. *Sent.Hrg.* at 21-29.

Nonetheless, the court found its imposition of 168 months was within the terms of the plea agreement, *Sent.Hrg.* at 16, 21-27, 28-29, and that the appeal waiver therefore became effective. *Sent.Hrg.* at 22.

SUMMARY OF ARGUMENT

Criminal defendants may bargain with the government for resolution of their case. In light of the deal, a defendant may waive his constitutional trial rights, but the waiver must be done with precautions, including the Rule 11 colloquies, to ensure that the defendant actually committed the crime charged, that his waivers are knowing and voluntary, and that he understands all the terms and liabilities of his plea.

Once Mr. Betancourt-Pérez agreed to the terms of the bargain and waived his rights, both he and the government were obligated to support the deal. Although the court is not a party, because there were significant disparities between the agreement and the sentence such that the sentence was unanticipated by the bargain, then the plea itself was no longer knowing and voluntary, because Mr. Betancourt-Pérez met liability beyond his understandings underlying the plea.

When the court suggested an outcome unanticipated by the agreement but the government did not object alongside Mr. Betancourt-Perez, it breached the agreement by not supporting it. By the court sentencing beyond Mr. Betancourt-Pérez's understandings as enunciated in the plea agreement and the Rule 11 colloquies, likewise it committed error.

The remedy for the breach or error is either remand for re-sentencing with a new judge, or leave for the defendant to withdraw his plea.

ARGUMENT

I. Plea Agreements are Enforced

Defendants are entitled to specific performance of their plea agreements. *Santobello v. New York*, 404 U.S. 257, 262 (1971) (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”); *United States v. Matos-Quinones*, 456 F.3d 14, 24 (1st Cir. 2006) (“[W]e hold prosecutors engaging in plea bargaining to the most meticulous standards of both promise and performance. Therefore, a defendant is entitled not only to the government’s technical compliance with its stipulations but also to the benefit of the bargain struck in the plea deal, and to the good faith of the prosecutor.”) (quotations and citations omitted); *United States v. Velez Carrero*, 77 F.3d 11 (1st Cir. 1996); *United States v. Clark*, 55 F.3d 9, 12 (1st Cir. 1995) (“Because plea bargaining requires defendants to waive fundamental constitutional rights, we hold prosecutors engaging in plea bargaining to the most meticulous standards of both promise and performance. . . . The government must keep its promises or the defendant must be released from the bargain.”).

Plea agreements are construed based on the defendant’s reasonable understanding. *United States v. Garcia*, 954 F.2d 12, 17 (1st Cir.1992) (defendant’s subjective expectations of plea agreement enforceable to extent objectively reasonable); *see also United States v. Fernandez*, 960 F.2d 771, 772 (9th Cir.1992); *United States v. Huddleston*, 929 F.2d 1030, 1032 (5th Cir.1991) (unreasonable expectation); *United States v. Shorteeth*, 887 F.2d 253, 256 (10th Cir.1989); *United States v. Nelson*, 837 F.2d 1519, 1521-22 (11th Cir.), *rehearing*

denied, 845 F.2d 1032 (11th Cir.), *cert. denied*, 488 U.S. 829 (1988).

“[A]mbiguity in plea agreements [is] construed against the government.” *United States v. McCoy*, 508 F.3d 74, 78 (1st Cir. 2007); *see also United States v. Johnson*, 979 F.2d 396, 399-400 (6th Cir.1992) (imprecisely drafted plea agreement construed against government because defendant possesses underlying constitutional right to contract); *United States v. Baker*, 25 F.3d 1452, 1458 (9th Cir.1994) (“[T]he government is to be held to the literal terms of the agreement, and ordinarily must bear responsibility for any lack of clarity.”). “A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language.” *United States v. Garcia*, 698 F.2d 31, 37 (1st Cir. 1983). Written plea agreements “should be viewed against the background of the negotiations.” *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990) (quotation omitted).

