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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

YASIEL PUIG VALDES,

Defendant.

Case No. CR 22-394-DMG

DEFENDANT YASIEL PUIG'S OPPOSITION TO GOVERNMENT'S MOTION FOR ORDER RE ADMISSION OF FACTUAL BASIS

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Defendant Yasiel Puig Valdes ("Puig"), through his counsel Waymaker LLP, respectfully submits his Opposition to the government's Motion for Order (Dkt. 110), filed June 1, 2023 ("Mot."), seeking to admit at trial the factual basis of defendant Puig's July 7, 2023 plea agreement.

I. INTRODUCTION

The Court should not admit the factual basis of defendant Puig's plea agreement in evidence, because it is part of a plea discussion and therefore inadmissible under Fed. R. Evidence 410 ("Rule 410"). The government claims that Puig waived the protection of Rule 410 through paragraph 22 of the plea agreement, and further claims that the factual basis is admissible because Puig has committed a "knowing breach" of the agreement.

The government is wrong. The Ninth Circuit has repeatedly held that a plea agreement that has not been offered in open court and approved by the Court – like the one here -- is unenforceable. This is rightly so, as a plea agreement such as the one the government reached with Puig must be approved by the Court and, had it been offered in open court, it would not have been accepted until the Court conducted detailed inquiries into whether the waivers were knowing and voluntarily made. Because the plea agreement was not offered in open court and approved by the Court, the government's motion is a non-starter. Indeed, on this basis alone, the Court can reject the government's motion without even a hearing.

Even were it the case that the plea agreement had been accepted, however, the Court could and should reject the admission in evidence of the factual basis because, under the unique circumstances here, the Rule 410 waiver was not knowingly and intelligently made.

Puig was working six days a week as a professional baseball player in South Korea when the government indicated that he was immediately going to be indicted and, although the interview in question had occurred only a few months before, the government indicated that it would not wait for his return from Korea to indict him,

but it would seek an arrest warrant. Given that defense counsel was new to the matter, was operating with a 17-hour time difference between Los Angeles and South Korea, and required an interpreter to speak with Puig, and given that Puig suffers from unique mental health issues and cognitive-educational deficits, in retrospect, there simply was insufficient time and opportunity to do a complete analysis of the relevant facts and consider all of Puig's defenses. When Puig arrived in the United States, however, defense counsel immediately discovered exculpatory evidence that undermined the government's proffered evidence, and ultimately the factual basis itself, demonstrating that Puig's waiver had not been knowing and intelligent at all, as this Court should find.

Finally, even if the plea agreement were enforceable (which it is not), and even if the Rule 410 waiver were knowing and intelligent (which it was not), the Court could and should exclude the factual basis under Rule 403, because its admission would devolve into a trial-within-a-trial as to the plea discussions and why Puig would have ever signed the plea agreement in the first place. This would confuse issues and waste the Court and jury's time. In these circumstances, the probative value of the factual basis is vastly outweighed by the potential for undue delay and jury confusion, so it should be excluded on this basis as well.

The government's motion therefore should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plea Discussions

On May 9, 2022, the U.S. Attorney's Office issued a letter stating that it had determined that Puig was a target of a criminal investigation and stating that he should respond by May 25, 2022. (Decl. of Keri Curtis Axel ISO Opposition to Government's Motion for Order ("Axel Decl.") ¶ 2, Ex. A). On May 25, defense counsel called the assigned prosecutor, AUSA Jeff Mitchell, who informed counsel that he had already drafted an indictment which would be submitted to the grand jury the following week. (*See* January 4, 2023 Declaration of Jeff Mitchell

("Mitchell Decl., Dkt. 50") ¶ 11.) Indeed, the Chief of the Criminal Division had already approved and signed the indictment. (*Id.*)

Although counsel indicated that Puig was willing to cooperate and be re-interviewed, AUSA Mitchell made clear the die was cast and Puig would be charged. Counsel then requested an opportunity to engage in pre-indictment resolution discussions. AUSA Mitchell gave counsel only a pair of days to indicate whether she had authority to engage in plea negotiations; and on May 27, defense counsel responded that she had "authority to move forward to engage in plea discussions," and requested to schedule the reverse proffer the parties had discussed. (*See* Mot. at 3; Mitchell Decl., Dkt. 50 ¶ 11, Ex. C.)

On June 6, 2023, AUSA Mitchell gave an attorney proffer summarizing the proposed charges and the evidence the government believed supported them. (*See* Mot. at 3; Mitchell Decl., Dkt. 50 ¶ 12.) Present for the defense was the defendant, Ms. Axel and Mr. Nuño, and a Puig representative, Anthony Fernandez, who acted as a translator. (*See* February 13, 2023 Decl. of Keri Curtis Axel (Dkt. 61) ("Axel Decl. Dkt. 61") ¶ 2.) The government set forth its plan to indict Puig on two charges and set forth the specific false statements it contended that Puig made, and the evidence the government believed definitively proved Puig's guilt. (*See* Declaration of Anthony Fernandez ("Fernandez Decl.") ¶ 4.)

