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

REPLY BRIEF OF THE APPELLANT

JONATHAN STERNBERG, Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (Ext. 7020)
Facsimile: (816) 292-7050
E-mail: jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
DEANDREA GRAY

Table of Contents

Table of Authorities

Cases

Constitution of the United States

United States Code

United States Sentencing Guidelines (2010)

Federal Rules of Appellate Procedure

Federal Rules of Criminal Procedure

Federal Rules Governing Section 2255 Proceedings

Reply Argument

I. Mr. Gray's issues on appeal properly are the first two of the district court's certified issues.

As Appellant Deandrea Gray explained in his opening brief (Brief of the Appellant ("Aplt.Br.") 24), the district court certified three issues for appeal under 28 U.S.C. § 2253(c)(1)(B) and Rule 11(a) of the Rules Governing Section 2255 Proceedings:

> 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.
>
> 3. Whether [Mr.] Gray received ineffective assistance of trial and/or appellate counsel because his attorneys failed to discover the mistake in the Information.

(Appellant's Appendix ("Aplt.Appx.") 240).

The Government argues that Mr. "Gray only addresses [issue] two, arguing his plea was neither knowing or voluntary," and thus "has abandoned the other two certified issues" (Brief of the Appellee ("Aple.Br.") 19). It suggests, though, that "Arguably the first certified issue is essentially the same as the second certified issue," so its "response under [issue] one effectively addresses the first two certified issues on appeal" (Aple.Br. 19, n.5).

Mr. Gray is unsure what the Government means by this. Is it suggesting that one of Mr. Gray's two issues on appeal do not fall within the certification? Its brief certainly does not actually say that.

Mr. Gray brings ***two*** issues on appeal, ***both*** of which plainly fall within the certified issues: (1) his plea was not knowing or voluntary (certified issue #2: "Whether [Mr.] Gray knowingly and voluntarily entered his plea of guilty"), entitling him to withdraw his guilty plea (certified issue #1: "Whether [Mr.] Gray's conviction under 21 U.S.C. § 841(b)(1)(B) entitles him to withdraw his guilty plea"); and (2) regardless, being sentenced under the wrong statute using the wrong range of punishment entitles him to a new sentencing hearing (certified issue #1: "Whether [Mr.] Gray's conviction under 21 U.S.C. § 841(b)(1)(B) entitles him to … receive a new sentencing hearing").

As a result, while the Government is correct that Mr. Gray does not address the third certified issue, ineffective assistance of counsel, he most certainly does argue the other two. While issues identified in certificates of appealability are liberally construed to encompass those argued in the appellant's brief, especially where the Government addresses them without arguing they are barred, *Snyder v. Addison*, 89 Fed.Appx. 675, 678 (10th Cir. 2004), here that is not even necessary.

Despite the Government's strange equivocation, both of Mr. Gray's issues on appeal properly are encompassed within the district court's certification.

II. The different sentencing provisions in 21 U.S.C. § 841(b) that depend on drug quantity are not mere "penalty provisions," but instead state a distinct part of the offense that § 841 creates, with distinct elements subject to disparate statutory sentences.

As Mr. Gray explained in his opening brief, 21 U.S.C. § 841(a)(1) states a general offense of "intentionally … possess[ing] with intent to distribute … a controlled substance" (Aplt.Br. 28-29). The next subsection, § 841(b), titled "Penalties," lists a series of possible sentencing ranges for various commissions of this offense based on the type and quantity of the controlled substance (Aplt.Br. 29). Mr. Gray pleaded guilty to and was sentenced for his § 841(a)(1) offense involving cocaine under § 841(b)(1)(B), which applies only to "500 grams or more" of cocaine, when in fact he only possessed 262.12 grams, which actually fell under § 841(b)(1)(C), not § 841(b)(1)(B).

Throughout its brief, the Government refers to the sentencing provisions of § 841(b) as "penalty statutes," "penalty provisions," or "penalty ranges" (Aple.Br. 21, 28, 30, 50), which it contrasts to what it calls a "substantive charge" (Aple.Br. 42). It briefly suggests that Mr. Gray's conviction was for violation of § 841(a)(1), the elements for which – "possess[ing] with intent to distribute 50 grams or more of cocaine" – control entirely, regardless of what "penalty statute" is applied at sentencing (Aple.Br. 28). It says that what happened to Mr. Gray was a "miscitation to the appropriate penalty provision …, not an illegal

probability" (Aple.Br. 30) – whatever that means. *See also infra* at 14-25.

