Case No. 15-3223

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DEANDREA GRAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the U.S. District Court
for the Western District of Missouri
Honorable David Gregory Kays, District Judge
Case No. 4:13-cv-00970-DGK

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

Summary

Deandrea Gray pleaded guilty to possessing 262.12 grams of cocaine with intent to distribute it. Because he possessed less than 500 grams, the offense was punishable under § 841(b)(1)(C), which levied no minimum prison sentence and a maximum of 20 years. But his plea agreement and all subsequent instruments and hearings *all* incorrectly stated his offense was punishable under § 841(b)(1)***(B)***, which carried a minimum sentence of five years in prison and a maximum of 40. He was sentenced to 130 months under that wrong statute. On § 2255 review, the district court held the appropriate remedy was simply to change the underlying judgment's citation to § 841(b)(1)(C).

This was error. Mr. Gray's plea of guilt under a harsher statute than actually applied was unknowing and involuntary, and thus void as a matter of Due Process. He must be allowed to withdraw his plea. Alternatively, sentencing Mr. Gray under the wrong penalty statute violated his right to Due Process. At the very least, he must be resentenced under the correct statute.

Request for Oral Argument

The issues in this case are complex and subtle. The district court saw that they were important enough to warrant a certificate of appealability. The interchange of oral argument would assist the Court in understanding and deciding the issues. Appellant requests at least 15 minutes per side.

Corporate Disclosure Statement

Appellant Deandrea Gray is an individual. No corporation or other entity is involved in this case.

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Jurisdictional Statement

This is an appeal from a final order and judgment of the U.S. District Court for the Western District of Missouri granting in part the appellant's motion under 28 U.S.C. § 2255 and granting a certificate of appealability.

The district court had jurisdiction under 28 U.S.C. § 2255. The underlying criminal case became final on October 11, 2012, when the Supreme Court denied the appellant's petition for writ of certiorari (Appellant's Appendix ("Aplt.Appx." 7). *Clay v. United States*, 537 U.S. 522, 527 (2003). The appellant filed his motion under § 2255 on September 30, 2013 (Aplt.Appx. 72). Under § 2255(f)(1), the motion was timely, as it was filed within one year of "the date on which the judgment of conviction bec[ame] final." The appellant had not previously filed any other motion under § 2255 (Aplt.Appx. 7).

On July 31, 2015, the district court entered its final order and judgment disposing of the motion and issuing a certificate of appealability (Aplt.Appx. 220, 239-41). The appellant filed his notice of appeal on September 14, 2015 (Aplt.Appx. 249).

Under Fed. R. App. P. 4(a)(1)(B)(i), and Rule 11(b), Rules Governing Section 2254 and 2255 Cases, the notice of appeal was timely, as it was filed within 60 days of the district court's order and judgment. Therefore, this Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253.

Statement of the Issues

I. Mr. Gray's erroneous guilty plea to 21 U.S.C. § 841(b)(1)***(B)***, rather than § 841(b)(1)***(C)***, altered the statutory range of punishment, rendered his guilty plea not knowing or voluntary, and prejudiced him, entitling him to withdraw it.

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II. Mr. Gray's erroneous conviction under 21 U.S.C. § 841(b)(1)***(B)***, rather than § 841(b)(1)***(C)***, altered the statutory range of punishment and, thus, both its calculation and the parties' recommendations, violating Mr. Gray's right to Due Process and entitling him to a new sentencing hearing.

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Statement of the Case

A. Background to the Original Criminal Case

Police officers in Kansas City, Missouri, alleged that, in March 2010, they observed Appellant Deandrea[1] Gray exit what a confidential informant had told them was a drug-selling house and leave in a Dodge Durango (Aplt.Appx. 9-10).

Officers alleged they then pulled the car over and ordered Mr. Gray and another occupant of the car, Gerome King, to exit, upon which Mr. Gray and Mr. King both attempted to flee on foot but were arrested (Aplt.Appx. 10). Officers alleged they then searched the car and found two clear plastic bags containing a 262.12 grams of powder cocaine, $1,749 in U.S. currency, a stolen Desert Eagle .44 magnum handgun, and a Glock 9 mm handgun with 26 rounds in the magazine and one in the chamber (Aplt.Appx. 10). Officers alleged they then searched the house and recovered cocaine base, more powder cocaine, other drugs, and more firearms (Aplt.Appx. 10-11).

At the time, Mr. Gray was a felon, having pleaded guilty to first-degree assault in Missouri state court in 1992 (Aplt.Appx. 11, 48-53).

B. Proceedings in the Original Criminal Case

In April 2010, a grand jury in the U.S. District Court for the Western District of Missouri returned a three-count indictment

[1] Mr. Gray's first name is pronounced "Day-awndray."

charging Mr. Gray and Mr. King with: (1) conspiracy to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), b(1)(A), and 846; (2) possession of firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); and (3) being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Aplt.Appx. 12-13).

In October 2010, Mr. Gray, through his court-appointed counsel, Kent Hall, entered into a written plea agreement with the Government (Aplt.Appx. 15-28). Under the agreement, the Government would dismiss all three counts of the indictment, Mr. Gray would waive a new indictment, and Mr. Gray would plead guilty to a newly-filed, two-count information charging him with: (1) possession with intent to distribute 50 grams or more of cocaine powder in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)***(B)***; and (2) possession of a firearm in furtherance of a drug trafficking crime (Aplt.Appx. 15-19). The parties agreed that the factual basis for Mr. Gray's plea agreement included that he possessed 262.12 grams of powder cocaine (Aplt.Appx. 17).

The parties then followed through with the agreement, with Mr. Gray waiving his indictment and the Government dismissing its indictment and filing its new information (Aplt.Appx. 29-30; Sentencing Transcript ("S.Tr.") 50).

Count One of the information charged Mr. Gray with having "knowingly and intentionally possessed with intent to distribute 50

grams or more of [powder] cocaine . . . in violation of Title 21, United States Code, Sections 841(a)(1) ***and (b)(1)(B)*** " (Aplt.Appx. 30) (emphasis added). Its header also cited "21 U.S.C. §§ 841(a)(1), (b)(1)***(B)***" as the applicable statutes governing Count One (Aplt.Appx. 30) (emphasis added). Count Two of the information was identical to Count Two of the Indictment (Aplt.Appx. 12-13, 30-31).

Mr. Gray then pleaded guilty in open court to both counts of the information, which the district court accepted (Change of Plea Hearing Transcript ("COPTr.") 3-24; Aplt.Appx. 32). On Count One, the district court, relying on the range of punishment listed in both the plea agreement and the information – the citation to § 841(b)(1)***(B)*** – advised Mr. Gray that the applicable statutory range of punishment on Count One was five to 40 years' imprisonment; it also advised him that the statutory range of punishment on Count Two was five years to life, to be served consecutively to the sentence imposed on Count One (COPTr. 11-12). Additionally, the district court told Mr. Gray that, by pleading guilty to the information, he faced a total statutory minimum sentence of "at least 10 years in prison," and that the total maximum possible sentence was life imprisonment (COPTr. 12).