Although a plea agreement is enforceable when it is adequately explained to the defendant, *United States v. Ramirez-Benitez*, 292 F.3d 22 (1st Cir. 2002), it is reversible error when the court fails to accurately inform the defendant regarding the maximum penalty, *United States v. Ortiz-Garcia*, 665 F.3d 279 (1st Cir. 2011); *United States v. Rivera-Maldonado*, 560 F.3d 16 (1st Cir. 2009); *United States v. Castro-Gomez*, 233 F.3d 684 (1st Cir. 2000); *see also United States v. Colunga*, 786 F.2d 655, 658 (5th Cir. 1986), or regarding a minimum-mandatory sentence. *United States v. Gray*, 63 F.3d 57, 60 (1st Cir. 1995); *United States v. Goins*, 51 F.3d 400, 403 (4th Cir. 1995); *United States v. Herndon*, 7 F.3d 55, 57 (5th Cir. 1993).

The government breaches a plea agreement when it claims drug quantities greater

than that to which the defendant stipulated in the plea agreement, even if the additional quantity does not result in any additional penalty. *United States v. Farmer*, 543 F.3d 363, 374 (7th Cir. 2008) (submitting and advocating greater quantity in PSI than agreement constitutes breach); *see also United States v. Johnson*, 132 F.3d 628, 630-31 (11th Cir. 1998) (same).

The government is obligated to “support” the promises it makes in plea agreements, and “a failure to support that promise is a breach of the plea agreement, whether done deliberately or not.” *United States v. Gonczy*, 357 F.3d 50, 53 (1st Cir. 2004). The government breaches by “advocating for the imposition of a higher sentence than the agreed-upon term,” even when the term advocated for is recommended by the sentencing guidelines. *Id.* The government’s support of the agreement must be genuine and unconditional. *United States v. Canada*, 960 F.2d 263, 269 (1st Cir. 1992) (“While it can be argued that the government stopped short of explicitly repudiating the agreement, *Santobello* prohibits not only ‘explicit repudiation of the government’s assurances, but must in the interests of fairness be read to forbid end-runs around them.’”). It is a breach even if the extra-agreement penalty the government advocates is adopted from the pre-sentence investigation report. *United States v. Rivera*, 357 F.3d 290, 295 (3d Cir. 2004) (“By, in effect, endorsing the Probation Office’s recommendation of an Offense Level of 39, the government breached its agreement that the stipulated applicable Offense Level would be 35.”); *United States v. Lawlor*, 168 F.3d 633, 637 (2d Cir. 1999); *United States v. Taylor*, 77 F.3d 368, 370 (11th Cir. 1996). Indeed, just submitting a PSI with a calculation greater than the agreement is a breach, because both

probation and prosecution are the government. *Id.*; *United States v. Farmer*, 543 F.3d at 374; *United States v. Johnson*, 132 F.3d at 630-31.

Although the court is not a party, it is error, and causes a breach of the agreement, for the court to sentence with regard to facts more prejudicial than those stipulated in the plea agreement and confirmed by the court upon taking the plea, because the sentence would be based on matters beyond the defendant's understandings underlying his plea. *United States v. Torres*, 926 F.2d 321 (3d Cir. 1991) (error where court sentenced with regard to drug quantity greater than stipulated by parties and confirmed by court); *United States v. Jefferies*, 908 F.2d 1520 (11th Cir. 1990) (same); *United States v. Mandell*, 905 F.2d 970 (6th Cir.1990) (error where court sentenced using higher offense level than stipulated by parties).

While a mistake of fact contained in a plea agreement does not vitiate the agreement, *United States v. Fagan*, 996 F.2d 1009, 1013 (9th Cir. 1993), courts do not have authority to modify a plea agreement. *United States v. Skidmore*, 998 F.2d 372, 375 (6th Cir.1993); *United States v. Olesen*, 920 F.2d 538, 540 (8th Cir. 1990) ("Once a court has accepted an agreement ... there is no provision in the rules that allows it to reject or modify the agreement.").