Thereafter, much of the Government's argument as to both of Mr. Gray's issues on appeal concentrates and depends on the notion that the information, plea agreement, and sentencing hearing stated the correct "elements" for either §§ 841(b)(1)(B) *or* 841(b)(1)(C) (Aple.Br. 1, 19, 21, 22, 30-31, 33-34, 41, 43, 50). It argues that, as a result, "the information and plea agreement supported a § 841(b)(1)(C) offense," and the district court merely clerically correcting the underlying judgment was sufficient (Aple.Br. 33). It believes "this is a situation involving a miscitation to the penalty provision – rather than a situation where an essential element of the offense is missing" (Aple.Br. 30-31).

At the same time, however, the Government repeatedly refers to Mr. Gray's "conviction under … § 841(b)(1)(B)", "conviction under ... [§ 841](b)(1)(C)," and "§ 841(b)(1)(C) offense" (Aple.Br. 19, 21, 33-34, 43, 50). If § 841(a)(1) is the "offense" and § 841(b) is merely the "penalty," how could there be a "conviction under" or "offense of" any of § 841(b)'s subsections?

The Government's confusion is because it misstates the "elements" of any of the § 841(b) subsections. It is well-established that, while "drug quantity is not an element of the substantive offense of possession with intent to distribute" under § 841(a)(1), *United States v. Buchanan*, 985 F.2d 1372, 1377 (8th Cir. 1993), the offense in § 841 of possession of

a controlled substance with intent to distribute it is more than *just* § 841(a)(1). As the Government tacitly acknowledges by referring to Mr. Gray's conviction or offense under *both* § 841(a)(1) *and* § 841(b)(1)(B) or (C), an offense under § 841 requires both the § 841(a)(1) component *and* an § 841(b) component.

As a result, because which subsection of § 841(b)(1) applies to the defendant is a part of the offense, "quantity ***is*** an element of the offense charged under 21 U.S.C. § 841." *United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (emphasis added). Because the quantity of the controlled substance at issue controls – and may aggravate – the statutory sentencing range, "the 'drug quantity' question … [i]s thus an element of the aggravated crime …." *United States v. Delgado-Marrero*, 744 F.3d 167, 186 (1st Cir. 2001). Below, the district court plainly agreed, finding that the information *did* fail to allege an essential element of the crime that it charged under § 841(b)(1)**(B)**, not **(C)**: that the quantity of cocaine Mr. Gray possessed was more than 500 grams (Aplt.Appx. 233).

Here, as the district court found and the Government concedes, Mr. Gray erroneously was charged with, pleaded guilty to, and was sentenced for a violation of § 841(b)(1)(B). He only ever had notice that ***this*** was the penalty half of the offense under § 841 with which he was charged. As a result, the quantity to meet that ***was*** an element, and the Government concedes that the quantity necessary to meet §

841(b)(1)(B) was not present. The facts may have supported a § 841(b)(1)(C) offense, but Mr. Gray was not charged with such an offense: he expressly was charged with an offense under § 841(b)(1)(B).

This is a far cry from *United States v. Martinez*, 277 F.3d 517 (4th Cir. 2002), on which the Government relies (Aple.Br. 31-33). There, the defendant was charged with violating § 841(b)(1)(C), *not*, as here, § 841(b)(1)(B). *Id.* at 530. On appeal, the defendant argued that quantity was an element of § 841(b)(1)(C), and the district court had violated Fed. R. Crim. P. 11(c)(1) by not informing him of that quantity. The Fourth Circuit disagreed, holding that, as § 841(b)(1)(C) was the "floor" of § 841(b)(1) as to the defendant's cocaine and marijuana offenses, the amount was not an element. *Id.*

Conversely, here, Mr. Gray incorrectly was charged with, pleaded guilty to, and was sentenced for violation of § 841(b)(1)(B), *not* § 841(b)(1)(C). As a result, the quantity – 500 grams or more – *was* an element, and he was not informed of it. *Martinez* is inapposite.