The district court sentenced Mr. Gray in July 2011 (S.Tr. 1; Aplt.Appx. 54, 56). Per the plea agreement and information, the presentence investigation report and the Government's sentencing memorandum recounted that § 841(b)(1)***(B)*** provided the applicable

range of punishment for Count One to which Mr. Gray had pleaded guilty: "possession with intent to distribute 50 grams or more of cocaine" (S.Tr. 4; Aplt.Appx. 40-41; PSI[2] 2, 4, 7). Mr. Gray's sentencing memorandum did not contest this (Aplt.Appx. 33-38).

The presentence report calculated Mr. Gray's base offense level under the U.S. Sentencing Guidelines ("the Guidelines") for Count One as 22, minus three levels for his acceptance of responsibility, for a total base level of 19 (PSI 7-8). Then, due to his "career offender" status and his simultaneous conviction for violation of 18 U.S.C. § 924(c) in Count Two, which carried a mandatory minimum five-year consecutive sentence and collectively placed him in "criminal history category" VI, it calculated that his actual, enhanced guidelines range was 262-327 months' imprisonment, with a total offense level of 31, including the reduction for acceptance of responsibility (PSI 8).

At the sentencing hearing, the district court began its guidelines calculation with § 841(b)(1)(B)'s statutory range of punishment of five to 40 years' imprisonment (S.Tr. 31). After hearing arguments from both Mr. Gray's counsel and the Government, the court agreed with the presentence report and found Mr. Gray's total Guidelines offense level was 31, criminal history category VI, carrying a Guidelines range of 262-327 months' imprisonment followed by supervised release of four to

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[2] On Mr. Gray's motion, on October 19, 2015, this Court ordered the sealed PSI transferred into this appeal.

five years, and a fine of between $15,000 and $2 million (S.Tr. 29-30). The Government sought a sentence of 157-196 months' imprisonment, and Mr. Gray's counsel sought 157 months' imprisonment (S.Tr. 33). Mr. Gray delivered an allocution (S.Tr. 37-42).

Stating it had considered all the relevant factors, including the 18 U.S.C. § 3553(a) sentencing factors, Mr. Gray's arguments, and his allocution, the district court sentenced Mr. Gray to 130 months' imprisonment on Count One and 60 months' imprisonment on Count Two, to be served consecutively, for a total of 190 months' imprisonment (S.Tr. 48). Finding Mr. Gray did not have the ability to pay a fine, it waived any fine (S.Tr. 48). During its comments, the court mentioned that Mr. Gray had been found with "262.12 grams of cocaine" (S.Tr. 45).

That same day, July 27, 2011, the court then entered judgment memorializing its oral pronouncements (Aplt.Appx. 56). It stated the "nature of [the] offense" on Count One was "Possession With Intent to Distribute 50 Grams or More of Cocaine" and it had adjudicated Mr. Gray guilty of that offense under "21 U.S.C. 841(a)(1) and (b)(1)***(B)***" (Aplt.Appx. 56) (emphasis added).

On July 27, 2011, Mr. Gray timely appealed to this Court (Aplt.Appx. 61). The appeal was designated No. 11-2726. As Mr. Gray's plea agreement expressly waived his right to appeal or collaterally attack anything other than an illegal sentence, prosecutorial misconduct, or ineffective assistance of counsel, on the Government's

motion this Court dismissed his appeal on February 3, 2012 (Aplt.Appx. 24, 63-64). Mr. Gray filed a timely motion for rehearing, which this Court denied on March 15, 2012. He then filed a timely petition for writ of certiorari in the Supreme Court, which was denied on October 11, 2012 (Aplt.Appx. 7).

C. Proceedings Under 28 U.S.C. § 2255

1. Motion, Response, Reply, and Sur-Reply

On September 20, 2013, Mr. Gray timely filed a *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct the district court's judgment of conviction and sentence (Aplt.Appx. 72, 225). His initial filing alleged a variety of grounds including: (1) the ineffective assistance of his trial and appellate counsel; (2) that his sentence was illegal and an abuse of discretion; (3) prosecutorial misconduct; and (4) that his plea was not knowing, voluntary, and intelligent (Aplt.Appx. 79-81, 87-104). He requested to withdraw his plea or, alternatively, to vacate his sentence and be resentenced (Aplt.Appx. 84, 105).

The district court ordered the Government to show cause why the relief Mr. Gray sought should not be granted (Aplt.Appx. 158-59). In the course of its response, the Government disclosed that, while preparing the response, it discovered that both the information and the plea agreement "erroneously cited 21 U.S.C. § 841(b)(1)(B), rather than § 841(b)(1)(C), regarding the statutory range of punishment" for Count One (Aplt.Appx. 179). This was because § 841(b)(1)(B) required "that a

defendant be responsible for 500 grams or more of powder cocaine," and Mr. Gray only had possessed 262.12 grams, which instead qualified for a lower sentence range under § 841(b)(1)(C) (Aplt.Appx. 180).

The Government argued, though, that this did not prejudice Mr. Gray, "because the [Guidelines] calculation was … controlled by the § 924(c) conviction (Count Two), not the statutory maximum sentence under Count One" and, thus, "even had [Mr.] Gray pled [*sic*] to § 841(b)(1)(C) in Count One, his Guidelines range would have remained the same – 262 to 327 months" (Aplt.Appx. 180-81). It also argued that Mr. "Gray suffered no prejudice" because "the [district] court sentenced [Mr.] Gray to 130 months on Count One, which was within the statutory range of punishment under § 841(b)(1)(C)" (Aplt.Appx. 181).

The district court ordered Mr. Gray to reply, which he timely did (Aplt.Appx. 71, 184). Mr. Gray addressed this new section of the Government's argument (Aplt.Appx. 196-99). He argued that being sentenced under § 841(b)(1)(B) for a crime that actually was punishable under § 841(b)(1)(C) was "not a marginal matter," but instead violated Due Process and was prejudicial (Aplt.Appx. 196). He argued this made his plea "not knowingly, voluntarily, intelligently entered into" and he was "convicted of a crime that he is actually innocent of" (Aplt.Appx. 197-98). He requested the court to find the plea invalid and allow him to withdraw it (Aplt.Appx. 203-04).

Due to this new issue, the district court ordered the Government to file a sur-reply, holding that the § 841(b)(1)(B) versus § 841(b)(1)(C) issue was "novel, and possibly meritorious" (Aplt.Appx. 211). The Government then did so, arguing that the discrepancy did not render Mr. Gray's plea void, he suffered no prejudice due to the effect of Count Two's mandatory sentencing scheme, and that, "[t]o the extent this Court wishes to eliminate any potential prejudice to Gray regarding the classification of his conviction," it could vacate his original judgment and issue a new judgment keeping the same sentence but merely correcting its statutory basis (Aplt.Appx. 214-19).

