IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BOB LOREN, Defendant-Appellant.	)	C.A. NO. 07-10470 D.C. NO. CR 06-00288 JMS -03 (District of Hawai'i, Honolulu)

DEFENDANT-APPELLANT'S OPENING BRIEF; CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

The Honorable David A. Ezra,
United States District Judge.

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JURISDICTIONAL STATEMENT

This is an appeal from a sentence imposed on August 30, 2007, after conviction on Count 1 of the Indictment, for the charge Conspiracy to Commit Marriage Fraud. [*See* Excerpts of Record filed with this Opening Brief ("ER") 1, 9-52; 46; 48].

The United States District Court Hawai'i ("district court" or "court") had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction to review criminal sentences under 28 U.S.C. § 1291.

As to timeliness of the Notice of Appeal pursuant to the 10-day rule of Fed. R.App. P. 4(b), on September 4, 2007, before entry of the Judgment in a Criminal Case, the defendant-appellant Bob Loren ("Mr. Loren") filed a Notice of Appeal. [ER 7]. On September 11, 2007, the District Court entered the Judgment in a Criminal Case (the "Judgment") in district court. [ER 1-6]. The Ninth Circuit has jurisdiction because: "A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." Fed. R.App. P. 4(b)(2).

STATEMENT OF ISSUES PRESENTED

Whether Mr. Loren Was Denied Effective Assistance of Counsel Guaranteed under the Sixth Amendment When, Pursuant to the Advice of Counsel, He Entered the Plea Agreement Whereby He Waived Fundamental Rights in Exchange for Sentencing Advantages That Were Illusory and Offered No Advantage Whatsoever?

STATEMENT OF THE CASE

A. The Indictment and Guilty Plea.

On May 17, 2006, a grand jury returned an Indictment against Mr. Loren and three other defendants charging:

- Count 1: Conspiracy to Commit Marriage Fraud, in violation of 18 U.S.C. § 371, a class D. Felony;
- Count 2: Improper Entry by an Alien, Marriage Fraud, in violation of 18 U.S.C. § 1325(c);
- Count 3: Fraud and Misuse of Visas, Permits, and Related Documents, and False Personation, in violation of 18 U.S.C. § 1546(a);
- Count 4: Fraud and Misuse of Visas, Permits, and Related Documents, and False Personation, in violation of 18 U.S.C. § 1546(a).

[ER 210-219].

The grand jury charged Mr. Loren only under Count 1. [ER 211-216]. As to that offense, the grand jury charged that from a precise time unknown but by, in or about June 2005, and continuing through April 18, 2006, Mr. Loren and the co-defendants willfully and knowingly combined, conspired, confederated, and agreed with each other to commit an offense against the United States, to wit, Marriage Fraud. [212-213]. Codefendant Hang Duan ("Duan") was an alien and citizen of China. [ER 213]. Codefendant Shara Padello ("Padello") was a United States citizen [ER 212-213] who entered into the fraudulent marriage with Duan. Codefendant Julia Bivit-Padello ("Bivit") was Shara Padello's mother who assisted in brokering the marriage between her daughter and Duan. [Presentence Investigation Report ("PSR") ¶ 14].[1]

The grand jury alleged that Duan, with Padello as aider and abettor, knowingly entered into the marriage with Padello for the purpose of evading immigration laws. Specifically, they sought to evade the law requiring that Duan be lawfully married to Padello, which Duan represented when he applied for a United States immigration visa, in violation of 18 U.S.C. § 1325 (c). [ER 213-214]. In furtherance of the conspiracy, the grand jury alleged that Mr. Loren and

[1] Mr. Loren files under seal with the Ninth Circuit the PSR, its addenda and other sealed sentencing papers filed in district court, pursuant to Ninth Circuit Rule 30 - 1.9.

the co-conspirators, both known and unknown, carried out five ways and means, and committed 11 overt acts in the District of Hawaii, in violation of 18 U.S.C. § 371. [ER 213-217]. On May 22, 2006, Mr. Loren appeared before United States Magistrate Judge Kevin S. C. Chang and pled not guilty to the charges against him. [ER 221; *see* U.S. District Court Hawai'i ("U.S.D.C.") Criminal Docket, entry for 5/22/06, # 18].

On March 27, 2007, Mr. Loren, his court-appointed attorney Stuart Fujioka ("Mr. Fujioka") and the Assistant United States Attorney Tracy A. Hino signed a Memorandum of Plea Agreement (the "Plea Agreement"). [ER 207]. In the Plea Agreement, Mr. Loren agreed to plead guilty to Count 1 of the Indictment, Conspiracy to Commit Marriage Fraud. [ER 198]. In direct exchange for Mr. Loren's guilty plea, the plaintiff-appellee, the United States of America ("Government"), agreed not to charge Mr. Loren in a superseding indictment with at least six related offenses including, but not limited to, Bringing in and Harboring Aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii), and Conspiracy to Commit Visa Fraud, in violation of 18 U.S.C. § 371, "in relation to the co-defendants' fraudulent submissions of INS forms I-485, I-130, and I-864 in order to obtain an immigrant visa". [ER 198-199].

The parties stipulated: to the facts presented in paragraph 8 of the Plea

Agreement [ER 202; *see infra* Statement of Relevant Facts]; that the applicable base offense level ("BOL") under the United States Sentencing Guidelines ("U.S.S.G." or "Guideline") for Count 1 was 11, pursuant to U.S.S.G. § 2L2.1 [ER 202]; that by entering a timely plea of guilty under the Plea Agreement, Mr. Loren would receive a two-level reduction for demonstrating acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a). [ER 202].

Mr. Loren agreed to waive his right to appeal or collaterally attack the conviction and sentence except on a claim of ineffective assistance of counsel, and should the sentencing court depart from the Guideline range deemed applicable. [ER 203].

On March 27, 2007, Mr. Loren appeared with his attorney Mr. Fujioka for the hearing on a Motion to Withdraw Not Guilty Plea and to Plead Anew before Magistrate Judge Chang. [ER 160-196]. Mr. Loren consented to a Fed. R. Crim. P. 11 hearing before Judge Chang rather than before a district court judge. [ER 166-167; 208-209].

At this hearing, Mr. Loren acknowledged that he had signed the Plea Agreement after reviewing and discussing it with his attorney Mr. Fujioka. [ER 167-168]. Mr. Loren acknowledged that he agreed to "what is stated in the plea agreement" and that the Plea Agreement covered every aspect of the agreement

that he had with the Government. [ER 169]. He affirmed that there were no "outside agreements", and that no one had made any other promise or assurance in an effort to get him to plead guilty. [ER 169]. When asked by Judge Chang if anyone had forced, pressured or threatened him to plead guilty, Mr. Loren responded, "[a]side from locking me up in prison, no." [ER 169-170].

The Government stated the major terms of the Plea Agreement, including but not limited to Mr. Loren's agreement to plead guilty to Count 1 of the Indictment, and the Government's reciprocal promise "not to charge him with related immigration offenses pertaining to the marriage fraud such as harboring an alien and Visa Fraud." [ER 170].[2]

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[2] At the hearing on March 27, 2007, the Government represented that two other investigations concerning Mr. Loren were ***not*** a part of the Plea Agreement or the case. [ER 170-171]. As to the first investigation, the Government represented that the State Department was conducting the same, which included allegations that Mr. Loren traveled to Hawaii from China using a United States passport acquired through fraud.

The Government represented that the second investigation was being conducted by the Chinese police, and the United States Immigration and Customs Enforcement. It concerned unsubstantiated allegations of physical contact between Mr. Loren and a 16-year-old Chinese national at a school in China where Mr. Loren taught. [ER 171].