Therefore, the Government's suggestion that "the information and plea agreement supported a § 841(b)(1)(C) offense" is without merit. While both referred to "more than 50 grams of cocaine," 500 grams of cocaine, in violation of § 841(b)(1)(B), also is more than 50 grams of cocaine. Both the plea agreement and the information cited § 841(b)(1)(B). Following § 841(b)(1)(B), both stated that, for Mr. Gray's offense of possessing with intent to distribute more than 50 grams of

cocaine, "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, 30).

The Government is forced to concede all of this. "[T]he caption of the information incorrectly stated that [Mr.] Gray faced a total sentencing exposure of 10 years' imprisonment up to life, when, actually, he was subject a total exposure of five years' imprisonment up to life" (Aple.Br. 28). The "plea agreement … restated the same erroneous penalty range as to Count One" (Aple.Br. 28). "At the change-of-plea hearing, the district court incorrectly informed [Mr.] Gray that, under Count One, he was subject to the § 841(b)(1)(B) penalty" (Aple.Br. 21). And at sentencing, "the district court erroneously informed [Mr.] Gray that, on Count One, he was subject to a sentence of not less than five years, but not more than 40 years' imprisonment" (Aple.Br. 29).

Nonetheless, the Government seeks to use its "penalty statute" moniker to distinguish *United States v. Stubbs*, 279 F.3d 402 (6th Cir. 2002) (Aple.Br. 42), on which Mr. Gray relied in his opening brief (Aplt.Br. 10, 31-32, 34-37, 39). It argues that *Stubbs* involved different statutes, 18 U.S.C. §§ 924(c) and 924(o), which "require[d] different levels of proof as to conduct" (Aple.Br. 42-43) (quoting *Stubbs*, 279 F.3d at 409), whereas "[h]ere, … the information charged the elements of a §

841(b)(1)(C) and the facts admitted by [Mr.] Gray supported those elements" (Aple.Br. 43).

But §§ 841(b)(1)(B) and (C) have *different* elements. Section 841(b)(1)(B) requires possession of more than 500 grams of cocaine, whereas § 841(b)(1)(C) does not. Just as in *Stubbs*, the two statutes required different levels of proof as to conduct, *Thomas*, 274 F.3d at 663; *Delgado-Marrero*, 744 F.3d at 186, and the district court convicted and sentenced Mr. Gray under the wrong one.

Similarly, the Government attempts to distinguish *United States v. Gigot*, 147 F.3d 1193, 1198 (10th Cir. 1998), on which Mr. Gray relied in his opening brief (Aplt.Br. 31), by saying that "[t]here, the court failed to inform the defendant of the elements of the offense *or* the correct statutory range of punishment" (emphasis in the original), but here, "the information and the plea agreement included § 841(b)(1)(C)'s elements" (Aple.Br. 43).

But the elements of the offense to which Mr. Gray pleaded guilty, § 841(b)(1)(B), included that the amount of cocaine had to be 500 grams or more. Nowhere at any point below did the Government or the district court inform Mr. Gray of this. And the court told him the range of punishment on Count One was five to 40 years in prison (S.Tr. 31), which the Government concedes was incorrect. Thus, just as in *Gigot*, "the court failed to inform [Mr. Gray] of the elements of the offense or the correct statutory range of punishment" (Aple.Br. 43).

III. As the Government does not cross-appeal, it cannot argue that the district court erred in finding that Mr. Gray's guilty plea to 21 U.S.C. § 841(b)(1)(B) was not knowing or voluntary, that the information did not contain the essential elements of that charge, that a properly informed judge would not have accepted the guilty plea, or that being convicted and sentenced for a crime he did not commit prejudiced Mr. Gray.

As part of its meritless argument about the "elements" of § 841(b), the Government goes so far as to argue that "the district court *improperly found* that 'the Information failed to allege an essential element of the crime, namely that [Mr.] Gray possessed with intent to distribute 500 grams or more of cocaine'" (Aple.Br. 34, n.14) (quoting Aplt.Appx. 233) (emphasis added). Throughout its brief, the Government also attacks other findings and holdings the district court made, sometimes *sub silentio*, including that:

(1) Mr. Gray's plea to § 841(b)(1)(B) was not knowingly or voluntarily entered (Aplt.Appx. 237), *cf.* Aple.Br. 19, 20, 23 (arguing Mr. Gray's plea to § 841(b)(1)(B) *was* knowing and voluntary);

(2) A "properly informed judge would [not] have accepted [Mr.] Gray's guilty plea to Count One" (Aplt.Appx. 236), *cf.* Aple.Br. 54-55 (arguing that nothing would be different had Mr. Gray been charged correctly); and

(3) Mr. Gray was "prejudiced … because [the conviction and sentence under the incorrect charge] led to a conviction for a more severe crime" (Aplt.Appx. 236), *cf.* Aple.Br. i, 21-22, 26, 37-39, 41, 47-48,

50, 57, 59 (arguing repeatedly that Mr. Gray suffered *no* prejudice as a result of being convicted and sentenced for an offense he did not commit).