2. District Court's Decision

Six months later, on July 31, 2015, without any evidentiary hearing and holding none was required, the district court entered an order disposing of Mr. Gray's § 2255 motion by granting the motion in part and granting a certificate of appealability (Aplt.Appx. 220, 239). After addressing the "claims addressed in [Mr.] Gray's initial" § 2255 motion and holding they were "meritless," it held that, on the § 841(b)(1)(B) versus § 841(b)(1)(C) issue, Mr. Gray was "entitled to relief under § 2255(b) in the form of an amended judgment stating he was convicted on Count One of violating 21 U.S.C. § 841(b)(1)(C)" (Aplt.Appx. 227-30).

The court agreed that, because Mr. Gray "was misinformed of the statutory range of punishment," his "plea was not knowing and

voluntary," but held he nonetheless "was not prejudiced by the mistake" (Aplt.Appx. 237). It held this was because, when pleading guilty, Mr. Gray "was told that his statutory range of punishment was five to forty years' imprisonment on Count One and five years to life, to be served consecutively, on Count Two," meaning that, as Mr. "Gray understood it, he was facing a higher minimum sentence than if the Information had actually charged him under § 841(b)(1)(C)" (Aplt.Appx. 238). It held this meant that, "[s]ince [Mr.] Gray agreed to plead guilty to a more severe range of punishment, logic dictates he would have been willing to plead guilty to a less severe range of punishment" (Aplt.Appx. 238).

Noting, though, that Mr. Gray had stated in his § 2255 reply "that if he had been informed of the correct, lower range of punishment he would have insisted on going to trial to make the government prove that he violated 21 U.S.C. § 841(b)(1)(B) by possessing only 262.12 grams of cocaine," the court held this was "based on a flawed assumption. If [Mr.] Gray had spurned the Government's plea deal, he would have been tried on the original, three-count indictment alleging a crack-cocaine conspiracy, not the reduced charges in the two-count Information" (Aplt.Appx. 238). It held that, therefore, "had [Mr. Gray] known the correct sentencing range under the Information, it would not have altered his decision to plead guilty in any way" (Aplt.Appx. 238).

Then, though, the court held that the information's "failure to allege that [Mr.] Gray possessed 500 grams or more of cocaine" was "a prejudicial error" because while "Count One alleged [he] violated 21 U.S.C. § 841(b)(1)(B) by possessing with intent to distribute 50 grams or more of cocaine," "a violation of § 841(b)(1)(B) requires possession of more than 500 grams of cocaine," and "thus the Information failed to allege an essential element of this crime" (Aplt.Appx. 231). Moreover, the "factual basis of the Plea Agreement … establishes [Mr.] Gray possessed only 262.12 grams of powder cocaine and so should not have been convicted under § 841(b)(1)(B)" (Aplt.Appx. 233). "As a result of this mistake, the Information failed to allege an essential element of the crime, namely that Gray possessed with intent to distribute 500 grams or more of cocaine" (Aplt.Appx. 233).

The court held this "defect" was "was more than just a simple citation error that can be corrected under Federal Rule of Criminal Procedure 36," and instead was a "legal error" under which "the Court calculated [Mr.] Gray's punishment under § 841(b)(1)(B)," the wrong statute (Aplt.Appx. 234). At the same time, the court held this was a "non-structural error subject to harmless-error analysis" (Aplt.Appx. 234). Because the purpose of an information is to "infor[m] the court of the facts alleged so that it can decide whether the facts allege support a conviction, and thus whether to accept a defendant's guilty plea," it held "the relevant inquiry in this case" into harmless error was "whether a

properly informed judge would have accepted [Mr.] Gray's guilty plea to Count One" (Aplt.Appx. 235). It held, "The answer is no" (Aplt.Appx. 236).

The court held this was for several reasons:

> First, the record conclusively demonstrates that the parties intended for [Mr.] Gray to plead guilty to possession with intent to distribute 50 grams or more of cocaine, not 500 grams or required to sentence [*sic*] under § 841(b)(1)(B). Thus, the factual basis outlined in the Plea Agreement does not support [Mr.] Gray's guilty plea, and no judge would accept a guilty plea where there was not an adequate factual basis for it. Second, Gray believed he was not guilty of a § 841(b)(1)(B) offense. Although under some circumstances a judge may accept a guilty plea from a defendant who claims he did not commit the offense charged, *see North Carolina v. Alford*, 400 U.S. 25, 36-37 (1970), this was not an *Alford* plea or other situation under which it would be appropriate for a judge to accept the defendant's guilty plea despite his protestation that he did not commit the relevant conduct. Hence, the flaw in the Information affected a substantial right. This flaw prejudiced [Mr.] Gray because it led to a conviction for a more severe crime. Hence, the error was not harmless beyond a reasonable doubt.

(Aplt.Appx. 236).

Then, however, holding that Mr. "Gray has not been prejudiced with respect to the length of sentence imposed," the district court held that the error's harm "can be remedied" simply "by amending the judgment to state a conviction under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)" (Aplt.Appx. 236). It held this, too, was for several reasons.

First, "Charging [Mr.] Gray under § 841(b)(1)(B) did not expose him to a longer potential sentence," as his career offender "Guidelines range was the same whether he was convicted under § 841(b)(1)(B) or § 841(b)(1)(C)," because Count Two "carr[ied] a range of punishment of five years to life to be served consecutively to the sentence imposed on Count One," and thus "the Government could still seek a life sentence by charging him under § 841(b)(1)(C)" (Aplt.Appx. 233 n.8).

Second, the court held that the proper remedy also was merely an amended judgment keeping the same sentence but correcting the statutory citation because it found "it would have sentenced [Mr.] Gray to the same sentence had it sentenced him under § 841(b)(1)(C)" (Aplt.Appx. 236). It held its

> rationale for imposing the 130-month sentence was based on his status as a career offender and the other applicable factors; it did not turn on which precise subsection he was sentenced under. The sentence was well within § 841(b)(1)(C)'s statutory range. The fact that the Court could have imposed a lower minimum sentence under § 841(b)(1)(C) than under § 841(b)(1)(B) is irrelevant. The Court would not have imposed a lower sentence than it did because it simply would not have been enough time. The Court imposed a 130-month sentence because it believed 130 months' imprisonment was the appropriate sentence.

(Aplt.Appx. 236-37).

Still, holding that "a reasonable jurist might resolve several of the questions presented here differently," it issued a certificate of

appealability under 28 U.S.C. § 2253(c)(1)(B) and Rule 11(a) of the Rules Governing Section 2255 Proceedings as to "three questions," including:

> 1. Whether [Mr.] Gray's conviction under 21 U.S.C. § 841(b)(1)(B) entitles him to withdraw his guilty plea or receive a new sentencing hearing.
>
> 2. Whether [Mr.] Gray knowingly and voluntarily entered his plea of guilty after being misinformed of the statutory range of punishment.

(Aplt.Appx. 240).

The court then entered judgment in the § 2255 case (Aplt.Appx. 241). Simultaneously, it issued an amended judgment in the original criminal case convicting Mr. Gray of the same offenses and sentencing him to the same term, but changing the citation of § 841(b)(1)(B) in Count One to § 841(b)(1)(C) (Aplt.Appx. 65).

On Mr. Gray's *pro se* motion, the district court granted him leave to appeal *in forma pauperis*, and *Mr. Gray* timely appealed to this Court (Aplt.Appx. 242, 249, 251).