Sentencing must be procedurally lawful. *Gall v. United States*, 552 U.S. 38, 51 (2007). To establish procedural error, the defendant need not show prejudice. *Puckett v. United States*, 556 U.S. 129, 141-42 (2009). Enforcement of plea agreements when they have been breached is a question of law for this Court. *United States v. Doe*, 233 F.3d 642 (1st Cir. 2000).

Appeal waivers are ineffective when the sentence is outside the provisions of the plea agreement, or the sentence is based on conditions different than the understanding of the defendant. *United States v. Almonte-Nunez*, 771 F.3d 84 (1st Cir. 2014); *United States v. Ortiz-Garcia*, 665 F.3d 279, 285 (1st Cir. 2011); *United States v. McCoy*, 508 F.3d 74 (1st Cir. 2007); *Correale v. United States*, 479 F.2d 944, 949 (1st Cir. 1973) (“The reason is obvious; it is the defendant’s rights which are being violated when the plea agreement is broken or meaningless. It is his waiver which must be voluntary and knowing. He offers that waiver not in exchange for the actual sentence or impact on the judge, but for the prosecutor’s statements in court. If they are not adequate, the waiver is ineffective.”). Appeal waivers are ineffective when the government breaches the plea agreement. *United States v. Keresztury*, 293 F.3d 750, 755 (5th Cir. 2002); *United States v. Gonzalez*, 16 F.3d 985, 990 (9th Cir. 1993); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990). In *United States v. Santiago-Burgos*, 750 F.3d 19, 23 (1st Cir. 2014), this Court held the appeal waiver ineffective when the sentencing court calculated a defendant’s criminal history points differently than the parties did in their agreement.

The remedy for the government’s breach or the court’s error is either to remand for re-sentencing with a different judge or to allow the defendant withdrawal of his plea, which the defendant may elect upon appellate victory. *Santobello v. New York*, 404 U.S. 257, 262 n. 2 (1971) (election to be made upon defendant’s decision to “plead anew”).

II. Mr. Betancourt-Pérez was Sentenced Beyond the Reasonable Understandings Underlying his Plea

It is conceded that the grouping calculation in Mr. Betancourt-Pérez's plea agreement either does not accurately comport with the drug quantity table in the sentencing guidelines, or misstates the drug quantity; and also that it significantly advantages Mr. Betancourt-Pérez.

The reason for this inaccuracy can only be postulated. In their agreement, the parties may have mutually mistaken the drug quantities, or mutually misread the guidelines table. However, they may have bargained for a particular base offense level without regard to exactitude in matching up quantities with corresponding offense levels, or had some other reason for agreeing on a base offense level of 26.

Whatever the reason, documents exchanged between the parties show considerable bargaining. The grouping calculation in the draft plea agreement, while exhibiting minor differences from the PSI, is fully in accord with the drug quantity table. But that calculation was rejected. This suggests the otherwise inaccurate calculation in the ultimate plea agreement was the product of bargaining, was intended by the parties, and was not the result of oversight.

In any event, a base offense level of 26 is what the parties set forth in their plea agreement, what the defendant's attorney advised his client; and upon the court confirming it with Mr. Betancourt-Pérez during his plea hearing, it became binding.

Accordingly, Mr. Betancourt-Pérez's reasonable understanding controls. Mr. Betancourt-Pérez understood he faced grouping based on 100 to 400 kilograms-equivalent

of marijuana, not the 2,050 kilograms as later used by the court. Mr. Betancourt-Pérez understood that his base offense level was 26, not 32 as later amended by the court. Mr. Betancourt-Pérez understood the government could recommend between 120 and 123 months total, not 120 months plus 5 additional years as later imposed by the court. And Mr. Betancourt-Pérez's understanding is reasonable, because unlike the court's interpretation, his harmonizes *all* clauses of the plea agreement and resolves any ambiguities. Upholding the court's after-fashioned methodology undermines, and therefore abrogates, the understandings Mr. Betancourt-Pérez was entitled to form when the terms of the plea agreement were confirmed to him by the court at his change-of-plea hearing. Accordingly, the sentence must be vacated.