As Mr. Gray explained in his opening brief, because the Government does not cross-appeal, it cannot now attack the district court's findings or conclusions (Aplt.Br. 28) (citing *Duit Constr. Co. v. Bennett*, 796 F.3d 938, 941-42 (8th Cir. 2015)). The Government offers no response to this, but goes ahead and argues that the district court erred against it anyway.

This Court cannot consider those arguments. "Under [the Supreme Court's] unwritten but longstanding [cross-appeal] rule, an appellate court may not alter a judgment to benefit a nonappealing party." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 244-45 (2008)). "[A]n appellee who does not cross-appeal may not 'attack the [lower court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *Jennings v. Stephens*, 135 S.Ct. 793, 798 (2015) (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

But that is exactly what the Government is seeking to do. The district court found that Mr. Gray's plea to a crime all parties agree he did not commit, and for which the information did not properly charge him, was *not* knowing and voluntary. Mr. Gray relies on this in explaining that, as a result, as a matter of Due Process he has to be

allowed to withdraw his plea to that offense. The Government, however, premises its argument on the notion that Due Process does not come into play because Mr. Gray's plea *was* knowing and voluntary. The same goes for the other express findings it attacks.

If the Government wanted to challenge the district court's findings and conclusions in this manner, it had to cross-appeal. It did not. As a result, this Court cannot consider its requests to find that the district court somehow erred to the Government's detriment.

IV. The Government's and district court's incorrect use of 21 U.S.C. § 841(b)(1)*(B)* in the information, the plea agreement, the presentence investigation report, and the judgment, and at the plea hearing and sentencing, rather than 21 U.S.C. § 841(b)(1)*(C)* as the Government now concedes would have been correct, was not a mere "miscitation" with no substantive effect.

This appeal concerns the effect on Mr. Gray's conviction and sentence of the Government's and the district court's use of the incorrect 21 U.S.C. § 841(b)(1)***(B)*** – possessing 500 grams or more of cocaine – as the "amount" component of his § 841 offense of possession of cocaine with intent to distribute, rather than the correct § 841(b)(1)***(C)*** – possessing more than 50 but less than 500 grams of cocaine. The district court itself held that § 841(b)(1)(B) was the incorrect statute, and § 841(b)(1)(C) was the correct statute (Aplt.Appx. 231-35). The Government concedes this (Aple.Br. 21, 28-29).

In his opening brief, Mr. Gray explained that, as a result of this error, and as a matter of Due Process: (1) his plea to an offense all parties agree he did not commit was unknowing and involuntary, requiring him to be allowed to withdraw his plea; and (2) the district court's sentencing him under the wrong penalty statute that carried a far larger statutory range requires a full resentencing.

Throughout its brief, apparently hoping subliminally to downplay the importance of this gross error, the Government repeatedly refers to its and the district court's use of § 841(b)(1)(B), rather than (b)(1)(C), as a "miscitation" (Aple.Br. i, 1, 4, 9, 12, 13, 14, 17, 19, 21-22, 24, 26, 28, 30-31, 34, 37, 39, 40-41, 45-47, 50-54, 60), which it often characterizes as "unfortunate" (Aple.Br. i, 4, 28). Buried in its brief is the Government's explanation for what it seems to mean by calling this a "miscitation": "[T]here was arguably a violation of both [Fed. R. Crim. P.] 7(c)(l) (in that the information did not include an accurate statutory penalty citation) and [Fed. R. Crim. P.] 11 (in that the district court advised Gray of the incorrect range of punishment under Count One)" (Aple.Br. 23).