Summary of the Argument

Appellant Deandrea Gray pleaded guilty to possessing 262.12 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). Because he possessed less than 500 grams, the offense was punishable under § 841(b)(1)(C), which levied no minimum prison sentence and a maximum prison sentence of 20 years.

Mr. Gray's plea agreement and all subsequent instruments and hearings, however, *all* stated that the offense was punishable under § 841(b)(1)***(B)***, which carried a minimum sentence of five years in prison and a maximum of 40. That section, though, only applies to possession of 500 grams of cocaine or more. The district court applied § 841(b)(1)(B) and sentenced Mr. Gray to 130 months. On § 2255 review, the court agreed that this was error and made Mr. Gray's plea unknowing and involuntary, but held the appropriate remedy was simply to change the underlying judgment's citation to § 841(b)(1)(C).

This was error. First, Mr. Gray's unknowing, involuntary plea is void as a matter of Due Process. That he agreed to plead guilty to something harsher than actually applied only compounded this. As a result, he must be allowed to withdraw his plea. Second, alternatively, sentencing Mr. Gray under the wrong penalty statute violated his right to Due Process, regardless of whether the ultimate sentence was within the range of the correct statute. This was not a clerical error. At the very least, Mr. Gray must be fully resentenced under the right statute.

Argument

Standard of Appellate Review as to All Issues

This is an appeal from a grant in part and denial in part of Mr. Gray's motion under 28 U.S.C. § 2255. "This [C]ourt reviews the denial of a § 2255 motion *de novo*." *United States v. Luke*, 686 F.3d 600, 604 (8th Cir. 2012). It "review[s] legal issues *de novo* and factual findings under a clear error standard." *Covey v. United States*, 377 F.3d 903, 906 (8th Cir. 2004) (citation omitted). "A finding is clearly erroneous when evidence in its entirety creates 'a definite and firm conviction that a mistake has been committed.'" *Luke*, 686 F.3d at 604 (citations omitted).

I. Mr. Gray's erroneous guilty plea to 21 U.S.C. § 841(b)(1)*(B)*, rather than § 841(b)(1)*(C)*, altered the statutory range of punishment, rendered his guilty plea not knowing or voluntary, and prejudiced him, entitling him to withdraw it.

When a defendant agrees to plead guilty to a statute that all parties recognize was mistaken under the facts and that changes the statutory range of punishment, the defendant has been misinformed of the correct statutory range, his guilty plea is unknowing, involuntary, and void, and he must be allowed to withdraw it. Nonetheless, here, the district court held that the appropriate remedy was just to amend the judgment to recite the correct statute. Was this error? Was the defendant entitled to withdraw his guilty plea?

* * *

A. As the district court found, Mr. Gray's guilty plea to the higher punishment range of § 841(b)(1)(B) for stipulated facts that did not support that range was not knowing and voluntary.

"A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998). While this is reflected in the colloquy of what the district court must "address" and "inform" the defendant under Fed. R. Crim. P. 11(b), *United States v. Ochoa-Gonzalez*, 598 F.3d 1033, 1037 (8th Cir. 2010), this is not merely a requirement of the Rule, but of Fifth Amendment Due Process. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

> [I]f a defendant's guilty plea is not … voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

Id. at 243 n.5 (1969) (citation and quotation marks omitted).

So, "For a plea to be voluntary, a defendant must have knowledge of the law in relation to the facts." *Bailey v. Weber*, 295 F.3d 852, 855 (8th Cir. 2002). And for it to be knowing, he must have "notice of the true nature of the charge to which he is pleading." *United States v. Perez*, 270 F.3d 737, 740 (8th Cir. 2001). These requirements apply not merely to the Rule 11 plea colloquy, but to the defendant's "decision to be bound by the provisions of [a] plea agreement …." *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000). When a plea violates these requirements, § 2255 allows the defendant "to withdraw his guilty plea …." *Ivy v. Caspari*, 173 F.3d 1136, 1140, 1144 (8th Cir. 1999).

In this case, the district court found that, "Because [Mr. Gray] was misinformed of the statutory range of punishment[, his] plea was not knowing and voluntary" (Aplt.Appx. 237). As the Government does not cross-appeal, it cannot now attack this finding. *Duit Constr. Co. v. Bennett*, 796 F.3d 938, 941-42 (8th Cir. 2015). Regardless, the district court's finding is well-grounded.

21 U.S.C. § 841(a)(1) makes it "unlawful for any person knowingly or intentionally … to … possess with intent to distribute … a controlled

substance." Section 841(b) then addresses the various "penalties" for violating this provision. Section 841(b)(1)(B) provides,

> [A]ny person who violates subsection (a) of this section shall be sentenced as follows: … In the case of a violation of subsection (a) of this section involving … 500 grams or more of a mixture or substance containing a detectable amount of … cocaine … such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years ….

Conversely, § 841(b)(1)***(C)*** provides that, generally, "In the case of a controlled substance in schedule I or II, … such person shall be sentenced to a term of imprisonment of not more than 20 years." Thus, if a person possesses less than 500 grams of cocaine, § 841(b)(1)(C) applies, the minimum prison term is zero, and the maximum is 20 years; if he possesses 500 grams or more, § 841(b)(1)(B) applies, the minimum term is five years, and the maximum is 40 years. *United States v. Gonzalez*, 501 F.3d 630, 641-43 (6th Cir. 2007).

In this case, Mr. Gray was found with 262.12 grams of cocaine (Aplt.Appx. 10). He and the Government stipulated to this amount in the plea agreement (Aplt.Appx. 17). The presentence report recounted this amount (PSI 5). The district court noted this amount at the sentencing hearing (S.Tr. 45). The Government admitted this amount in its § 2255 response (Aplt.Appx. 180). The district court further noted this amount in its § 2255 order (Aplt.Appx. 233).

Because 262.12 grams is less than 500 grams, for Mr. Gray's violation of § 841(a)(1), the penalty was governed by § 841(b)(1)(C): no minimum prison sentence and a maximum prison sentence of 20 years.

Mr. Gray's plea agreement, the information to which he agreed to plead guilty, and the district court at sentencing, however, did not state that the possession crime to which Mr. Gray was pleading guilty was under § 841(b)(1)(C). Instead, these instruments and the district court all stated it was under § 841(b)(1)**(B)** (Aplt.Appx. 15, 29-30, 40, 56; COPTr. 9; PSI 6). That made the minimum sentence five years and the maximum sentence 40 years. § 841(b)(1)(B).

But the offense to which Mr. Gray agreed to plead guilty possessing 262.12 grams of cocaine – *did not* carry such a sentence. Section 841(b)(1)(B) did not and could not apply to it. Applying § 841(b)(1)(B) nonetheless, the plea agreement stated that, for Count One, "the minimum penalty the Court may impose is five years, while maximum penalty [*sic*] the Court may impose is not more than forty years of imprisonment" (Aplt.Appx. 17). The information echoed that the statutory punishment range was "NLT 5 Years, NMT 40 Years Imprisonment" (Aplt.Appx. 30). At the change of plea hearing, the district court advised Mr. Gray, "Count 1 carries with it a minimum sentence of five years in prison and a maximum sentence of 40 years" (COPTr. 11-12). Finally, at sentencing, the Government argued this count carried a "five-year [statutory] minimum" (S.Tr. 23).