Concerning both investigations, the Government told the court that it had given Mr. Loren partial discovery, "so there – there should be no doubt that he knows which cases we are referring to. And once, again, neither of those cases is covered by the plea agreement." [ER 171].

Referring to paragraph 8 of the Plea Agreement [ER 200], the Government acknowledged that Mr. Loren was not admitting all the overt acts identified in Count 1 of the Indictment. [ER 171]. Rather, he was only agreeing to the overt acts relating to the marriage contract between Duan and Padello. [ER 171].

The Government acknowledged the parties' stipulation to a Guideline BOL (base offense level) of 11. [ER 172]. The Government anticipated seeking a two-level reduction in Guideline offense level given Mr. Loren's timely guilty plea. [ER 172].

Mr. Loren told the court that the Government's summary of the Plea Agreement's terms accurately portrayed his agreement with the Government. [ER 173]. He acknowledged the possible punishments, including a maximum five-year incarceration term, and three years of supervised release. [ER 174].

Mr. Loren represented that he understood the following warnings and waivers provided to him by the court at the hearing:

- if convicted he would lose valuable civil rights, including the right to vote;
- that the U.S.S.G. would apply and that he and his attorney had discussed their application to his case;
- that the court could not determine the applicable Guideline sentence until after the PSR had been completed and the parties provided the opportunity to challenge the PSR's reported facts and application of the Guidelines;

- that the court had the discretion and authority to depart from the U.S.S.G. and impose a more severe sentence than that recommended in the PSR;

- and that the sentencing judge, district court Judge Seabright, would determine his sentence based on admissions that he made at the change of plea hearing;

- that he understood that he was waiving important constitutional safeguards, including the right to plead not guilty, the right to a jury trial, the right to an attorney, the right to see and hear all evidence against him, the right to testify, the right to remain silent, the right to have the court issue subpoenas for any witnesses he sought to call in his defense, the right to appeal;

- that if he pled guilty he was waiving his right to trial;

- if he pled guilty the court would ask him questions about what occurred and he must answer those questions truthfully under oath.

[ER 175-181].

The Government summarized the essential elements it would have been required to prove if there was a trial. In order for Mr. Loren to be found guilty under Count 1, Conspiracy to Commit Marriage Fraud, the Government would have been required to prove three elements: first, that there was an agreement between two or more persons to commit the offense of marriage fraud; second, that Mr. Loren became a member of the conspiracy knowing of at least one of the objects and intending to help accomplish it, in this case the marriage and the change of immigration status; and third, that one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy.

[ER 181-182]. The Government noted that, as set forth in paragraph 8 of the Plea Agreement, Mr. Loren was admitting to assisting codefendant Duan in drafting and putting together the actual marriage contract between Duan and Padello. [ER 182].

Mr. Fujioka agreed with the Government's summary of the essential elements. [ER 182]. Mr. Loren agreed to the facts set out in paragraph 8 of the Plea Agreement (discussed in detail, *infra*, under "Statement of Relevant Facts") confirming that they were true in every respect, "[t]o the best of my knowledge". [ER 183-184].

The court then asked Mr. Loren to tell the court in his own words what he did that constituted the crime charged against him in Count 1. [ER 184]. Mr. Loren told the court:

> "Well, I–I told Duan Hang that marriage was one of the ways he could remain in the United States. And I believe this – I believe that it was one of the ways. After all the Government in the past normally turned a blind eye to it, when it concerned these people of substance who first came to this country illegally and paid their way. They were not illegals and undocumented. Therefore, I plead guilty to telling Mr. Duan that marriage is one of the options available to stay in the country where, in fact, I am guilty of this charge. I have never denied it since the beginning a year ago."

[ER 184-185].

The court refused to accept this plea. [ER 185].

After attempts at clarifying Mr. Loren's understanding, the court then engaged him in the following colloquy:

"THE COURT: – Mr. Loren, did you agree with Hang Duan to commit an offense in this case?

THE DEFENDANT: Yes, I did.

THE COURT: All right. And the offense that you agreed with Mr. Duan was what?

THE DEFENDANT: That he would get married and stay in the country instead of continuing on with the business Visa.

THE COURT: And how did you facilitate that? What did you do?

THE DEFENDANT: I had dinner with him, and his future wife, and mother-in-law, and – and we all discussed the situation.

THE COURT: And what exactly did you say?

THE DEFENDANT: Exactly I don't know, but I – we all discussed that Duan was adamant about getting married, and he was willing to pay them to get married so he could stay in the country.

THE COURT: And you knew that was illegal?

THE DEFENDANT: I knew that was illegal, but I also thought it was acceptable, but that's okay. I knew it was illegal.

THE COURT: So, you knew then it was a crime to facilitate a fraudulent marriage?

THE DEFENDANT: Yes.

THE COURT: And in this case you knew that the marriage that you were suggesting to Hang Duan was fraudulent in nature?

THE DEFENDANT: Yes."

[ER 185-187].

As to Mr. Loren's overt act, the court questioned Mr. Loren, who stated:

"THE DEFENDANT: Duan Hang came to me and asked about the security of his money. He was always concerned about his money. And I said the only way he could do that is by making a contract with his prospective wife of which he didn't do until after they were married, and then he made the contract.

THE COURT: And so, where did you tell him to look to see how he could prepare –

THE DEFENDANT: On the internet, and I explained all this to Bruce Law when I was interviewed.

THE COURT: Did you review that contract, the written contract?

THE DEFENDANT: He presented it to me to make grammatical corrections. His English – written English wasn't that good, and I did so, yes.

THE COURT: And the gist of that contract was for Duan to pay Padello money so that he could get married?

THE DEFENDANT: Yeah, I believe it was 1,000 – I'm not sure what it was, but he was to pay her a certain amount of money to marry him and stay in the country. A

certain amount of money to get his green card."

[ER 187-188].

The Government made the following proffer:

> "[B]asically Duan, Padello, Bivit-Padello, and the defendant all agreed that Duan would marry Padello in exchange for money, and that the – the whole purpose of the – of the marriage was just to circumvent the immigration law – laws in order to get Duan a green card, you know, permanent resident status.
>
> And the defendant's specific part in the conspiracy, at least what he's admitting to for the change of plea, is that an essential part of this whole thing was the marriage contract, because it sets forth the agreement, it – and the payment schedule, and it was executed by the parties as well. So, that would be my proffer, your Honor. And – and I believe the defendant has covered those issues in both his in Court statement and what he executed as part of the plea agreement."

[ER 188-189]. Mr. Loren agreed to the Government's proffer. [ER 189]. He then pled guilty to Count 1 of the Indictment. [ER 189].

Judge Chang found that Mr. Loren was fully competent and capable of entering an informed plea, and that his plea of guilty was knowing and voluntary and supported by an independent basis in fact for each of the essential elements of the offense. [ER 190]. Judge Chang signed the Report and Recommendation Concerning Plea of Guilty, determining that Mr. Loren was fully competent and capable of entering an informed plea, and that his plea was intelligently, knowingly and voluntarily made, and that it was supported by an independent

basis in fact establishing each of the essential elements of the offense. [ER 158].

On July 20, 2007, the Court held a hearing on Mr. Loren's Motion to Compel Discovery due to continuing, unsubstantiated allegations by the Government that Mr. Loren was somehow involved in: sexual activities with boys in China; a child sex tourism scheme; and trips for adult men wishing to travel to China for the purpose of having sex with young boys. [ER 134; *and see* PSR, Addendum, 1A]. Allegedly, there was a videotape and written reports including an interview with the 16-year-old Chinese boy concerning sexual contact. [ER 136-138]. The court granted the Motion to Compel Discovery. [ER 139; 132-133]. It turned out that the Government neither possessed the alleged videotape, nor alleged photos and a letter. [ER 138].