At the conclusion of the proffer, the government indicated that, if Puig was not interested in a plea disposition, they would go forward with indicting him, and DHS would put a warrant for his arrest into the system. (*See id.* at ¶ 5; Axel Decl. Dkt. 61, ¶ 2.) The parties then discussed that it would trigger a notice to Interpol, resulting in his arrest in Korea. As described by Fernandez, "Mitchell said that, if [Puig] did not agree[] to a deal, he would be indicted and the government would get a warrant for his arrest… based on the discussion, I [] pictured Puig being arrested in the middle of a game in Korea and hauled off to jail to be extradited to the United States if he did not make a deal with the government." (Fernandez Decl. ¶ 5.)

The government required a response almost immediately. (Mitchell Decl. Dkt. 50, ¶ 12.) The defense responded promptly requesting a plea offer to the false statements charge only. (*Id.* ¶ 13.)

On June 16, 2022, the government issued a plea offer, attaching a 20-page plea offer with a responsive deadline of June 23, 2022 – one week later. (Mitchell Decl. Dkt. 50, Ex. D.) Defense counsel requested certain edits to the factual basis and fine within the shortened period, and, on June 27, the government a revised draft plea agreement; the government clarified the deadline to sign was now only July 1, 2022. (*See* Axel Decl., ¶¶ 3-4, Ex. B.)[1]

Throughout the plea negotiations, Puig and the defense team faced daunting procedural obstacles. Among other things:

- Puig was in Korea, which is a 17-hour time difference from Los Angeles. There were very limited windows of time in the morning and late at night that Puig and the defense team could speak.
- Puig was playing baseball approximately 6 days per week, an intensive work schedule that included regular travel due to his game schedule.
- In addition, schedules had to be coordinated so that there was an interpreter to translate the plea agreement into Spanish.
- Counsel for Puig had only been retained on May 25 and had no pre-existing knowledge of the facts of the case; and no direct access to Puig or his electronic devices to work through relevant factual materials, such as Puig's phone messages, with Puig.

[1] The government suggests that Puig had three weeks to consider the plea (Mot. at 14), but this is misleading: Puig had initially one week (June 16-June 23, a period in which he had a travel day and a double-header). (*See* Mitchell Decl. Dkt. 50, Ex. D; Axel Decl. ¶ 5, Ex. C.) Then, after counsel requested some limited edits to the factual basis, the government issued a revised plea agreement with a short deadline (again conflicting with Puig's work schedule). (*See id.*) The defense did not (and believes it would not have been allowed to) request changes after July 1. The reason the deadline lapsed from July 1 to July 7 was because defense counsel provided the government with financial documentation relevant to the fine amount, and Mitchell did not revert the revised agreement until July 6. (*Id.* ¶¶ 3-4, Ex. B.)

(*See* Axel Decl., ¶ 5, Ex. C.)

B. Puig's Return to the United States and Fact Discovery

Puig returned from Korea on November 13, 2022. As the defense has previously explained to the Court, the defense only learned of facts supporting his innocence upon Puig's return, after which it requested documents from the government to vet those facts and explore his factual innocence defenses. On November 15, Puig appeared for an initial appearance and arraignment, waiving his right to an indictment and preliminary hearing; a change of plea proceeding was scheduled for November 23, 2022. On November 17, 2022, defense counsel requested discovery from the government. (Dkt. 80-1, Ex. 2).

On November 23, only 10 days after his return to the U.S., Puig appeared before this court and counsel requested a continuance to explore a factual innocence defense. Puig's counsel informed this Court about the procedural history of Puig's charges, the urgency created by the government's haste and the threat of international arrest while Puig was working in South Korea, and the facts that counsel had reviewed and developed with Puig since he returned to the U.S. and could meet with counsel in person. Specifically, counsel informed the Court that, prior to the hearing, counsel had requested and reviewed interview reports that corroborated some of Puig's statements, casting serious doubt on the government's prosecution theory.

Accordingly, counsel requested various additional discovery items from the government to explore Puig's factual defenses with him, as the Court would have required that counsel affirm that they had done under Federal Rules of Criminal Procedure Rule 11 ("Rule 11"). The Court granted a short continuance of the change-of-plea hearing until November 29, and ordered the parties to meet and confer regarding the requested discovery.

The government subsequently provided some of the items requested, and the defense team finally had time in person with Puig to review those items and to evaluate the context of events with Puig.