All of this, though, was wrong. It was a legal impossibility. Mr. Gray's plea of guilty to possessing 262.12 grams of cocaine in violation of § 841(a)(1) *did not* carry a mandatory minimum of five years and maximum of 40 years under § 841(b)(1)(B). Instead, under § 841(b)(1)(C), it carried *no* minimum and a maximum of 20 years.

As a result, and as the district court held, Mr. Gray's plea was not knowing or voluntary. He did not have accurate "knowledge of the law in relation to the facts." *Bailey*, 295 F.3d at 855. He did not have accurate "notice of the true nature of the charge to which he [was] pleading." *Perez*, 270 F.3d at 740.

It is well-established that failing accurately to inform the defendant of his statutory sentence range, including the presence or lack of mandatory minimums, renders his guilty plea unknowing and involuntary and, thus, unconstitutional and void. *See, e.g.*:

- *United States v. Stubbs*, 279 F.3d 402, 410-13 (6th Cir. 2002), *superseded on other grounds*, *United States v. Helton*, 349 F.3d 295, 299 (6th Cir. 2003) (plea void and entitled to be withdrawn where defendant mistakenly was sentenced under 18 U.S.C. § 924(c), rather than § 924(o), which carried a lower statutory penalty range);
- *United States v. Gigot*, 147 F.3d 1193, 1198-99 (10th Cir. 1998) (plea void and entitled to be withdrawn where defendant was advised of statutory penalty for first charge of willfully making false statements, but not for second charge of mail fraud);

- *United States v. Goins*, 51 F.3d 400, 402-05 (4th Cir. 1995) (plea void and entitled to be withdrawn where defendant not informed of mandatory minimum sentence); and
- *Pitts v. United States*, 763 F.2d 197, 200-01 (6th Cir. 1985) (plea void and entitled to be withdrawn where defendant was misinformed that statutory maximum was 25 years and $25,000 fine, when it actually was 15 years and $20,000 fine; did not matter that he received less than maximum either way).
- *United States v. Herrold*, 635 F.2d 213, 215-16 (3d Cir. 1980) (plea void and entitled to be withdrawn where defendant was misinformed that statutory maximum was 45 years, when it actually was 25).

Cf. Perez, 270 F.3d at 740 (where defendant did not assert that quantity of drugs was less than "required to trigger" § 841(b)(1)(B), his plea under that statute was voluntary and intelligent).

Mr. Gray, too, was not "aware of the true nature of the crime charged and the proper statutory consequences …." *Stubbs*, 279 F.3d at 412. His plea was not "voluntary" because he did not have "knowledge of the law in relation to the facts." *Bailey*, 295 F.3d at 855. His plea was not "intelligent" because he did not have "notice of the true nature of the charge to which he is pleading." *Perez*, 270 F.3d at 740.

Therefore, the district court correctly found that, "Because [Mr. Gray] was misinformed of the statutory range of punishment[, his] plea was not knowing and voluntary" (Aplt.Appx. 237).

B. Because Mr. Gray's guilty plea was not knowing and voluntary, it is void and he must be entitled to withdraw it.

When, as the district court found here, a "guilty plea is not … voluntary and knowing, it has been obtained in violation of due process and is therefore void." *Boykin*, 395 U.S. at 243. It follows, then, that as a defendant cannot be convicted on a void guilty plea that violated Due Process, if found to be void on § 2255 review, the appropriate, standard remedy is to allow the defendant "to withdraw his guilty plea …." *Ivy*, 173 F.3d at 1140, 1144.

Here, however, the district court held that Mr. Gray was not entitled to this relief (Aplt.Appx. 237-38). It correctly noted that it had to "appl[y] harmless-error analysis to a claim that the defendant's guilty plea was not knowing and voluntary because he was misinformed of the statutory range of punishment," under which "the Government bears 'the burden of proving the defendant's knowledge and comprehension of the omitted information would not have been likely to affect his willingness to plead guilty'" (Aplt.Appx. 237) (quoting *United States v. Gray*, 581 F.3d 749, 752 (8th Cir. 2009)).

Citing no authority, the court then held that the "Government has carried this burden" in this case because, as Mr. Gray "was facing a *higher* minimum sentence than if the Information had actually charged him under § 841(b)(1)(C)," since he "agreed to plead guilty to a more

severe range of punishment, logic dictates he would have been willing to plead guilty to a less severe range of punishment" (Aplt.Appx. 238).

This was error. To the contrary, it is well-established that a guilty plea that is void for being unknowing and involuntary due to being misinformed of the statutory sentencing range is not "harmless" simply because the defendant pleaded guilty to a higher range than he correctly should have been informed of. Federal appellate courts uniformly have rejected the reasoning the district court used.

In *Stubbs*, the defendant pleaded guilty to an indictment charging him with violating 18 U.S.C. § 924(o). 279 F.3d at 405. The plea agreement stated that this "called for a mandatory consecutive term of 60 months' imprisonment," and the district court informed the defendant of this at his change of plea hearing. *Id.* In reality, though, it was § 924***(c)*** that called for that term. *Id.* Section 924(o) actually had no mandatory term and stated a maximum sentence of 20 years without mandating a consecutive sentence. *Id.* After the district court accepted the defendant's plea but before sentencing, the defendant sought to withdraw the plea. *Id.* The district court denied the motion and he was sentenced to the mandatory minimum consecutive to his sentence for another offense. *Id.*

Under plain error review on direct appeal, the Sixth Circuit held the plea was void and vacated the district court's judgment. *Id.* It rejected the Government's contention that, by pleading guilty to a

mandatory minimum sentence with a possibility of life imprisonment, any error was harmless. *Id.* To the contrary,

> Defendant's substantial rights were affected by the district court's error. An error affects the defendant's substantial rights if it prejudices the defendant, i.e., if it affects the outcome of the district court's proceedings. Because of the erroneous application of § 924(c), the district court had no choice but to sentence Defendant to a mandatory consecutive 60 month sentence. If Defendant had been properly sentenced under § 924(o), he would not have been subject to a mandatory minimum sentence and there would not have been a requirement that the sentence be served consecutive to any other sentenced imposed. The erroneous application of § 924(c) therefore affected the outcome of the district court's proceedings establishing that Defendant's substantial rights were affected, i.e., that he was prejudiced by the error.

Id. at 410.