On August 16, 2007, Mr. Loren's attorney Stuart Fujioka filed a Motion to Withdraw as Counsel for Defendant. [ER 125]. Among the grounds for this motion, Mr. Fujioka informed the court that Mr. Loren wished to withdraw his guilty plea. [ER 129]. Mr. Fujioka told the court that it was his belief that the Plea Agreement was advantageous to Mr. Loren. [ER 130]. "Should the plea be withdrawn and the matter proceed to trial, Amendment VI and the applicable rules of Professional Conduct suggest that substitute counsel should be appointed." [ER 130].

Also on August 16, 2007, Mr. Fujioka filed for Mr. Loren a Notice of Hearing Concerning Motion to Withdraw Guilty Plea. [ER 118]. Mr. Loren believed the motion necessary given his assessment that the Presentence Report was based upon lies. [ER 122-1]. Mr. Loren wrote directly to the court, stating, "I disavow my guilty plea and ask you to assign me an attorney that would defend me in court." [ER 122.1].

On August 23, 2007, the Court, the Honorable J. Michael Seabright, United States District Court Judge presiding, heard arguments on the motions. [ER 95]. As to the motion to withdraw his guilty plea, Mr. Loren told the court:

> "The primary concern for me is because, from the very beginning, I've been accused of many things, outrageous things, nefarious acts. And as they kept repeating each other, they became facts instead of lies.
>
> So I was upset at that. And even in this latest presentencing report, those same factors were repeated and repeated, and I kept telling my attorney that he must oppose these and he didn't. So that is my concern."

[ER 99]. Mr. Loren also expressed his frustration with Mr. Fujioka who did not answer his telephone calls or respond to his letters for four to five months. [ER 103].

The court told Mr. Loren that it was willing to grant Mr. Fujioka's motion to withdraw as legal counsel. [ER 103]. However the court warned Mr. Loren that he could not keep coming back to court to get a new lawyer each time he was

dissatisfied. [ER 103-104]. Moreover, contrary to Mr. Loren's apparent belief, the court warned that Mr. Fujioka's withdrawal would not automatically result in an order granting the withdrawal of the guilty plea. [ER 104].

After a seven-minute recess so that attorney and client could discuss the matter, Mr. Fujioka represented to the court that Mr. Loren wished to withdraw his motion and that he wanted Mr. Fujioka to continue representing him. [ER 106-107]. Mr. Loren personally affirmed these representations to the court. [ER 107-108]. The court denied as moot the motion to withdraw as counsel and the motion to withdraw guilty plea. [ER 108].

B. Sentencing.

On June 20, 2007, the United States Department of Probation for the District of Hawai'i ("Probation") submitted for review the Draft PSR (Presentence Investigation Report). Under the Guidelines, Probation found a BOL (base offense level) of 11 for violation of 18 U.S.C. § 371, Conspiracy, pursuant to U.S.S.G. § 2X1.1. [PSR ¶ 32]. Section 2X1.1 directs that the applicable BOL stems from the Guideline for the substantive offense. [PSR ¶ 32]. In this case the substantive offense is violation of 8 U.S.C. § 1325(c), and the applicable Guideline for that offense is U.S.S.G. § 2L2.1, Fraudulent Marriage to Assist

Alien to Evade Immigration Law. [PSR ¶ 32]. Since Mr. Loren pled guilty to participating in a conspiracy to commit marriage fraud to evade immigration law, Probation found a BOL of 11 pursuant to U.S.S.G. § 2L2.1. [PSR ¶ 32; *and see* U.S.S.G. § 2L2.1].

Pursuant to U.S.S.G. § 3B1.1(c), Probation added a two-level upward adjustment based on the finding that Mr. Loren was an organizer, leader, manager or supervisor of the criminal activity. [PSR ¶ 35]. Probation determined that Mr. Loren initiated the offense and facilitated the activities of 19-year-old Duan, 20-year-old Padello and 43-year-old Bivit, through the fraudulent marriage scheme. [PSR ¶ 35].

Further, pursuant to U.S.S.G. § 3C1.1, Probation found that Mr. Loren willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense. [PSR ¶ 36]. Probation referred to Mr. Loren's travel to San Diego, California, after being released on a $50,000 unsecured bond on March 22, 2006, and an allegation that he traveled to Mexico. [PSR ¶ 25]. In this regard, Probation determined that Mr. Loren willfully failed to abide by bail conditions imposed by the district court, and that he absconded from pretrial supervision. [PSR ¶ 36; *see* PSR ¶¶ 4-5]. Therefore, Probation added an additional two-level

increase to the BOL. [PSR ¶ 36].

Pursuant to U.S.S.G. § 3C1.1, Probation reduced the offense level by two levels on the ground that Mr. Loren accepted personal responsibility for the charged criminal conduct based on the statements he provided at the change of plea hearing on March 27, 2007, and based on the stipulations in the Plea Agreement. [PSR ¶ 38]. Probation's adjustments resulted in a total offense level ("TOL") of 13. [PSR ¶ 41].

As to criminal history, Probation reported no juvenile adjudications, and no adult criminal convictions. [PSR ¶¶ 42, 43]. Therefore, Probation found a total criminal history score of zero. [PSR ¶ 44]. According to the Guideline Sentencing Table, a zero criminal history score established a criminal history category ("CHC") of I. [PSR ¶ 44]. U.S.S.G. Chapter 5, Part A.

As to sentencing options, Probation found that pursuant to 18 U.S.C. § 371, the maximum term of imprisonment was five years. [PSR ¶ 71]. As to the Guidelines, based on the TOL of 13 and a CHC of I, the range for imprisonment was 12-to-18 months. [PSR ¶ 72].

As to the impact of the Plea Agreement, Probation noted the following:

> "The defendant pled guilty as charged in the Indictment and all relevant factors have been considered in the guideline computations. According to the Plea Agreement, the United States agreed not to charge him in a

> Superseding Indictment with related offenses including, but not limited to Bringing In and Harboring Aliens, False Statement and Conspiracy to Commit Visa Fraud. If convicted of these offenses, they would be grouped together pursuant to U.S.S.G. § 3D1.2(b), as they involve the same victim and two or more acts connected by a common criminal objective or constituting part of a common scheme or plan. In this case, the instant offense would constitute the most serious offense ***and conviction on all offenses would not affect the guideline calculations as shown in the Presentence Report."***

[PSR ¶ 74] (emphasis added).

As to supervised release, pursuant to 18 U.S.C. § 3583 (b)(2), Probation noted that if a term of imprisonment was imposed, the court could impose a term of not more than three years. [PSR ¶ 75].

> "The court shall order the applicable mandatory conditions identified in 18 U.S.C. § 3583(d) which are consistent with any pertinent policy statements issued by the U.S. Sentencing Commission pursuant to 18 U.S.C. § 994(a). The Court may also order any condition set forth as a discretionary condition of probation in 18 U.S.C. § 3563(b)(1) through (b)(10) and (b)(12) through (b)(20) and any other condition it considers to be appropriate."

[PSR ¶ 75].