It then argues that, under Rule 11, to withdraw his guilty plea Mr. Gray would have to show "a 'complete miscarriage of justice'" or "an error which is … constitutional" (Aple.Br. 23) (quoting *United States v. Vonn*, 535 U.S. 55, 63 (2002); *Rogers v. United States*, 1 F.3d 697, 699 (8th Cir. 1993) (citation omitted)). "Unless [the defendant can

demonstrate that his plea was not knowing and voluntary, his collateral attack fails" (Aple.Br. 24) (quoting *Roberson v. United States*, 901 F.2d 1475, 1477 (8th Cir. 1990)). Similarly, it argues that, under Rule 7, Mr. Gray cannot withdraw his guilty plea "[u]nless the defendant was misled and thereby prejudiced" (Aple.Br. 24) (quoting Rule 7(c)(2)).

The Government's argument that Mr. Gray's pleading guilty to, conviction for, and being sentenced under the wrong statute was in any way a mere "miscitation" with no substantive effect is without merit.

First, Mr. Gray's point both before the district court and now, on appeal, is that there *was* a miscarriage of justice, a constitutional error, his plea was not knowing or voluntary, and he was misled and prejudiced (Aplt.Br. 27-32, 34-39). The district court itself expressly agreed: Mr. Gray's "plea was not knowing and voluntary," and this was a "prejudicial error," a "legal error" (Aplt.Appx. 234, 236-37). In his opening brief, Mr. Gray explained that, much more than just a "legal error," unknowingly pleading to a crime he did not commit because he was misinformed about the law in relation to the facts was a *constitutional* error, in violation of his Fifth Amendment right to Due Process (Aplt.Br. 27-28, 32-33, 39). The Government offers no response.

Second, the Government itself concedes that Mr. Gray pleading guilty to a crime he did not commit had real, substantive effects. "[T]he caption of the information incorrectly stated that [Mr.] Gray faced a total sentencing exposure of 10 years' imprisonment up to life, when,

actually, he was subject a total exposure of five years' imprisonment up to life" (Aple.Br. 28). The "plea agreement … restated the same erroneous penalty range as to Count One" (Aple.Br. 28). "At the change-of-plea hearing, the district court incorrectly informed [Mr.] Gray that, under Count One, he was subject to the § 841(b)(1)(B) penalty" (Aple.Br. 21). And at sentencing, "the district court erroneously informed [Mr.] Gray that, on Count One, he was subject to a sentence of not less than five years, but not more than 40 years' imprisonment" (Aple.Br. 29).

The Government argues, though, that this nonetheless was no-harm, no-foul, because:

- "The district court sentenced [Mr. Gray] to 130 months on Count One, well within § 841(b)(1)(C)'s range of punishment" (Aple.Br. 21, 37);
- Due to Count Two, Mr. "Gray's advisory Guidelines range was the same regardless of the citation" (Aple.Br. 21, 37, 50); and
- The "district court explained … it would have imposed the same sentence even if the information and plea agreement had cited the correct statute" and it "did not impose a higher sentence as a result of the statutory miscitation" (Aple.Br. 38-39, 50).

Each of these bases is without merit. First, that Mr. Gray's ultimate sentence for Count One, 130 months, was within either §§ 841(b)(1)(B) or (C) has no bearing on whether his plea to the

inapplicable § 841(b)(1)(B) was knowing and voluntary, or whether his being sentenced under the wrong statute requires resentencing as a matter of Due Process. In his opening brief, Mr. Gray cited several decisions in which the Government's exact argument was rejected, including *Stubbs*, 279 F.3d at 405, 410-12; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *United States v. Greenwood*, 974 F.2d 1449, 1471-74 (5th Cir. 1992); and *United States v. Bargas*, 80 Fed.Appx. 912, 913-14 (5th Cir. 2003) (Aplt.Br. 31-32, 34-37, 44-46).

In *Stubbs*, the defendant pleaded guilty to and was sentenced under 18 U.S.C. § 924(c), rather than 18 U.S.C. § 924(o), as he should have been. 279 F.3d at 405. Section 924(c) calls for a mandatory minimum sentence of five years and a maximum of life imprisonment, and § 924(o) calls for a sentence of up to 20 years. In holding that the defendant had to be allowed to withdraw his plea if he wished, the Sixth Circuit rejected the Government's "harmless error" argument, as here, that the defendant's five-year consecutive sentence was within either statute. 279 F.3d at 410-12.