Simply put, "our criminal justice system is sorely lacking in the procedural safeguards mandated by the Constitution when a defendant can be charged with one crime and sentenced for another." *Id.* "[A]n error of this magnitude … runs contrary to the administration of justice and the fundamental constitutional principles of due process and the Sixth Amendment right to notice, substantially and adversely affects the integrity of the judicial process," and an appellate court is "compelled to correct it." *Id.*

The Sixth Circuit corrected the error by allowing the defendant to withdraw his guilty plea if he wished. *Id.* at 412-13. Because this error

occurred in the plea agreement, that agreement was void, and the defendant's "guilty plea was not knowing and voluntary," rendering it "constitutionally invalid." *Id.* at 410, 412. As "neither Defendant, his counsel nor the district court was aware that Defendant was not subject to a mandatory consecutive minimum 60-month sentence under § 924(o)," he was not "aware of the true nature of the crime charged and the proper statutory consequences of his guilty plea." *Id.* at 412. "It is therefore reasonably probable that had Defendant known that he was not subject to a mandatory consecutive 60-month sentence, but rather was subject to a sentence of up to twenty years that could be served concurrent to any other sentenced received, Defendant would not have pleaded guilty." *Id.*

In *Stubbs*, however, though the defendant was "entitled to withdraw his guilty plea" because it was "constitutionally infirm," he did "not seek to withdraw his guilty plea. Instead, [he] simply s[ought] to be properly sentenced under § 924(o)." *Id.* at 412-13. The Sixth Circuit agreed, vacated the district court's judgment, and remanded for resentencing.

Here, however, Mr. Gray *does* seek to withdraw his plea. Just as in *Stubbs*, he entered into a plea agreement that recited a lengthier and harsher statutory range than the law actually permitted for his offense. In addition to the district court's erroneous Rule 11 colloquy, the *plea agreement* itself also stated the wrong statute and wrong range of

punishment. But the knowing and voluntary requirements apply to the defendant's "decision to be bound by the provisions of [a] plea agreement," *DeRoo*, 223 F.3d at 923, not just the Rule 11 colloquy. And if the plea agreement itself states a legal impossibility, it is unknowing and void, and entitled to be withdrawn. *Stubbs*, 279 F.3d at 410-12.

Paraphrasing *Stubbs*, and contrary to the district court's holding, as "neither [Mr. Gray], his counsel nor the district court was aware that [he] was not subject to a mandatory [minimum five-year sentence with a maximum possible of 40 years] under" § 841(b)(1)(B), he was not "aware of the true nature of the crime charged and the proper statutory consequences of his guilty plea." 279 F.3d at 412. "It is therefore reasonably probable that had [Mr. Gray] known that he was not subject to a mandatory [minimum five-year sentence with a maximum possible of 40 years], but rather was subject to a sentence of [no minimum with a maximum of 20 years]," he "would not have" agreed to the plea agreement before him. *Id.*

Rather than the plea to the higher range making the invalid plea harmless, it in fact *compounded* the error. As a result, Mr. Gray "is entitled to withdraw his guilty plea …." *Id.* at 412-13.

Pitts, 763 F.2d at 197, provides an even more straightforward example. There, the defendant pleaded guilty to a charge for which the actual statutory range of punishment was a maximum of 15 years in

prison and a $20,000 fine, but the district court and the plea agreement had misinformed him it was 25 years and a $25,000 fine. *Id.* at 199.

The Sixth Circuit held this rendered the plea unknowing, involuntary, and void. *Id.* at 199-201. The circumstances did "not involve a mere failure to give a defendant some information for which he later claims would have affected his pleading decision. Instead it involves affirmative misstatements of the maximum possible sentence. Numerous cases have held that misunderstandings of this nature invalidate a guilty plea." *Id.* at 201 (citing, *inter alia*, *Herrold*, 635 F.2d at 213).

Contrary to the district court's reasoning here, the Sixth Circuit held that

> the effect of the plea agreement may have been to exacerbate the problem. When considering a plea agreement, a defendant might well weigh the terms of the agreement against the maximum sentence he could receive if he went to trial. When the maximum possible sentence exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject.

Id.

Once again, the same is true here. As in *Pitts*, it does not matter that Mr. Gray pleaded guilty under an understanding that his offense was punishable by a greater penalty, or that the district court's ultimate sentence was within the statutory range either way. *Id.* Mr. Gray pleaded guilty thinking that the plea to Count One carried a

mandatory minimum sentence of five years and a statutory maximum sentence of 40 years, and knew that this would inform the parties' sentencing recommendations and the district court's sentencing decision. But the plea did not carry that sentencing range. Instead, as in *Stubbs*, Mr. Gray was convicted of one crime and sentenced for another.

The uniform law of the United States is that this is constitutionally impermissible:

> There is no question that our criminal justice system is sorely lacking in the procedural safeguards mandated by the Constitution when a defendant can be charged with one crime and sentenced for another. Inasmuch as an error of this magnitude, an error which runs contrary to the administration of justice and the fundamental constitutional principles of due process and the Sixth Amendment right to notice, substantially and adversely affects the integrity of the judicial process, [this Court is] compelled to correct it.

Stubbs, 279 F.3d at 410.

As in *Stubbs*, *Pitts*, and *Herrold*, the correction that the Constitution requires is to allow Mr. Gray to withdraw his guilty plea. The district court's conclusion otherwise was error.

This Court should reverse the district court's judgment and remand this case with instructions to vacate Mr. Gray's underlying criminal judgment and allow him to withdraw his guilty plea.

II. Mr. Gray's erroneous conviction under 21 U.S.C. § 841(b)(1)*(B)*, rather than § 841(b)(1)*(C)*, altered the statutory range of punishment and, thus, both its calculation and the parties' recommendations, violating Mr. Gray's right to Due Process and entitling him to a new sentencing hearing.[3]

Sentencing a defendant under the wrong penalty statute violates the defendant's right to Due Process, regardless of whether the ultimate sentence was within the range of the correct statute. Such a mis-citation is not a clerical error and the defendant must be resentenced. Nonetheless, while acknowledging that Mr. Gray incorrectly was sentenced under 21 U.S.C. § 841(b)(1)(B), rather than § 841(b)(1)(C), as he should have been, the district court held that the appropriate remedy was merely to correct the statutory citation in the underlying judgment. Was this error? Is Mr. Gray entitled to be resentenced?

* * *

In this case, the district court observed that Count One of the information "charged [Mr.] Gray under 21 U.S.C. § 841(b)(1)(B) when it should have charged him under § 841(b)(1)(C)" (Aplt.Appx. 233). He "possessed with intent to distribute 262.12 grams of powder cocaine and" thus could "not have been convicted under § 841(b)(1)(B)" (Aplt.Appx. 233). Still, at sentencing the district court "calculated [Mr.]

[3] This issue is an alternative to issue one, above. If the Court disagrees that Mr. Gray is entitled to withdraw his guilty plea, this issue explains that he nonetheless certainly is entitled to a full resentencing under the correct statute.

Gray's punishment under § 841(b)(1)(B)" (Aplt.Appx. 234). On § 2255 review, the court held this was a "legal error" that "affected a substantial right," which "prejudiced [Mr.] Gray because it led to a conviction for a more severe crime," which "was not harmless beyond a reasonable doubt" (Aplt.Appx. 234, 236).