III. If There is Ambiguity in the Plea Agreement, it Must be Resolved to Comport with the Reasonable Understandings Underlying Mr. Betancourt-Pérez's Plea

If there is a possibility of ambiguity in the plea agreement, it appears to stem from § 7E regarding the plea agreement's sentencing recommendations.

Both paragraphs of §7E begin with sentence-constructions which are explicitly restrictive to particular dockets and counts. But the second sentences of both paragraphs do not contain language restrictive to any particular docket or count. Thus, it is arguably unclear whether the second sentence of each paragraph is intended to be restricted to the dockets and counts listed in their respective first sentences. If such is the basis for the court's interpretation of the agreement, it is a hyper-technical reading that ignores the record of bargaining, the intent of the parties, and the overall grouping calculation prominently displayed in the immediately preceding chart and confirmed by the court during the plea colloquy.

Because ambiguities are resolved in favor of the defendant, to the extent there is lack of clarity based on the language of the agreement, Mr. Betancourt-Pérez's understandings control, and this court should vacate the sentence and remand for specific performance.

IV. The Government Breached the Plea Agreement, and the Court Erred in Sentencing Beyond the Stipulations of the Parties

The government allowing submission of the PSI, in which the grouping calculation contravenes the plea agreement, is itself a breach of the plea agreement. The government also beached by not supporting the defendant's reasonable understanding of its terms.

The court erred by suggesting a novel interpretation of the agreement neither intended nor advocated by either party. The court further erred by insisting on a grouping calculation based on 2050 kilograms-equivalent of marijuana, rather than the 100 to 400 kilograms as stipulated by the parties and confirmed by the court. The court further erred by using a base offense level of 32, not 26 as stipulated by the parties and confirmed by the court. The court yet further erred by allowing the government to recommend greater than 120 months total, as stipulated by the parties and confirmed by the court.

Whether based on breach or error, the result is unlawful, and this Court should vacate Mr. Betancourt-Pérez's sentence, and remand for re-sentencing.

V. Remedy is Remand

Sentencing here was procedurally defective, and therefore unlawful. As such, the appeal waiver was ineffective, and this Court is obligated to reach the merits of Mr. Betancourt-Pérez's sentence, which it reviews as a matter of law.

Whether the basis for the unlawful sentence is the government's breach or the court's error, the remedy is the same: either remand for re-sentencing with a different judge, or allow the defendant to withdraw his plea. Mr. Betancourt-Pérez can see the advantages and disadvantages of each choice, and prefers to exercise his option at such time as to benefit from the wisdom of this Court's decision.

VI. Remand for Re-sentencing Under Amendment 782

Mr. Betancourt-Pérez was sentenced in April 2014. In July 2014, the United States Sentencing Commission announced it had:

[V]oted unanimously ... to amend the guidelines to lower the base offence levels in the Drug Quantity Table across drug types, which may mean lower sentences for most drug offenders going forward. Today the Commission decided that judges could extend that reduction to offenders currently in prison, but with a requirement that reduced sentences cannot take effect until November 1, 2015. Under the guidelines, no offender would be released unless a judge reviews the case to determine whether a reduced sentence poses a risk to public safety and is otherwise appropriate.

Congress has until November 1, 2014 to disapprove the amendment to reduce drug guidelines. Should Congress choose to let the guideline reductions stand, courts could then begin considering petitions from prisoners for sentence reductions, but no prisoners could be released pursuant to those reductions before November 1, 2015.

USSC NEWS RELEASE (July 18, 2014) <http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf>.

The Sentencing Commission understood that Congress took no action, thus allowing the new guidelines to go into effect.