As to the Guideline provisions, pursuant to U.S.S.G. § 5D1.2(a)(2) the range for supervised release was at least two years but not more than three years. [PSR ¶ 76]. "If a sentence of imprisonment of one year or less is imposed, a term of supervised release is not required but is optional. U.S.S.G. § 5D1.1(b)." [PSR ¶ 76]. "The Court shall order the applicable mandatory conditions of supervised

release identified in U.S.S.G. § 5D1.3(a). Pursuant to U.S.S.G. § 5D1.3(b), the Court may order any other conditions of supervised release which are consistent with any pertinent policy statements issued by the U.S. Sentencing Commission as identified in U.S.S.G. §§ 5D1.3(c) through 5D1.3(e)." [PSR ¶ 76].

On June 25, 2007, the Government filed a sentencing statement indicating that it had no objections to the draft PSR, but it provided clarifications and supplemental information. [ER 142-156].

On July 5, 2007, Mr. Loren filed a sentencing statement that included objections to the upward adjustments for role in the offense and for obstruction of justice. [PSR, Addendum 4A-5A]. Further, pursuant to U.S.S.G. § 2L2.1(b)(1) he sought a three-level decrease because his involvement in the offense was not for profit. [PSR, Addendum 4A-5A].

As to the role in offense as organizer/leader, Probation responded that the facts established by a preponderance of the evidence the two-level adjustment. Probation relied upon the corroborating statements provided by Duan and Padello, along with evidence gathered by investigators to support the allegation that Mr. Loren initiated the offense and facilitated the activities of codefendants throughout the fraudulent marriage scheme. [PSR, Addendum, 4A]. "Specifically, the defendant was knowledgeable regarding all aspects of the fraudulent marriage

scheme, exercised decision-making authority over Duan and recruited Bivit and Padello and directed them when they participated in the criminal activity." [PSR, Addendum, 4A].

As to the obstruction of justice, Probation argued that the two-level increase was applicable:

> "the defendant escaped from custody before trial, or willfully failed to appear, as ordered, for a judicial proceeding. U.S.S.G. § 3C1.1, Application Note 3. It is well established that absconding from pretrial release constitutes 'escaping from custody.' Therefore, the adjustment for obstruction of justice was properly applied and no changes have been made to the identified paragraphs."

[PSR, Addendum, 5A].

As to the requested three-level decrease because the instant offense was not for profit, Probation acknowledged that according to U.S.S.G. § 2L2.1(b)(1) a three-level decrease was possible if the offense was committed other than for-profit, or the offense involved smuggling, transporting, or harboring the defendant's spouse or child (or both the defendant's spouse and child). *See* U.S.S.G. § 2L2.1(b)(1). Probation found that the facts of this case did not apply to the specific characteristics addressed in U.S.S.G. § 2L2.1(b)(1). [PSR, Addendum, 5A].

On August 24, 2007, the sentencing hearing commenced, Judge Seabright

presiding. [ER 54]. Concerning the obstruction of justice enhancement, Mr. Fujioka told the court that he had no objection to the same. [ER 60].

The Court acknowledged that there was no dispute that Mr. Loren travel San Diego while out on bail without notifying pretrial services. [ER 60]. That travel, alone, was not enough to impose the obstruction enhancement. [ER 60 – 61]. The Court reasoned that the evidence needed to show that the defendant intended to stay away and not come back. [ER 62]. Indeed, later in the hearing Mr. Fujioka noted that the court minutes for the bail hearing stated that Mr. Loren was allowed to leave the jurisdiction. [ER 88; *and see* Exhibit B, Defendant's Sentencing Statement, filed under seal July 5, 2007, and attached to PSR].

The Court noted that Mr. Loren had told a Ms. Sumner of San Diego (Mr. Loren's sponsor while in San Diego) that he was going to Mexico, and that at the time of his arrest in Hawai'i he had told a U.S. deputy marshal that he had gone to Mexico. [ER 61]. However during the revocation of bail hearings on March 12, 13, 2007, Mr. Loren adamantly insisted that he had never gone to Mexico. [ER 61; *and see* U.S.D.C. Criminal Docket, entries for 3/12/07 and 3/13/07, ## 127, 131].

In this regard, the Government stated that the obstruction enhancement could exist on the alternative ground that Mr. Loren lied during these hearings.

[ER 63-64]. The court adjourned this particular issue until the arresting marshal, to whom Mr. Loren allegedly stated that he went to Mexico, was back in Honolulu and could appear in court. [ER 64-66].

As to the two-level adjustment for role in the offense, Mr. Loren argued that it was not fair to paint him as the leader or mastermind of the scheme just because he was the oldest person involved and perhaps the best educated. [ER 81]. The court agreed, finding that the Government had not presented sufficient evidence in this regard and that the two-level enhancement did not apply. [ER 67, 72, 87-88].

As to the three-level reduction on the grounds that the offense was not-for-profit, Mr. Loren argued that he received no payment for his involvement in the offense, and that the Government's proffer of the handwritten letter by co-defendant Duan did not support a claim that he financially benefited. [ER 74-75; 76-77]. However, the court found that he failed meet his burden of showing that he did not receive some form of payment or expectation of payment. [ER 80].

On August 30, 2007, the Court continued the sentencing hearing, now focusing on the two-level obstruction of justice enhancement. [ER 12]. The United States Marshal, Deputy Dexter Gapusan ("Gapusan") testified for the Government. [ER 14]. Gapusan was present and assisted Mr. Loren's arrest on March 1, 2007. [ER 14]. Gapusan testified that after the arrest, and while he and

Deputy Marshal Arthur Oh were transporting Mr. Loren to FDC Honolulu, Mr. Loren appeared pale and sick. [ER 15]. Gapusan asked him if he was sick or injured. [ER 15]. Gapusan testified that Mr. Loren replied, "You should see me last week. I was worse when I was in Mexico." [ER 15].

Deputy Marshal Arthur Oh ("Oh") also testified for the Government. Oh was also present and assisted in the arrest on March 1, 2007. [ER 19]. Oh testified that during the transportation of Mr. Loren to FDC Honolulu, he drove the vehicle while Gapusan sat next to Mr. Loren in the back seat. [ER 20]. Oh testified that he did not hear any conversation between Gapusan and Mr. Loren. [ER 20]. After arrival at FDC, and checking Mr. Loren into the facility, Oh testified that Gapusan stated to him, "Did you hear what Loren said or mentioned something about going to Mexico?" [ER 20].

Oh testified that he replied, "No, I didn't hear." [ER 20]. Then he testified that Gapusan said, "Yeah, he said that he went to Mexico, and he had a great time." [ER 20].

Oh testified that he told Pretrial Services Officer David Kahunahuna what Gapusan had said to him: that Mr. Loren had gone to Mexico. [ER 21]. Later, apparently Kahunahuna would report that Mr. Loren had "boasted" about going to Mexico. [ER 22].

Mr. Loren testified in his own defense, stating that he had no conversations with the marshals during the post-arrest transportation to FDC Honolulu. [ER 24-25]. Based on his testimony, Mr. Fujioka argued that the record was inadequate to add the two levels for obstruction. [ER 26]. The court found that the Government did not fulfill its burden by a preponderance of the evidence in showing that Mr. Loren intended to evade court proceedings and obstruct justice. [ER 28].

However, the court found other grounds for the obstruction enhancement were present. The court agreed with United States Magistrate Judge Kobayashi's conclusion that Mr. Loren did, in fact, travel to Mexico, notwithstanding his adamant denial. [ER 29]. Therefore, on the ground of perjury, the court found that the enhancement applied pursuant to U.S.S.G. § 3C1.1. [ER 29]. The court found that Mr. Loren falsely testified, saying that he had not gone to Mexico and that he had not discussed the trip with the marshals in any way. [ER 30; 45].