Reasoning that Mr. "Gray has not been prejudiced with respect to the length of the sentence imposed," however, because the court surmised that "it would have sentenced [him] to the same sentence had it sentenced him under § 841(b)(1)(C)," the district court held the remedy for this harm was "amending the judgment to state a conviction under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)" (Aplt.Appx. 236). It held his sentence of 130 months "was well within § 841(b)(1)(C)'s statutory range," and any harm thus was cured by a clerical amendment to the underlying judgment, keeping the same conviction and sentence but just changing the statute number (Aplt.Appx. 236). It held this *despite* already having determined that this "*was more than* just a simple citation error" (Aplt.Appx. 234) (emphasis added).

This was error. Sentencing Mr. Gray under the wrong statute affected not only the citation in the underlying judgment, but the entire sentencing *process*, including the parties' sentencing recommendations. The error deprived him of his right to Due Process in sentencing, requiring the underlying judgment to be vacated and that Mr. Gray undergo a new resentencing proceeding under the correct statute.

A. A sentence entered under the wrong statute violates the defendant's right to Due Process, the only remedy for which is a complete resentencing under the correct statute, regardless of whether the ultimate sentence might be the same.

It is well-established that, in addition to the trial or plea process, the sentencing process itself "must satisfy the requirements of" Due Process. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). A "defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence …." *Id.*

As a result, "[s]entencing a defendant under the wrong statute" is "a due process violation when the [sentencer]'s proper discretion is impaired." *Murtishaw v. Woodford*, 255 F.3d 926, 969 (9th Cir. 2001). That the sentence under the correct statute might have been exactly the same is irrelevant. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

For this reason, whenever a defendant has been sentenced under the wrong statute, the remedy for this Due Process violation always has been to order a new sentencing proceeding under the correct statute. *See, e.g.*, *id.* at 347; *United States v. Bargas*, 80 Fed.Appx. 912, 913-14 (5th Cir. 2003); *Murtishaw*, 255 F.3d at 969-71, 974; *United States v. Greenwood*, 974 F.2d 1449, 1471-74 (5th Cir. 1992) (on Government's appeal); *Jones v. Arkansas*, 929 F.2d 375, 380-81 (8th Cir. 1991).

In *Hicks*, the defendant was sentenced under an Oklahoma habitual offender statute requiring a 40-year sentence, which the jury

recommended and the trial court imposed. 447 U.S. at 344-45. After sentencing, however, and while the case was on direct appeal, the Oklahoma courts found the statute to be unconstitutional. *Id.* at 345. Despite this, the state appellate courts affirmed the defendant's conviction and sentence, holding he was not prejudiced by the impact of the invalid statute because his sentence was within the range of punishment that could have been imposed in any event. *Id.* at 345.

The Supreme Court vacated and remanded for resentencing, holding:

> Where … a state has provided for the imposition of criminal punishment … the defendant has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent … in the exercise of [the sentencer's] statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. at 346.

The Court concluded that Oklahoma had denied the defendant the sentence to which he was entitled under state law "simply on the frail conjecture that" he might have received "a sentence equally as harsh as that mandated by the invalid … provision." *Id.* It held that "[s]uch an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." *Id.* (emphasis added). As a result, the defendant had to be resentenced under the correct statute. *Id.* at 346.

In *Murtishaw*, a California defendant was sentenced to death for first degree murder under a 1978 death penalty statute that did not exist at the time of his offense, rather than a slightly different 1977 death penalty statute. 255 F.3d at 961. The California Supreme Court rejected the defendant's *ex post facto* challenge, holding that the only difference between the two statutes was that the 1977 one allowed the jury to reject death even if it found aggravating circumstances outweighed mitigating circumstances, which the 1978 one did not, and the jury had not found this, such that the defendant's sentence would have been the same either way. *Id.* at 964.

On habeas review, the Ninth Circuit disagreed, holding that, due to the *Ex Post Facto* Clause,[4] the defendant was sentenced under the wrong statute: he should have been sentenced under the 1977 statute, rather than the 1978 one. *Id.* at 967. As a result, regardless of whether the result *might* have been the same, remand for resentencing was required. *Id.* This was because, cardinally, "[s]entencing [the defendant] under the wrong statute violated due process." *Id.* at 969.

In *Greenwood*, the Government indicted the defendant for possession of methamphetamine but mistakenly stated in the indictment that methamphetamine was a Schedule III controlled substance when in fact it was listed in Schedule II. 974 F.2d at 1471.

[4] U.S. Const. art. I, § 10.

As a result, and over the Government's objection once it realized the error, the district court sentenced the defendant under 21 U.S.C. § 841(b)(1)(D), rather than § 841(b)(1)(B), which was the statute that actually applied. *Id.* at 1472.

On the Government's appeal, the Fifth Circuit held that the application of the incorrect statute to the facts required resentencing under the correct statute. *Id.* at 1472-73. It rejected the defendants' argument that their 60-month sentences fit within either statute. *Id.* "Because the [district] court applied the wrong statute, … the sentences it imposed were illegal." *Id.* at 1472. The remedy was to "remand for resentencing" under § 841(b)(1)(B). *Id.*

Finally, in *Bargas*, virtually *exactly* the same situation as in this case occurred. 80 Fed.Appx. at 913-14. The defendant pleaded guilty to possession with intent to distribute marijuana and was sentenced to 87 months in prison. *Id.* at 913. On appeal, he "contend[ed], and the Government concede[d], that he was convicted of an offense under 21 U.S.C. § 841(b)(1)*(B)*, rather than an offense under 21 U.S.C. § 841(b)(1)*(C)*," as he should have been. *Id.* (emphasis in the original). The Government argued, however, that as the sentence could have been the same either way, a mere "remand for correction of this 'clerical error' would be the proper course." *Id.*

The Fifth Circuit disagreed and instead remanded the case for resentencing. *Id.* at 913-14. It held that this was "not the sort of

mechanical or clerical error that is subject to correction under [Fed. R. Crim. P.] 36." *Id.* at 913-14. The indictment incorrectly had charged the defendant "with an offense under § 841(b)(1)*(B)*, and [the defendant] pleaded guilty as charged in the indictment …." *Id.* at 914 (emphasis in the original). But this was legally incorrect. *Id.* at 913-14. As such, despite the fact that the defendant could have received 87 months either way, a new sentencing hearing was required to sentence the defendant under the correct statute. *Id.*

B. Mr. Gray was sentenced for Count One under the wrong statute, violating his right to Due Process, the remedy for which is to vacate the original criminal judgment and order a new sentencing proceeding.

All authority on point uniformly holds that sentencing a defendant under the wrong statute violates Due Process, regardless of whether the sentence *might* have been the same under the correct statute, and resentencing the defendant is the only permissible remedy. Given this, it is unsurprising that the district court cited no authority in holding otherwise (Aplt.Appx. 235-36).

The district court's conclusion that Mr. "Gray has not been prejudiced" because it surmised "it would have sentenced [him] to the same sentence had it sentenced him under § 841(b)(1)(C)" (Aplt.Appx. 236), was error. As in all the above cases, an amended judgment treating sentencing Mr. Gray under the wrong statute effectively as a

"clerical error" and summarily resentencing him to the same term by just "correcting" the statute in the judgment was not the appropriate remedy for this violation of Mr. Gray's right to Due Process.