District courts may reduce prison terms if the defendant's sentence was based on a sentencing range that has subsequently been lowered by the Sentencing Commission if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.... The Sentencing Commission expressly made Amendment 782 retroactive, effective as of November 1, 2015. When considering a sentence reduction, the district court shall substitute the amended Guidelines range for the initial range and shall leave all other guideline application decisions unaffected.

United States v. Alejandro-Montanez, 778 F.3d 352, 362 (1st Cir. 2015) (quotations and

citations omitted).

Here, the court found that Mr. Betancourt-Pérez was responsible for the equivalent of 2,050 kilograms of marijuana, producing a base offense level of 32. The United States Sentencing Guidelines published as of November 1, 2014, however, has a new scheme for drug quantities, providing for level 30 for cases involving that quantity. Thus, had Mr. Betancourt-Pérez been sentenced under the current-yet-retroactive guidelines, he would have been faced a lower range.

Further, to the extent that Mr. Betancourt-Pérez's sentence should have been calculated on a base offense level of 26 as he argues here, it should be lowered to 24 in accord with the terms of the new guidelines.

Accordingly, Mr. Betancourt-Pérez's sentence should be remanded for correction.

CONCLUSION

For the foregoing reasons, this Court should remand for re-sentencing with a new judge, and allow Mr. Betancourt-Pérez to withdraw his plea.

Respectfully submitted,

Angel Abner Betancourt-Pérez
By his Attorney,

Law Office of Joshua L. Gordon

/s/

Dated: September 24, 2015

Joshua L. Gordon, Esq.
First Circuit Bar No. 33963
75 South Main Street #7
Concord, NH 03301
(603) 226-4225
www.AppealsLawyer.net

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Mr. Betancourt-Pérez requests that Attorney Joshua L. Gordon be allowed oral argument.

I hereby certify that on September 24, 2015, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X6, and that it contains no more than 5,652 words, exclusive of those portions which are exempted.

/s/

Dated: September 24, 2015

Joshua L. Gordon, Esq.

ADDENDUM

JUDGMENT IN A CRIMINAL CASE (3:10-cr-0175) (Apr. 14, 2014). 28

JUDGMENT IN A CRIMINAL CASE (3:11-cr-0181) (Apr. 14, 2014). 33

JUDGMENT IN A CRIMINAL CASE (3:11-cr-0367) (Apr. 14, 2014). 38

UNITED STATES DISTRICT COURT

JUDICIAL DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
v.

Angel Abner BETANCOURT-PEREZ

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JUDGMENT IN A CRIMINAL CASE

Case Number: 3:10-CR-00175-016 (PG)

USM Number: 36545-069

Jose R. Olmo-Rodriguez, Esq.

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One (1)

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(a)(1), 846 and 860	Conspiracy to possess with intent to distribute at least 3.5 but less than 5 kilograms of cocaine within a protected location.	May 5, 2010	One (1)

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The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) 2, 3, 4, 5, and 6 is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 11, 2014

Date of Imposition of Judgment

S/ Juan M. Perez-Gimenez

Signature of Judge

Juan M. Perez-Gimenez

Senior, U.S. District Judge

Name and Title of Judge

April 14, 2014

Date

DEFENDANT: Angel Abner BETANCOURT-PEREZ
CASE NUMBER: 3:10-CR-00175-016 (PG)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One Hundred and Eight (108) months as to each of counts One (1) in Cr. 10-175-16 (PG), Cr. 11-181-01 (PG), and Cr. 11-367-025 (PG) to be served concurrently with each other, but consecutively with the term of Sixty (60) months imposed in count Three (3) in Cr. 11-181-01 (PG), for a total term of imprisonment of One Hundred and Sixty-Eight (168) months.

The court makes the following recommendations to the Bureau of Prisons:

It is recommended that this defendant be allowed to serve the term of imprisonment in FCI Miami.
It is recommended that this defendant be provided while incarcerated the maximum drug program treatment (500 hours).