Based on this finding, the court determined a TOL total offense level of 11, the CHC of I, with a resulting in a Guidelines range of 8-to-14 months for incarceration. [ER 30]. As to supervised release, the court made no specific finding that supervised release was warranted. The court cited the Guideline range for supervised release of two to three years. [ER 30]. The monetary fine range was from $2,000-$20,000, and a $100 special assessment applied. [ER 31]. Both

parties concurred with the Court's statement of the Guideline sentence. [ER 31].

Mr. Fujioka noted to the court that Mr. Loren had already been in jail for close to six months. [ER 32]. Considering his age (66 years at the time of sentencing) and the lack of pecuniary gain, Mr. Fujioka asked for leniency and for a prison term of time served. [ER 33]. Otherwise, Mr. Fujioka asked for in a split sentence, with the jail time deemed already served. [ER 33]. The court then provided Mr. Loren the opportunity to speak, but he declined the invitation. [ER 33]. The Government sought the maximum Guideline sentence, or 14 months prison time. [ER 39].

The court provided the parties an opportunity to discuss the issue of sentencing disparity, and the fact that codefendant Duan only received a six-month jail term. [ER 39]. Mr. Fujioka argued that in order of culpability, the court should place Mr. Loren below Duan and that the court's sentence should reflect that determination. [ER 40].

The court reviewed the relevant sentencing factors under 18 U.S.C. § 3553 (a) factors. [ER 42]. As to Mr. Loren's history and characteristics, the Court made clear that the allegations from the Beijing police were not given any weight in determining the appropriate sentence. [ER 42]. The court noted that Mr. Loren had no prior criminal history, and a very solid employment history. [ER 43]. As

to disparity in sentencing between Mr. Loren and Duan, the court found the two defendants' culpability to be essentially equal. [ER 44].

The court imposed a sentence of 10 months incarceration followed by three years supervised release. [ER 46; 48]. The court declined to impose a fine because it did not believe Mr. Loren had the financial resources to pay one. [ER 46].

On September 4, 2007, the undersigned counsel filed the Notice of Appeal on Mr. Loren's behalf. [ER 7]. On September 11, 2007, the court filed the Judgment in a Criminal Case. [ER 1-6]. On September 18, 2007, the court filed the Order for Time Schedule as to this appeal. [ER 228, USDC Criminal Docket, entry for 9/18/2007, # 208]. By that order this opening brief and excerpts of record are due on or before December 18, 2007.

BAIL STATUS

According the Federal Bureau of Prisons ("BOP") website (www.bop.gov), Bob Loren, BOP No. 95721-022, age 66 years, is currently in BOP custody FDC Honolulu. The inmate mailing address is FDC Honolulu - Federal Detention Center; P.O. Box 30080; Honolulu, HI 96820. His projected date of release according to the BOP website is December 29, 2007.

STATEMENT OF RELEVANT FACTS

The following relevant facts are drawn from Mr. Loren's admissions in the Plea Agreement and during his guilty-plea hearing on March 27, 2007, and uncontested statements from the PSR. Duan was a Chinese national who entered the United States on June 7, 2005 on a 'non-immigrant B1 visitor for business' visa. [PSR ¶ 11]. This visa form allowed Duan to enter, live, and work in the United States under specified conditions for up to 90 days. [PSR ¶ 11]. Mr. Loren traveled with Duan to Honolulu from China on June 7, 2005. In Honolulu, he and Duan, then 19 years old, shared the same residence. [PSR ¶ 11].

On or about August 22, 2005, Duan married codefendant Shara Padello, a United States citizen, in Honolulu, Hawai'i. [PSR ¶ 12]. On October 22, 2005, Duan signed a completed Application to Register Permanent Residence or Adjust Status (Form I-485) requesting an immigrant visa based upon his marriage to Padello. [PSR ¶ 13]. Padello filed a completed Petition for Alien Relative (Form I-130). [PSR ¶ 13]. Padello's mother, codefendant Julia Bivit-Padello ("Bivit") signed a completed Affidavit of Support under Section 213A of the Act (Form I-864). [PSR ¶ 13]. Along with the Application and Petition, Duan submitted supporting documents reflecting that Duan and Padello were married on August 22, 2005, and residing at a residence in Honolulu. [PSR ¶ 13].

On August 25, 2005, Duan traveled from Honolulu to Beijing, and returned to Honolulu on September 21, 2005. [PSR ¶ 11]. On that date, Duan was issued a second non-immigrant B1 visitor for business visa. [PSR ¶ 11].

Mr. Loren admitted in the plea agreement and at the change-of-plea hearing on March 27 that he agreed to assist Duan in marrying Padello so that Duan could evade immigration laws. [ER 186]. He told Duan that he could marry a U.S. national and stay in the United States instead of continuing on with the business visa. [ER 186]. To facilitate this, Mr. Loren stated that he had dinner with Duan, Padello and Bivit, and discussed the situation. [ER 186; 200]. He told the district court that Duan was adamant about getting married and that he was willing to pay Padello to get married so he could stay in the United States. [ER 186]. Mr. Loren admitted that he knew that it was a crime to facilitate a fraudulent marriage. [ER 186].

As to his specific acts, Mr. Loren admitted that he assisted Duan in securing money Duan had apparently paid Padello to marry him. [ER 187]. "He [Duan] was always concerned about his money. And I said the only way he could do that is by making a contract with his prospective wife of which he didn't do until after they were married, and then he made the contract." [ER 187].

Mr. Loren told Duan to look on the Internet for a sample contract. [ER 187-

188; 200]. After Duan found a sample contract, he presented it to Mr. Loren who assisted by making grammatical corrections. [ER 188; 200-201]. Mr. Loren admitted that the gist of the contract was for Duan to pay Padello in exchange for Padello's agreement to marry him. [ER 188]. Mr. Loren believed that Duan paid Padello a certain amount of money to marry him and stay in the country, followed by another amount to get his green card. [ER 188; 200-201]. Apparently, Duan believed that the green card would permit him to remain in the United States indefinitely. [ER 200].

SUMMARY OF THE ARGUMENT

Mr. Loren Was Denied Effective Assistance of Counsel Guaranteed under the Sixth Amendment When, Pursuant to the Advice of Counsel, He Entered the Plea Agreement Whereby He Waived Fundamental Rights in Exchange for Sentencing Advantages That Were Illusory.

In waiving his right to appeal in Plea Agreement, Mr. Loren set aside two exceptions from the wavier. The second exception, ineffective assistance of counsel, is relevant in this direct appeal. Mr. Loren acknowledges this Court's general rule against reviewing challenges to the effectiveness of defense counsel on direct appeal. United States v. Jeronimo, 398 F.3d 1149, 1155-56 (9th Cir. 2005). This rule can be overcome, however, "(1) where the record on appeal is

sufficiently developed to permit determination of the issue, or (2) where the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." Id.

As fully argued below, Mr. Fujioka's ineffectiveness in this case stems from his failure to ensure that Mr. Loren pled guilty knowingly and voluntarily.

> "The 'clearly established Federal law, as determined by the Supreme Court of the United States' at issue in this case is the test for ineffective assistance of counsel claims set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Under Strickland, to establish a claim of ineffective assistance of counsel, the petitioner must show (1) grossly deficient performance by his counsel, and (2) resultant prejudice. 466 U.S. at 687, 104 S.Ct. 2052. In Hill, the Supreme Court adapted the two-part Strickland standard to challenges to guilty pleas based on ineffective assistance of counsel, holding that a defendant seeking to challenge the validity of his guilty plea on the ground of ineffective assistance of counsel must show that (1) his 'counsel's representation fell below an objective standard of reasonableness,' and (2) 'there is a reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' 474 U.S. at 57-59, 106 S.Ct. 366."