On November 28, 2022, counsel informed the government that, after reviewing the materials and further exploring the facts with Puig, he did not intend to enter a guilty plea, and counsel together informed this Court.

III. ARGUMENT

A. The Plea Agreement Was Never Accepted By This Court and Therefore Is Unenforceable

The plea agreement cannot be used against Puig at trial. The Ninth Circuit has held that "a plea agreement that has not been entered and accepted by the trial court does not bind the parties." *United States v. Fagan*, 996 F.2d 1009, 1013 (9th Cir. 1993) (citing *Mabry v. Johnson*, 467 U.S. 504, 507–08 (1984)); *United States v. Kuchinski*, 469 F.3d 853, 858 (9th Cir. 2006); *United States v. Washman*, 66 F.3d 210, 212 (9th Cir. 1995) (defendant and the government not bound by the plea agreement until it was accepted by the court)[2]; *United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992) ("We hold that neither the defendant nor the government is bound by a plea agreement until it is approved by the court."); *see also United States v. Gonzalez*, 918 F.2d 1129, 1133 (3d Cir.1990) ("It is axiomatic that a plea agreement is neither binding nor enforceable until it is accepted in open court."). Here, the Court never took Puig's plea, so the plea agreement is unenforceable. The government's argument seeking to enforce paragraph 22 should be a non-starter.

The extensive plea agreement procedures to which the parties and this Court are accustomed are set forth in Rule 11, which was amended in 1975. As explained by Wright & Miller:

[2] The Ninth Circuit confirmed in *United States v. Alvarez-Tautimez*, 160 F.3d 573, 576 n.5 (9th Cir. 1998) that the portion of its *Washman* holding relevant here was not undercut by *United States v. Hyde*, 520 U.S. 670 (1997).

> Significantly, the 1975 amendments, for the first time, gave explicit recognition to the validity of plea bargaining and sought to move the results of the discussions into open court. The changes were 'designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.'

1A Fed. Prac. & Proc. Crim. § 171 (History of the Rule) (5th ed.) (citing 1975 Advisory Committee Notes). Such safeguards include the District Court's detailed Rule 11(b) colloquy prior to accepting a plea, and its review and discretion to accept or reject a plea agreement under Rule 11(c)(3)(A).

The instant plea agreement arises under Rule 11(c)(1)(A) because the agreement includes a charge bargaining agreement (that is, the government's agreement to forego a potential charge in return for a guilty plea). Under Rule 11(c)(3), where a plea agreement arises under Rule 11(c)(1)(A) – just like under Rule 11(c)(1)(C) -- the court may accept the agreement, reject it, or defer a decision until the review of the presentence report. As explained by the Supreme Court:

> Rule 11 "envision[s] a situation in which the defendant performs his side of the bargain (the guilty plea) before the Government is required to perform its side (here, the motion to dismiss four counts). If the court accepts the agreement and thus the Government's promised performance, then the contemplated agreement is complete and the defendant gets the benefit of his bargain. But if the court rejects the Government's promised performance, then the agreement is terminated and the defendant has the right to back out of his promised performance (the guilty plea), just as a binding contractual duty may be extinguished by the nonoccurrence of a condition subsequent." (citation omitted).

Hyde, 520 U.S. at 677–78 (1997).

Here, Puig gave notice to the Court that he was not prepared to enter a guilty plea, resulting in the plea agreement never being presented to the Court in open court to accept or to reject.[3] Under such circumstances, the agreement is simply not enforceable. *See generally U.S. v. Norris*, 486 F.3d 1045, 1048-51 (8th Cir. 2007)

[3] In this respect, and as the government itself recognizes (Mot. at 12, n.7), this case is wholly distinguishable from *United States v. McTiernan*, 2010 WL 11667960 (C.D. Cal. July 7, 2010) because, in *McTiernan*, the defendant underwent the rigors of a Rule 11 hearing while Puig did not and could not for reasons discussed at Puig's change of plea hearing.

(en banc) (to treat a plea agreement as simply a contract between two parties would impermissibly "ignore[] the presence of a 'contractual' condition completely independent of the defendant and the Government—the district court's independent power under [Rule] 11 to accept or reject the defendant's associated plea"); *accord United States v. Wood*, 378 F.3d 342, 348 (4th Cir. 2004) (plea agreement "not simply a contract between two parties" but "necessarily implicates the integrity of the criminal justice system and requires the courts to exercise judicial authority in considering the plea agreement and in accepting or rejecting the plea")(cleaned up).

The Ninth Circuit's precedents leave no doubt that Puig's plea agreement is not enforceable, yet the government failed to bring these cases to the Court's attention.[4] Indeed, and as applicable here, the Ninth Circuit has expressly endorsed the Fifth Circuit's reasoning that:

> the realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely on the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court.