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

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Angel Abner BETANCOURT-PEREZ
 CASE NUMBER: 3:10-CR-00175-016 (PG)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Eight (8) years as to count One (1) in Cr. 10-175-16 (PG), Four (4) years as to count One (1) in Cr. 11-181-01 (PG), and Cr. 11-367-025 (PG), and Five (5) years as to Count Three (3) in Cr. 11-181-01 (PG) to be served concurrently with each other. Under the following terms and conditions.

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

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

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court’s determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: Angel Abner BETANCOURT-PEREZ
CASE NUMBER: 3:10-CR-00175-016 (PG)

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall refrain from the unlawful use of controlled substances and shall submit to a drug test within fifteen (15) days of release from imprisonment. After his release, he shall submit to random drug testing, no less than three (3) samples during the supervision period but not to exceed 104 samples per year under the coordination of the U.S. Probation Officer. If any sample detects substance abuse, the defendant shall participate in an in-patient or an out-patient substance abuse treatment program, for evaluation and/or treatment, as arranged by the U.S. Probation Officer until duly discharged. The defendant is required to contribute to the cost of services rendered by means of co-payment, in an amount arranged by the U.S. Probation Officer based on his ability to pay or the availability of third party payment.
2. The defendant shall submit his person, property, house, residence, vehicle, papers, [computer (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media], or office to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
3. The defendant shall cooperate in the collection of a DNA sample as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code § 3563(a)(9).
4. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

DEFENDANT: Angel Abner BETANCOURT-PEREZ

CASE NUMBER: 3:10-CR-00175-016 (PG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ _____ 0.00	\$ _____ 0.00
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- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

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

UNITED STATES DISTRICT COURT

JUDICIAL DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA)

v.)

Angel Abner BETANCOURT-PEREZ)

aka "Angel el Flaco")

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:11-CR-00181-01 (PG)

USM Number: 36545-069

Jose R. Olmo-Rodriguez, Esq.

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One (1), and Three (3)

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(a)(1), and 846	Conspiracy to possess with intent to distribute at least 2 but less than 3.5 kilograms of cocaine.	May 10, 2011	One (1)
18 U.S.C. § 924(c)(1)	Carrying and possessing a firearm during and in relation to a drug trafficking offense.	May 10, 2011	Three (3)

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) Two (2) is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 11, 2014

Date of Imposition of Judgment

S/ Juan M. Perez-Gimenez

Signature of Judge

Juan M. Perez-Gimenez

Senior, U.S. District Judge

Name and Title of Judge

April 14, 2014

Date

DEFENDANT: Angel Abner BETANCOURT-PEREZ
CASE NUMBER: 3:11-CR-00181-01 (PG)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One Hundred and Eight (108) months as to each of counts One (1) in Cr. 10-175-16 (PG), Cr. 11-181-01 (PG), and Cr. 11-367-025 (PG) to be served concurrently with each other, but consecutively with the term of Sixty (60) months imposed in count Three (3) in Cr. 11-181-01 (PG), for a total term of imprisonment of One Hundred and Sixty-Eight (168) months.

The court makes the following recommendations to the Bureau of Prisons:

It is recommended that this defendant be allowed to served the term of imprisonment in FCI Miami.
It is recommended that this defendant be provided while incarcerated the maximum drug program treatment (500 hours).

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

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Angel Abner BETANCOURT-PEREZ
CASE NUMBER: 3:11-CR-00181-01 (PG)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Eight (8) years as to count One (1) in Cr. 10-175-16 (PG), Four (4) years as to count One (1) in Cr. 11-181-01 (PG), and Cr. 11-367-025 (PG), and Five (5) years as to Count Three (3) in Cr. 11-181-01 (PG) to be served concurrently with each other. Under the following terms and conditions.