The Government seeks to distinguish *Stubbs* on the basis that the statutes in §§ 924(c) and (o) "require[d] different levels of proof as to conduct" (Aple.Br. 42-43) (quoting *Stubbs*, 279 F.3d at 409), and here the two did not. Mr. Gray already has explained that is meritless, as possessing over 500 grams of cocaine is different than possessing less than 500 grams of cocaine. *Supra* at 7-12. But if the Government is

right about its "the sentence would be the same either way" argument then *Stubbs* would have to be distinguishable on that basis, too. The Government does not even attempt to argue it is so.

In *Hicks*, the Supreme Court expressly disagreed with Oklahoma's argument that the defendant's 40-year sentence under the wrong statute was harmless error because he equally could have received the same sentence under the correct statute. 447 U.S. at 346. The Government seeks to distinguish *Hicks* by arguing that, there, "under the correct statute, the jury could have imposed" a sentence of 10 years, rather than minimum of 40 years (Aple.Br. 56-57). But that was exactly the Supreme Court's point: the jury *could* have imposed a *lesser* amount of time, regardless if it *also* could have imposed the *same* amount of time. 447 U.S. at 346.

The same "distinction" is true here: under the correct statute for *both* offenses, the court could have imposed a minimum of *five* years, rather than the nearly 16 it imposed. The Government criticizes Mr. Gray's argument that "the district court was … 'laboring' under the impression that [Mr.] Gray faced a minimum sentence … because, once it granted the Government's motion" for a downward departure, Mr. "Gray no longer faced *any* minimum sentence" (Aple.Br. 49-50, 53-54) (citing 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1) (emphasis in the original). But the district court *itself* agreed that it was working under the wrong statute with a thought of a greater minimum on Count One than the

correct statute would have supported: at sentencing, it "calculated [Mr.] Gray's punishment under § 841(b)(1)(B)," which was a "legal error" (Aplt.Appx. 234).

The Government seeks to distinguish *Greenwood*, 974 F.2d at 1472, by arguing it involved "the district court appl[ying] § 841(b)(1)(D), which imposes a maximum five years' imprisonment, rather than § 841(b)(1)(A), which imposes a minimum 10 years' imprisonment (up to life)," and so "the district court in *Greenwood* imposed a sentence which was *lower* than the correct statute's mandatory minimum 10-year sentence," which "made the sentence illegal and required resentencing" (Aple.Br. 57-58) (emphasis in the original).

Only *one of* the two methamphetamine defendants in *Greenwood* who received 60-month sentences correctly should have been sentenced under § 841(b)(1)(A). *Id.* at 1472. The other should have been sentenced under § 841(b)(1)(B)(viii), which *does* allow for a five-year sentence. *Id.* Nonetheless, the Fifth Circuit held this made *no* difference, and ordered resentencing anyway. *Id.*

Finally, the Government tries to get around *Bargas*, 80 Fed.Appx. at 913-14, by arguing that, besides the *exact* "(B) versus (C)" error present in this case, the district court also incorrectly had calculated the defendant's guidelines range (Aple.Br. 58-59). While that is true, the Fifth Circuit separately *did* reject the notion that, because the defendant could have been sentenced to 87 months either way, this was

a clerical error (i.e., miscitation) subject to correction under Fed. R. Crim. P. 36, and it *was* one of the reasons for ordering resentencing. *Id.*

The Government argues that "[n]o one [here] is requesting a Rule 36 amendment" (Aple.Br. 59). But, in effect, that is exactly what the district court did and what the Government asks the Court to affirm: it "corrected" the statutory citation on its underlying judgment from "(B)" to "(C)," and left the rest the same. This is precisely what the Fifth Circuit in *Bargas* held was *impermissible*. The Government even calls this a "correction," arguing the court "corrected [Mr.] Gray's judgment to reflect the crime to which he pled" (Aple.Br. 20). As in all these cases, Mr. Gray *did not* plead guilty to § 841(b)(1)(C): he pleaded guilty – unknowingly and involuntarily incorrectly – to § 841(b)(1)(B). That his sentence under § 841(b)(1)(C) *might* have been the same as the one he erroneously received under § 841(b)(1)(B) is irrelevant.