Womack v. Del Papa, 497 F.3d 998, 1002 (9th Cir. 2007).

The record on direct appeal shows that Mr. Loren's counsel advised him to pled guilty in exchange for the Government's promise to refrain from filing a superseding indictment loaded with at least six identified charges relating to the immigration fraud. To the untrained, this bargain appeared to be a good one. In

exchange for pleading guilty to Count 1, Mr. Loren would avoid the threat of conviction and sentencing under the superseding indictment and its six additional charges.

In reality, however, the record on direct appeal and the application of the Guidelines clearly show that the Government's promise to refrain from filing a superseding indictment had ***no*** benefit for Mr. Loren. As set forth fully below, under the Guidelines even if the Government had filed the superseding indictment with its six additional charges, and even if Mr. Loren had been convicted of all those charges, his sentence would have been substantially the same.

Thus, the Government's promise to refrain from filing the superseding indictment was an illusory promise designed to induce Mr. Loren's guilty plea. Given Mr. Loren's reluctance to enter the Plea Agreement, had his legal counsel advised him that the Plea Agreement was an illusory bargain, it is unlikely he would have pled guilty. Under these circumstances it cannot be said that Mr. Loren received effective assistance of counsel. Rather than require the enforcement of an illusory promise, this Court should elect to remand this case to the district judge for further proceedings.\

ARGUMENT

Mr. Loren Was Denied Effective Assistance of Counsel Guaranteed under the Sixth Amendment When, Pursuant to the Advice of Counsel, He Entered the Plea Agreement Whereby He Waived Fundamental Rights in Exchange for Sentencing Advantages That Were Illusory.

1. Standard of Review.

Whether Mr. Loren was denied Sixth Amendment rights to counsel is a question of law reviewed de novo. *See* United States v. Ortega, 203 F.3d 675, 679 (9th Cir.2000). De novo review means that the appellate court must consider the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988). Such review is "independent," *see* Perez-Lastor v. INS, 208 F.3d 773, 777 (9th Cir. 2000), or "plenary," *see* United States v. Waites, 198 F.3d 1123, 1126 (9th Cir. 2000). Thus, no deference is owed to the district court. United States v. Lang, 149 F.3d 1044, 1046 (9th Cir. 1998).

2. Discussion.

a. The Record on Appeal Is Sufficiently Developed to Permit Determination of Whether the Legal Representation Was So Inadequate That it Denied Mr. Loren His Sixth Amendment Right to Counsel.

Mr. Loren acknowledges this Court's general rule against reviewing challenges to the effectiveness of defense counsel on direct appeal. Jeronimo, 398

F.3d at 1155 (*citing* United States v. McKenna, 327 F.3d 830, 845 (9th Cir. 2003), *cert. denied*, 126 S.Ct. 198 (2005). The policy informing this rule seeks a more complete development of the record in the context of a habeas petition that allows for a more effective inquiry into the decisions of defense counsel. *See* United States v. Laughlin, 933 F.2d 786, 788-89 (9th Cir. 1991) ("[A] habeas corpus proceeding is preferable [for the adjudication of an ineffective assistance claim] as it permits the defendant to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted.")

The Ninth Circuit has held, however, that a defendant need not wait for collateral proceedings to obtain relief from an ineffective attorney. The Court has made exceptions to its general rule, allowing claims of ineffective assistance of counsel to proceed "(1) where the record on appeal is sufficiently developed to permit determination of the issue, or (2) where the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." Jeronimo, 398 F.3d at 1156 (*citing* United States v. Daychild, 357 F.3d 1082, 1095 (9th Cir. 2004)).

This case qualifies as an exceptional case that merits review on direct appeal on both grounds identified in Jeronimo. As seen below, the record is sufficiently developed to permit determination as to whether Mr. Fujioka urged Mr. Loren to

enter an illusory bargain wherein he waived his criminal procedural rights for no advantage. Further, the record shows that this advice denied Mr. Loren his Sixth Amendment right to effective legal counsel.

b. Mr. Loren Was Denied Effective Assistance of Counsel Guaranteed under the Sixth Amendment Because His Attorney Failed to Ensure That He Knowingly and Voluntarily Pled Guilty to Count 1.

Under Strickland, to establish a claim of ineffective assistance of counsel, the petitioner must show (1) grossly deficient performance by his counsel, and (2) resultant prejudice. 466 U.S. at 687, 104 S.Ct. 2052. In Hill, the Supreme Court adapted the two-part Strickland standard to challenges to guilty pleas based on ineffective assistance of counsel, holding that a defendant seeking to challenge the validity of his guilty plea on the ground of ineffective assistance of counsel must show that (1) his "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 57-59, 106 S.Ct. 366.

(1) Counsel's Representation Fell below an Objective Standard of Reasonableness.

"Because a guilty plea is a waiver of the Fifth Amendment's protection against compulsory self-incrimination, the right to a jury trial and the right to

confront one's accusers, Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1170-71, 22 L.Ed.2d 418 (1969), it must be a knowing, intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970). Because "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney," id. at 748 n. 6, 90 S.Ct. at 1469 n. 6, counsel have a duty to supply criminal defendants with necessary and accurate information." Iaea v. Sunn 800 F.2d 861, 865 (9th Cir. 1986).

> "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."

Brady, 397 U.S. at 755, 90 S.Ct. 1463.

Here the record shows that Mr. Fujioka advised Mr. Loren to plead guilty in exchange for what appears, at first glance, to be the Government's generous offer to refrain from piling on the criminal charges and the sentencing exposure Mr. Loren would face. Count 1 charged Mr. Loren with Conspiracy to Commit

Marriage Fraud in violation of 18 U.S.C. § 371, a Class D Felony. [ER 211-216]. In the Plea Agreement he agreed to plead guilty to Count 1. [ER 198]. The ***only*** exchange offered by the Government for his guilty plea to Count 1 was its promise in paragraph 4 of the Plea Agreement to refrain from charging Mr. Loren with six related crimes:

> "In exchange for the Defendant's plea of guilty to Count 1 of the Indictment and based upon information presently known to the Government, the United States agrees not to charge the Defendant in a Superseding Indictment with related offenses including, but not limited to, **[1]** Bringing In and Harboring Aliens, in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(ii) (transporting alien); **[2]** 1324(a)(1)(A)(iii) (concealing alien); **[3]** 1324(a)(1)(iv) (encouraging or inducing alien to enter or remain unlawfully); **[4]** 1324(a)(1)(v) (conspiracy to bring in or harbor alien), **[5]** False Statement, in violation of Title 18, Section 1001(a)(2), and **[6]** Conspiracy to Commit Visa Fraud, in violation of Title 18 United States Code, Section 371 (i.e., in relation to the co-defendants' fraudulent submissions of INS forms I-485, and I-864 in order to obtain an immigrant visa)."

[ER 198-199](brackets, numbers and emphasis added). Herein lies the deceit.

Probation pointed out in the PSR that even if Mr. Loren had been convicted of these six threatened offenses, for the purposes of sentencing they would have been grouped together pursuant to U.S.S.G. § 3D1.2(b). [*See* PSR ¶ 74]. Probation's application of the Guidelines concerning multiple counts was correct. Section 3D1.2 states in relevant part:

> "All counts involving substantially the same harm shall be grouped together

> into a single Group. Counts involve substantially the same harm within the meaning of this rule: * * * (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan."

U.S.S.G. § 3D1.2.