Rather, the required remedy was to have Mr. Gray resentenced. No law supports the district court's notion that, because Mr. Gray's sentence of 130 months "was well within § 841(b)(1)(C)'s statutory range," any harm was cured by a clerical amendment to the underlying judgment (Aplt.Appx. 236). Indeed, as shown above, the law is to the contrary.

While the district court was correct that the ultimate Guidelines calculation over both Counts One *and* Two together would have been the same under either § 841(b)(1)(B) or § 841(b)(1)(C) (Aplt.Appx. 233 n.3), both parties requested significantly lower sentences than the Guidelines prescribed (S.Tr. 33). This was because Count One's individual Guidelines sentence was much lower than Count Two's, and Mr. Gray was assuming responsibility by pleading guilty.

Under U.S.S.G. § 4B1.1(c)(3),[5] because Mr. Gray also was pleading guilty to a violation of 18 U.S.C. § 924(c) and the court found he qualified as a "career offender," any ordinary guidelines range was superseded by a special range of 262-327 months for both counts.

[5] All citations to the U.S. Sentencing Guidelines are to the 2010 version, which apply to Mr. Gray's case.

But that does not mean that sentencing Mr. Gray under the wrong, harsher statute made no difference to the Guidelines calculation itself. Mr. Gray's Guidelines criminal history category was VI (PSI 10). Section 841(b)(1)(B) mandates a minimum sentence of five years and a maximum of 40 years. Applying the Guidelines to Count One sentenced under that statute, possessing the minimum of more than 500 grams of cocaine, per the drug quantity table, yields a level of 26 and a sentencing range of 120-150 months. U.S.S.G. § 2D1.1(a)(5). Because Mr. Gray accepted responsibility by pleading guilty, this would be reduced two levels to 24, yielding a range of 100-125 months. U.S.S.C. §§ 3E1.1(a) and (b). Only with the addition of Count Two did Mr. Gray's guidelines range increase to 262-327 under § 4B1.1(c)(3) (PSI 7).

Still, at sentencing, the Government recommended a total sentence of 157-196 months' imprisonment and Mr. Gray's counsel recommended 157 months' imprisonment (S.Tr. 33). Neither party explained from where they drew this number. The 2010 Guidelines sentencing table does not include such a range. It appears, though, that the Government was seeking to average in some manner the 100-125-month range for Count One and 262-327-month total range. The district court then decided to sentence Mr. Gray within the Government's total recommendation, ordering 190 months (S.Tr. 48).

But Mr. Gray's actual base Guidelines level for Count One *was not* 26. It was 20. Applying the drug quantity table to Mr. Gray's *actual*

quantity of cocaine, "at least 200 G but less than 300 G" yields a base level of 20. § 2D1.1(a)(5). Subtracting three levels for assumption of responsibility yields a level of 17. §§ 3E1.1(a) and (b). At a criminal history category of VI, the Guidelines range for level 17 is ***51-63 months***. While the § 924(c) conviction still mandated a *special* range of 262-327 months for both charges together, § 4B1.1(c)(3) that was not what the Government recommended or what the district court sentenced.

Thus, taking this *lower* range into mental calculation, it is entirely possible that the Government would have recommended – and the district court would have imposed – a much lower range than it did. Plainly, using the wrong statute affected the Guidelines calculation – and likely the Government's recommendation under it, which the district court followed.

Mr. Gray recognizes that all of this – what the Government *might* have recommended, what the district court *might* have done – is speculation. But that is what the district court engaged in, too. It speculated that, applying the correct statute, "it would have sentenced [him] to the same sentence had it sentenced him under § 841(b)(1)(C)" (Aplt.Appx. 236). But it had no way of knowing that. The parties were afforded no opportunity to make their arguments as to the range of sentencing under the correct statute.

That is why federal law uniformly has held that this exact situation commands resentencing, regardless of whether the defendant speculatively *might* or *might not* have received the same sentence in the end. "Sentencing [Mr. Gray] under the wrong statute" was "a due process violation," and the district court's "proper discretion [wa]s impaired." *Murtishaw*, 255 F.3d at 969. Indeed, given that Mr. Gray's minimum statutory prison sentence on Count One was actually *zero*, not five years, his total minimum sentence, including Count Two, was five years. The district court was laboring under the notion that the minimum was ten years, when it was not. That sentencing Mr. Gray under the correct statute *might* have resulted in the same sentence is of no consequence. *Hicks*, 447 U.S. at 346.

Simply put, Congress "has provided for the imposition of criminal punishment" and Mr. Gray had "a substantial and legitimate expectation that he w[ould] be deprived of his liberty only to the extent" that the district court would follow that law, which is a requirement that the Fifth Amendment "preserves against arbitrary deprivation by the" courts. *Hicks*, 447 U.S. at 346. "[S]imply … the frail conjecture that" Mr. Gray might have received under the correct statute "a sentence equally as harsh as that" he received under the incorrect statute is "an arbitrary disregard of [his] right to liberty" and "a denial of due process of law." *Id.* The law of the United States is that, to cure

this Due Process violation, Mr. Gray must be resentenced under the correct statute. *Id.* at 346.

Regardless of whether Mr. Gray's 130-month sentence on Count One would fit § 841(b)(1)(C), too, "the [district] court applied the wrong statute" and thus "the sentenc[e] it imposed w[as] illegal." *Greenwood*, 974 F.2d at 1472. The only permissible remedy is to "remand for resentencing" under § 841(b)(1)(C). *Id.*

This was "not the sort of mechanical or clerical error that is subject to correction under [Fed. R. Crim. P.] 36" simply by, as the district court did here, summarily changing the statute number in its original judgment. *Bargas*, 80 Fed.Appx. at 913-14. The plea agreement and information incorrectly charged Mr. Gray "with an offense under § 841(b)(1)*(B)*, and [he] pleaded guilty as charged …." *Id.* at 914. But this was legally incorrect. *Id.* at 913-14. As such, despite the fact that Mr. Gray could have received 130 months under § 841(b)(1)(C), too, a new sentencing hearing is required to sentence him under the correct statute. *Id.* Only this will cure the district court's Due Process violation. *Id.*

The district court erred in concluding otherwise. As in *Hicks*, *Murtishaw*, *Greenwood*, *Jones*, and especially *Bargas*, this Court must reverse the judgment below and remand this case with instructions to vacate the underlying criminal judgment and resentence Mr. Gray.

Conclusion

This Court should reverse the judgment below and should remand this case with instructions to vacate Mr. Gray's underlying conviction and sentence and allow him to withdraw his plea. Alternatively, the Court should reverse the judgment below and should remand this case with instructions to vacate Mr. Gray's underlying sentence and order him resentenced in a new sentencing proceeding.

Respectfully submitted,

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I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because this brief has been prepared in a proportionally spaced typeface, Century Schoolbook size 14 font, using Microsoft Word 2016.

I further certify that the electronic copies of both this Brief of the Appellant and the Addendum filed via the Court's ECF system are exact, searchable PDF copies thereof, that they were scanned for viruses using Microsoft Security Essentials and, according to that program, that they are free of viruses.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that, on December 28, 2015, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system.

/s/Jonathan Sternberg
Attorney