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

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

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: Angel Abner BETANCOURT-PEREZ
CASE NUMBER: 3:11-CR-00181-01 (PG)

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall refrain from the unlawful use of controlled substances and shall submit to a drug test within fifteen (15) days of release from imprisonment. After his release, he shall submit to random drug testing, no less than three (3) samples during the supervision period but not to exceed 104 samples per year under the coordination of the U.S. Probation Officer. If any sample detects substance abuse, the defendant shall participate in an in-patient or an out-patient substance abuse treatment program, for evaluation and/or treatment, as arranged by the U.S. Probation Officer until duly discharged. The defendant is required to contribute to the cost of services rendered by means of co-payment, in an amount arranged by the U.S. Probation Officer based on his ability to pay or the availability of third party payment.
2. The defendant shall submit his person, property, house, residence, vehicle, papers, [computer (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media], or office to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
3. The defendant shall cooperate in the collection of a DNA sample as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code § 3563(a)(9).
4. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

DEFENDANT: Angel Abner BETANCOURT-PEREZ

CASE NUMBER: 3:11-CR-00181-01 (PG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$ 0.00	\$ 0.00

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ _____ 0.00	\$ _____ 0.00
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- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

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

UNITED STATES DISTRICT COURT

JUDICIAL DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA)

v.)

Angel Abner BETANCOURT-PEREZ)

aka "Flaco")

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:11-CR-00367-025 (PG)

USM Number: 36545-069

Jose R. Olmo-Rodriguez, Esq.

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One (1)

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(a)(1)	Possession with intent to distribute at least 100 but less than 400 kilograms of marihuana.	September 23, 2011	One (1)

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) Two (2) is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 11, 2014

Date of Imposition of Judgment

S/ Juan M. Perez-Gimenez

Signature of Judge

Juan M. Perez-Gimenez

Senior, U.S. District Judge

Name and Title of Judge

April 14, 2014

Date

DEFENDANT: Angel Abner BETANCOURT-PEREZ
CASE NUMBER: 3:11-CR-00367-025 (PG)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One Hundred and Eight (108) months as to each of counts One (1) in Cr. 10-175-16 (PG), Cr. 11-181-01 (PG), and Cr. 11-367-025 (PG) to be served concurrently with each other, but consecutively with the term of Sixty (60) months imposed in count Three (3) in Cr. 11-181-01 (PG), for a total term of imprisonment of One Hundred and Sixty-Eight (168) months.

The court makes the following recommendations to the Bureau of Prisons:

It is recommended that this defendant be allowed to served the term of imprisonment in FCI Miami.
It is recommended that this defendant be provided while incarcerated the maximum drug program treatment (500 hours).

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

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Angel Abner BETANCOURT-PEREZ
CASE NUMBER: 3:11-CR-00367-025 (PG)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Eight (8) years as to count One (1) in Cr. 10-175-16 (PG), Four (4) years as to count One (1) in Cr. 11-181-01 (PG), and Cr. 11-367-025 (PG), and Five (5) years as to Count Three (3) in Cr. 11-181-01 (PG) to be served concurrently with each other. Under the following terms and conditions.

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

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

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: Angel Abner BETANCOURT-PEREZ
CASE NUMBER: 3:11-CR-00367-025 (PG)

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall refrain from the unlawful use of controlled substances and shall submit to a drug test within fifteen (15) days of release from imprisonment. After his release, he shall submit to random drug testing, no less than three (3) samples during the supervision period but not to exceed 104 samples per year under the coordination of the U.S. Probation Officer. If any sample detects substance abuse, the defendant shall participate in an in-patient or an out-patient substance abuse treatment program, for evaluation and/or treatment, as arranged by the U.S. Probation Officer until duly discharged. The defendant is required to contribute to the cost of services rendered by means of co-payment, in an amount arranged by the U.S. Probation Officer based on his ability to pay or the availability of third party payment.
2. The defendant shall submit his person, property, house, residence, vehicle, papers, [computer (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media], or office to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
3. The defendant shall cooperate in the collection of a DNA sample as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code § 3563(a)(9).
4. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

DEFENDANT: Angel Abner BETANCOURT-PEREZ

CASE NUMBER: 3:11-CR-00367-025 (PG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ _____	0.00	\$ _____	0.00
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Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

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