Section 3D1.3 states in relevant part:

> "In the case of counts grouped together pursuant to §3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group."

U.S.S.G. § 3D1.3(a).

The BOL (base offense level) for Count 1 of the Indictment to which Mr. Loren pled guilty, Conspiracy, is found in U.S.S.G. § 2X1.1. That section states that the applicable BOL is from the Guideline for the substantive offense, plus the adjustments from such Guidelines for any intended offense conduct that can be established with reasonable certainty. U.S.S.G. § 2X1.1(a).[3] Here, the substantive offense was violation of 8 U.S.C. § 1325(c). The applicable Guideline was U.S.S.G. § 2L2.1, Fraudulent Marriage to Assist Alien to Evade Immigration Law. It imposes a BOL of 11. *See* U.S.S.G. § 2L2.1(a).

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[3] "Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." U.S.S.G. § 2X1.1(a).

The BOL of 11 must be viewed against the six offenses the Government threatened to charge against Mr. Loren in a superseding indictment unless he pled guilty. The first four charges represent violations of 8 U.S.C. § 1324 (a), with each carrying a BOL of 12. *See* U.S.S.G. § 2L1.1(a)(3). The fifth threatened charge under 18 U.S.C. § 1001 carried a BOL of 6. *See* U.S.S.G. § 2B1.1(a)(2). The sixth threatened charge under 18 U.S.C. § 371 carried the BOL of 12. *See* U.S.S.G. § 2C1.1(a)(2). Thus, even if Mr. Loren had pled guilty to the six threatened charges, his BOL at the most would have only been 12 – only one level above the actual BOL of 11 found by Probation for Count 1, Conspiracy. [PSR ¶ 32]. Considering Mr. Loren's CHC (Criminal History Category) of I, the BOL of 12 resulted in an incarceration range of 10-to-16 months. ***This range begins and ends only two months above the range for the BOL of 11, that is 8-to-14 months***.

This small difference hardly equates with a sentencing advantage worthy of waiving Mr. Loren's Fifth and Sixth Amendment criminal due process rights.[4]

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[4] U.S. Const., fifth amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Indeed, so negligible was the Government's bargained-for consideration in the Plea Agreement, Probation itself recommended to the district court:

> "If convicted of these [six] offenses, they would be grouped together pursuant to U.S.S.G. § 3D1.2(b), as they involve the same victim and two or more acts connected by a common criminal objective or constituting part of a common scheme or plan. In this case, the instant offense would constitute the most serious offense ***and conviction on all offenses would not affect the guideline calculations as shown in the Presentence Report.***"

[PSR ¶ 74, emphasis added].

It is noted that the parties stipulated in the Plea Agreement that by entering a timely plea of guilty, Mr. Loren would receive a two-level reduction for clearly demonstrating acceptance of responsibility pursuant of U.S.S.G. § 3E1.1(a). [ER 202]. This stipulation was not, however, the bargained-for exchange upon which Mr. Loren pled guilty. The two-level reduction was a function of Section 3E1.1(a) of the Guidelines[5], and not a bargained-for consideration offered by the

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U.S. Const., sixth amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, b an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

[5] "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." U.S.S.G. § 3E1.1(a).

Government in exchange for the guilty plea. Further, the court was not bound by this stipulation, as clearly set forth in the Plea Agreement: "The Court is not bound by any stipulation entered into by the parties but may, with the aid of the presentence report, determine the facts relevant to sentencing." [ER 202].

The ***only*** expressed offer by the Government in exchange for Mr. Loren's guilty plea is found in paragraph 4 of the Plea Agreement. [ER 198]. There is no other inducement in the Plea Agreement for his guilty plea. That offer was the seemingly generous promise to refrain from filing a superseding indictment with charges that would include "but not [be] limited to" the six identified offenses noted above. [*See* ER 198]. That chilling, non-exclusive list, included six offenses: Bringing In and Harboring Aliens, in violation 8 U.S.C. §1324(a)(1)(A)(ii); Concealing Alien, in violation of 8 U.S.C. §1324(a)(1)(A)(iii); Encouraging or Inducing Alien to Enter or Remain Unlawfully, in violation of 8 U.S.C. §1324(a)(1)(iv); Conspiracy to Bring in or Harbor Alien, in violation of 8 U.S.C. § 1324(a)(1)(v); False Statement, in violation of 18 U.S.C. § 1001(a)(2); Conspiracy to Commit Visa Fraud, in violation of 18 U.S.C. § 371. [ER 198].

As threatening as this list appears, in reality – and as acknowledged by Probation in the PSR [PSR ¶ 74] – it provided Mr. Loren with no sentencing advantage in exchange for his guilty plea to Count 1. He waived his criminal

procedural rights under the Fifth and Sixth Amendments for nothing, and all at the urging of his counsel, Mr. Fujioka.

Mr. Fujioka reviewed the Plea Agreement with Mr. Loren, and then advised him to plead guilty pursuant to the Plea Agreement. [ER 167-168]. Counsel did this, notwithstanding the undisputed application of the Guidelines multiple count and grouping provisions,[6] which application revealed that the Government's offer provided Mr. Loren with no advantage. Had counsel been paying attention and reviewed the applicable Guidelines, Mr. Loren would have understood that even if the Government had filed the superseding indictment with the additional six charges, and a jury convicted him, he still would have faced the same sentencing BOL – give or take two months at the most.

Moreover, the Government's inducement to the plea has the earmark of coercion. Even if convicted of the six threatened charges, as Probation pointed out such convictions would not have affected the Guidelines calculations reached under the current Indictment and guilty plea. [PSR ¶ 74]. There appears to be only one reason for the Government's offer, and that was to frighten Mr. Loren

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[6] Neither party objected to Probation's determination in paragraph 74 of the PSR that even if convicted of all the threatened offenses, such conviction would not affect the Guidelines calculations as shown in the PSR. [*See* PSR, Addendum].

into pleading guilty. Under these circumstances, Mr. Loren's guilty plea cannot be considered credible or just.

"When a guilty plea is challenged as being the product of coercion, our concern is not solely with the subjective state of mind of the defendant, but also with the constitutional acceptability of the external forces inducing the guilty plea. *See* United States v. Martinez, 486 F.2d 15, 21 (5th Cir.1973); *see also* Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 453, 88 L.Ed.2d 405 (1985) (voluntariness of confession turns as much on whether techniques used for extracting confession comport with due process as on subjective state of mind). If the prosecutor elicits a guilty plea by pointing a revolver at the defendant, the plea is void regardless of the defendant's state of mind. To determine voluntariness, we examine the totality of the circumstances. Brady, 397 U.S. at 749, 90 S.Ct. at 1469." Iaea, 800 F.2d at 866.

Looking at the circumstances as they appeared on March 27, 2007, this inducement sounded like a good deal. The Government warned Mr. Loren that unless he pled guilty, they (the Government) would throw the book at him – so to speak. To avoid facing at least six additional criminal charges and the penalties they carried, Mr. Loren pled guilty to Count 1.

The trouble is, under the Guidelines he didn't face additional penal liability,

save a possible two-month difference in the BOL of 11 (8-to-14 months) and the BOL of 12 (10-to-16 months). Indeed, according to Probation, "conviction on all offenses would not affect the guideline calculations as shown in the Presentence Report". [PSR ¶ 74]. "A guilty plea must be the voluntary expression of the defendant's own choice." Iaea, 800 F.2d at 866 (citing Brady, 397 U.S. at 748, 90 S.Ct. at 1469). A plea that is coerced or induced by illicit promises is involuntary and void. Id. Mr. Loren's legal counsel, Mr. Fujioka, should have known that under the Guidelines the Government's bargained-for exchange in the Plea Agreement actually provided Mr. Loren with no advantages. Further, Mr. Fujioka should have communicated this sentencing reality to his client. "[C]ounsel [has] a duty to supply criminal defendants with necessary and accurate information." Iaea, 800 F.2d at 865. Mr. Fujioka's failure to do so represents legal representation falling below an objective standard of reasonableness. Hill, 474 U.S. at 57-59.