Second, the same goes for the Government's argument that, due to Count Two, Mr. "Gray's advisory Guidelines range was the same regardless of the citation" (Aple.Br. 21, 37, 50). Mr. Gray conceded in his opening brief that the addition of Count Two gave him a Guidelines range of 262-327 for both counts together, regardless of whether Count One was under § 841(b)(1)(B) or (C) (Aplt.Br. 47). But the parties did not *use* the actual Guidelines range (S.Tr. 33). The Government sought and received a downward departure due to Mr. Gray's substantial assistance to the Government in an unrelated matter, enabling the

parties to argue for much lower ranges than the Guidelines sought.[1] (Similarly, for this reason, the Government's invocation of the plea agreement's provision barring Mr. Gray from arguing outside the Guidelines range (Aple.Br. 54) is irrelevant.)

As a result, because neither the parties nor the district court used the Guidelines range, the fact that it was the same either way is irrelevant. Notably, the Government cites *no* authority in which a defendant sentenced under the wrong statute was *not* ordered to be resentenced under the correct statute – for this or any other reason.[2] While it attacks the authorities on which Mr. Gray relied, it does not offer any of its own as to his second point on appeal.

Indeed, one of the decisions the Government cites in support of its response to Mr. Gray's first issue, arguing that the plea did not have to be withdrawn, *United States v. Rolon-Ramos*, 502 F.3d 750, 759 (8th

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[1] Counsel for Mr. Gray agrees that this was the reason for the much lower sentencing recommendations than the Guidelines range. Because the information was sealed below, and he did not represent Mr. Gray below, he did not know this until the Government filed its brief under seal along with the sealed materials. As explained here, though, that makes no difference.

[2] The Government cites *United States v. Covarrubia-Mendolia*, 241 Fed.Appx. 569 (10th Cir. 2007), as an example of a remand being ordered to correct a statutory citation (Aple.Br. 41). There, though, the error was in an *indictment* under which the defendant was tried, not a guilty plea that depended on its knowingness or voluntariness.

Cir. 2007) (Aple.Br. 31), *still* held that the defendant had to be resentenced under the correct statute. There, a defendant was convicted under §§ 841(a)(1) and § 924(c) in connection with 500 grams or more of methamphetamine, but this Court held there was no evidence of that amount. *Id.* at 754-55. As a result, the defendant had to be resentenced. *Id.*

But 500 grams or more of methamphetamine is governed by § 841(b)(1)(A), whereas a lower amount is governed by § 841(b)(1)(B). As a result, in *Rolon-Ramos*, too, the defendant's sentence would have had the same Guidelines range either way due to the § 924(c) offense, under the same Guidelines provisions the Government cites here. Nonetheless, this Court *still* required that he be resentenced.

The reason for this is obvious. Sentencing a defendant under the wrong, harsher statute when he did not commit that offense *always* is a Due Process violation (Aplt.Br. 42-46). That the Government is unable to come up with a *single* counterexample in which it was held *not* to require at least resentencing is unsurprising. "[T]he 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." *Hicks*, 447 U.S. at 346.

As well, Mr. Gray was sentenced separately for both offenses: 130 months for Count One and 60 months for Count Two. As in *Rolon-*

Ramos, he is not challenging his sentence on Count Two, only that on Count One: a crime he did not commit. Thus, just as in *Rolon-Ramos*, the Court can order him resentenced on Count One, *not* Count Two.

The Government's final reason for arguing that convicting and sentencing Mr. Gray for a crime he did not commit was a "miscitation" with no substantive effect – that the "district court explained … it would have imposed the same sentence even if the information and plea agreement had cited the correct statute" (Aple.Br. 38-39, 50) – is also meritless. As he explained in his opening brief, this was mere speculation (Aplt.Br. 49). The Government offers no response.

Simply put, the district court had no way of knowing what it would or would not have done. It was not a psychic, prognosticator, or soothsayer. The easiest way to find out for sure is, as in *every other decision* in which a defendant was sentenced under the wrong, harsher statute, to obey Mr. Gray's Fifth Amendment right to Due Process and order him resentenced under the correct statute.

The Government, though, argues that, "even if there were a resentencing, [Mr.] Gray could make no new arguments" because, "In the plea agreement, [he] agreed not to argue for a sentence outside the Guidelines range" (Aple.Br. 54). It suggests that, "On remand for resentencing, [Mr.] Gray would be bound to recommend no better than the 157 months he advocated the first time" (Aple.Br. 55). Thus, it says, "Resentencing will accomplish nothing" (Aple.Br. 55).

This is untrue. First, Mr. Gray was not "bound" to 157 months. The Government's downward departure motion argued for an open departure "downward by an amount which fully reflects defendant's past and possible future assistance" (Appellee's Addendum A2). The parties then were afforded an opportunity to make their arguments for what that should mean. Mr. Gray's counsel requested a 50% reduction from the Guidelines (Sealed Sentencing Transcript 5-6). Ultimately, the court held it would impose a 40% reduction. As a result, Mr. Gray's counsel was not "bound" to anything, and certainly would not be on resentencing. Again, there is simply *no way of knowing* what would happen upon resentencing, and there is no harm in ordering it.

Plainly, convicting and sentencing Mr. Gray under § 841(b)(1)(B), a crime all parties and the district court agree he did not commit, rather than the correct § 841(b)(1)(C), was not a "miscitation" with no substantive effect. To the contrary, as the court and the parties relied on the wrong statute with its aggravated sentence, its use violated Mr. Gray's right to Due Process both in the plea and sentencing portions of his underlying case.

Simply changing the cited statute in the judgment, as if it were a clerical error, is not and cannot ever be a sufficient or just remedy. Instead, the Court should allow Mr. Gray to withdraw his plea or, at the least, should order that he be fully resentenced.

V. That the original indictment charged more serious offenses than the information to which Mr. Gray pleaded guilty is irrelevant to the fact that his plea to an offense he did not commit was not knowing or voluntary.

In his opening brief, Mr. Gray explained that, because he lacked knowledge of the law in relation to the facts when he pleaded guilty to § 841(b)(1)(B), a crime he did not commit, and as the district court found, this meant that his plea was not knowing and voluntary (Aplt.Br. 27-28). Thus, as a matter of Due Process, he must be allowed to withdraw his plea (Aplt.Br. 27-28).

Ignoring the requirement that, both in the Rule 11 colloquy *and* the plea agreement, Mr. Gray must be correctly informed of the law in relation to the facts, which he was not, the Government argues Mr. Gray cannot show he would not have entered into the plea agreement had he correctly been informed of the range of punishment applicable to his offense, because the "Original indictment exposed [him] to a higher penalty than the information did" (Aple.Br. 26-28, 34-35). That is, "but for his plea agreement, … [Mr.] Gray would have been required to go to trial on the original indictment," under which he "faced a total [statutory] sentencing exposure of 15 years up to life imprisonment" (Aple.Br. 39-40).

That is irrelevant. The question is whether Mr. Gray would have pleaded guilty to § 841(b)(1)**(B)** had he known that, in reality, the facts

did not and could not support that charge as a matter of law. Obviously, the answer is no.

The reason that the original indictment is (and must be) irrelevant is simple. As the Court knows well, when a defendant pleads guilty under an agreement, it is common that the information to which he pleads guilty is less serious than the indictment: dropping some charges (as here) or changing them to a less-serious version. A black-letter rule that *any* such plea is knowing or voluntary, even if it erroneously contains a harsher charge that all parties agree the facts could not possibly support the defendant convicting, and without the defendant knowing that, would be unjust as a matter of Due Process.

Otherwise, the Government surreptitiously could put incredibly harsh but unsupportable offenses in the information. When the defendant unknowingly pleads to – and is sentenced for – that offense, the Government could claim, "No harm, it could have been worse under the indictment." Indeed, at that point, cases like *Stubbs* and others Mr. Gray cited in his first issue in his opening brief would be wrong. Effectively, *anytime* the defendant pleaded guilty under an agreement to an information that was less harsh than the original indictment, his plea *always* would be knowing and voluntary.

Thankfully, that is not and never has been the law of the United States. Rather, the law is that, unless the defendant had "knowledge of the law in relation to the facts" and "notice of the true nature of the

charge to which he is pleading," his plea is not knowing or voluntary (Aplt.Br. 28) (quoting *Bailey v. Weber*, 295 F.3d 852, 855 (8th Cir. 2002); *United States v. Perez*, 270 F.3d 737, 740 (8th Cir. 2001)).

The Government's argument otherwise is without merit.

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,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (Ext. 7020)
Facsimile: (816) 292-7050
E-mail: jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
DEANDREA GRAY

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Attorney

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I certify that, on April 14, 2016, 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.

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Attorney