(2) But for Counsel's Errors Mr. Loren Would Not Have Pled Guilty and Would Have Insisted on Going to Trial.

To satisfy the prejudice component in the context of a guilty plea, the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to

trial". Hill, 474 U.S. at 59, 106 S.Ct. at 370.

To begin with, generally Mr. Loren expressed his frustration with Mr. Fujioka who according to Mr. Loren, did not answer his telephone calls or respond to his letters for four to five months. [ER 103]. Against this failure in attorney-client communication, the record shows that Mr. Loren was reluctant to plead guilty. At the change-of-plea hearing on March 27, 2007, Mr. Loren could not provide the court with a satisfactory recitation of the facts underlying Count 1.

> "Well, I–I told Duan Hang that marriage was one of the ways he could remain in the United States. And I believe this–I believe that it was one of the ways. After all the government in the past normally turned a blind eye to it, when it's concerned these people of substance who first came to this country illegally and paid their way. They were not illegals and undocumented. Therefore, I plead guilty to telling Mr. Duan that marriage is one of the options available to stay in the country where, in fact, I am guilty of this charge. I have never denied it since the beginning a year ago."

[ER 185]. Based on this recitation, clearly Mr. Loren did not believe what he did was wrong: "the government in the past normally turned a blind eye"; "[t]hey were not illegals"; "I plead guilty to telling Mr. Duan that marriage is one of the options available to stay in the country".

Thus, initially the court refused to accept the plea. [ER 185]. Thereafter the court sought to clarify the guilty plea. Notwithstanding, Mr. Loren still provided a qualified guilty plea: "I knew that was illegal, ***but I also thought it was***

acceptable. . ." [ER 186; emphasis added].

On August 16, 2007, Mr. Fujioka filed a motion to withdraw as counsel because Mr. Loren wished to withdraw his guilty plea against Mr. Fujioka's advice that the Plea Agreement was advantageous. [ER 129-130]. Mr. Fujioka argued in the motion: "Should the plea be withdrawn and the matter proceed to trial, Amendment VI and the applicable rules of Professional Conduct suggest that substitute counsel should be appointed." [ER 130].

Also on August 16, 2007, Mr. Fujioka filed on Mr. Loren's behalf a Notice of Hearing Concerning Motion to Withdraw Guilty Plea. [ER 118]. Mr. Loren saw this motion as necessary given his belief that the PSR was saturated with lies. [ER 122-1]. He wrote to the court, "I disavow my guilty plea and ask you to assign me an attorney that would defend me in court." [ER 122-1].

On August 23, 2007, Judge Seabright heard arguments on the motions. [ER 95]. As to the motion to withdraw his guilty plea, Mr. Loren told the court:

> "The primary concern for me is because, from the very beginning, I've been accused of many things, outrageous things, nefarious acts. And as they kept repeating each other, they became facts instead of lies.
>
> So I was upset at that. And even in this latest presentencing report, those same factors were repeated and repeated, and I kept telling my attorney that he must oppose these and he didn't. So that is my concern."

[ER 99]. Further, he expressed frustration with Mr. Fujioka who did not answer

his telephone calls or respond to his letters for four to five months. [ER 103].

The court indicated that it would grant Fujioka's motion to withdraw as counsel, but advised Mr. Loren that this did not automatically result in a corresponding grant of his motion to withdraw the guilty plea. [ER 104]. Rather, the court would schedule a hearing on that motion with the newly appointed counsel. [ER 105].

At that point, the record shows that there was a seven-minute recess during which client and attorney conferred. [ER 106]. Back on the record, Mr. Fujioka represented that Mr. Loren wanted Fujioka to remain as his legal counsel, and he wanted Fujioka to withdraw the motion to withdraw guilty plea. [ER 106-107].

When the court sought to clarify Mr. Loren's intentions [ER 107], he told the court: "Your Honor, please be patient with me. I'm an old man, and this has gone on for well over a year. And it has wreaked havoc on me, and I don't particularly care. I just want to get it over with as soon as possible." [ER 107].

The court queried Mr. Loren. As to the Motion to withdraw a guilty plea, the court said, "We're taking that off the table." [ER 108]. Mr. Loren said, "Yes." [ER 108]. As to legal representation, Mr. Loren told the court he wanted Mr. Fujioka to stay on as legal counsel for sentencing. [ER 108].

Seen in its totality, the record shows that Mr. Loren did not want to plead

guilty to begin with, believing that he did nothing wrong. At the change-of-plea hearing on March 27, 2007, the court initially refused to accept the plea after listening to his explanation. [ER 185]. Even during the colloquy with the court aimed at clarifying the guilty plea, Mr. Loren told the court, "I knew that was illegal, but I also thought it was acceptable. . ." [ER 186].

Mr. Loren's ambivalence is seen again in his Motion to Withdraw Guilty Plea. [ER 118]. It is further seen at the hearing on August 23, 2007, before Judge Seabright. After the seven-minute recess with Mr. Fujioka, rather than knowingly and voluntarily relinquish his motion to withdraw his guilty plea, he responded to the court's query out of apathy and exhaustion: "I don't particularly care. I just want to get it over with as soon as possible." [ER 107].

The record shows that Mr. Fujioka urged Mr. Loren to waive his criminal procedural rights under the Fifth and Sixth Amendments and plead guilty. [ER 165, 167, 190]. However, as set forth above, the Government's promise to refrain from filing the superseding indictment with the six additional charges provided no advantage to Mr. Loren's waiver of his Fifth and Sixth Amendment rights. The Plea Agreement was illusory and Mr. Fujioka erred in advising his client Mr. Loren to enter it.

Further, given Mr. Loren's ambivalence to plead guilty seen throughout the

proceedings, the record shows that there is a reasonable probability that but for counsel's error – urging Mr. Loren to enter an illusory bargain with the Government for which he continued to express ambivalence and misgivings – Mr. Loren would not have pled guilty to Count 1 of the Indictment and would have insisted on going to trial. Hill, 474 U.S. at 57-59, 106 S.Ct. 366.

CONCLUSION

Under these circumstances and de novo review, Loren's conviction and sentence is not credible and it is not just. For all these reasons set forth above, Mr. Loren respectfully requests that this Court vacate the judgment and remand for further proceedings consistent with that decision.

DATED: Wailuku Maui, Hawai'i, December 5, 2007.

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GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

STATEMENT OF RELATED CASES

Upon information and belief, there are no other cases in this Circuit, or elsewhere, relating to the defendant-appellant and the matters discussed herein.

DATED: Wailuku Maui, Hawai'i, December 5, 2007.

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GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Opening Brief and Certificate of Compliance were duly served on the following, by placing said copy in the U.S. mail, postage prepaid, addressed as set forth below:

- Tracey Hino, Assistant U.S. Attorney
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  UNITED STATES OF AMERICA

DATED: Wailuku Maui, Hawai'i, December __ , 2007.

_____
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Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. Appl. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionately spaced, has a typeface of 14-points, Times New Roman, and contains 11231 words, with an average of 224 words per page.

DATED: Wailuku Maui, Hawai'i, December 5, 2007.

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