Savage, 978 F.2d at 1138 (quoting *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980)). Similarly, since Puig withdrew his consent to the agreement and did not plead guilty, the agreement is unenforceable.[5]

[4] The defense was unaware of the above case law, but told the Court at the time of the prior breach motion that there was no breach and that the government's motion was premature and unripe because it did not present an actionable form of relief. The prior breach motion was also distinct because it did not seek to hold Puig to any promise made in the disregarded agreement, but merely asked the Court for permission to do something that it needed no permission to do.

[5] Although the defense believes that the Ninth Circuit precedent is clear that the plea agreement is unenforceable against Puig even without any formal withdrawal notice because it was not entered in open court and accepted by this Court, out of an

For this reason too, the defense respectfully asks the Court to amend its prior order finding breach. There can be no breach because the plea agreement is unenforceable. Because neither party is bound by any purported commitment in the agreement, the government was permitted to supersede the indictment, as the defense recognized at the time; thus, the defense has no issue with the relief that the Court ordered, but the basis should be amended.

B. The Rule 410 Waiver Should Not Be Enforced Because, Under the Unique Circumstances Here, It Was Not Knowingly and Intelligently Made

Even if the plea agreement had been proffered to this Court in open court and accepted under Rule 11(e) in a guilty plea proceeding, the Court would not be required to enforce the Rule 410 waiver and it should not do so, because the waiver was not knowingly and intelligently made under the unique circumstances presented here. Specifically, the combination of the government's haste and strict timelines, Puig's difficult schedule and language differences, and Puig's mental health and cognitive-educational deficits, created a perfect storm in which he did not have the ability to knowingly and intelligently waive his Rule 410 right, nor did counsel have sufficient information to advise him as to the waiver of such right.

1. Legal Standard

As the government recognized, courts look to principles of contract law to interpret plea agreements. But waivers of constitutional and statutory rights are to be interpreted narrowly. *United States v. Hamdi*, 432 F.3d 115, 122–123 (2d Cir. 2005). Ultimately, when construing plea agreements, a court "determine[s] what [defendant] reasonably believed to be the terms of the plea agreement at the time of the plea." *United States v. Franco-Lopez*, 312 F.3d. 984, 989 (9th Cir. 2002).

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abundance of caution and so the record is clear, Puig is filing herewith a formal notice of withdrawal.

While the prohibitions on the use of plea evidence in Rule 410 may be waived, such waiver must be knowing, voluntary, and intelligent. *United States v. Rebbe*, 314 F.3d 402, 406 (9th Cir. 2002). The Court's analysis of whether a waiver is valid will depend "on the totality of the circumstances, including the background, experience, and conduct of defendant." *United States v. Bautista-Avila*, 6 F.3d 1360, 1365 (9th Cir. 1993); *see also United States v. Plugh*, 648 F.3d 118, 127 (2d Cir. 2011) (waiver "must be determined on the particular facts and circumstances" "including the background, experience, and conduct of the accused" (citation omitted)).

A waiver is knowing and intelligent if, under the totality of the circumstances, it is made with a "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). If the defendant meets his burden of showing that a waiver was neither voluntary, knowing, nor intelligent, the Court must not enforce it. *See United States v. Rebbe*, 314 F.3d 402, 407 (9th Cir. 2002).

Even when a plea agreement has been offered in open court and accepted, courts have found insufficient evidence that all waivers in such an agreement were knowing and intelligent waiver where the Court did not specifically advise a defendant as to the right allegedly waived. *Compare United States v. Wessells*, 936 F.2d 165, 167 (4th Cir. 1991) (declining to enforce appellate waiver where district court did not confirm wavier during Rule 11 inquiry) and *United States v. Wiggins*, 905 F.2d 51 (4th Cir.1990) (affirming appellate waiver where district court went to "elaborate lengths" "to ascertain that the defendant did indeed understand the meaning of the waiver" and that defendant "understood the implications of his decision to waive his right to appeal or challenge his sentence.").

The Court has complete discretion to reject the Rule 410 waiver. *See In re* Morgan, 506 F.3d 705, 708 (9th Cir. 2007) ("We have noted in various contexts the broad discretion that district courts enjoy when choosing to accept or reject plea

agreements."); *see also United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992).

2. Given Puig's Mental Health Challenges and the Plea Discussion Circumstances, the Waiver Was Not Knowing and Intelligent

Evaluating the Rule 410 waiver in this case under the totality of the circumstances, including the timing and logistics of Puig's consideration of the plea agreement, and through the lens of Puig's background and experience, this Court should find that the waiver was not knowingly or intelligently made.

From the minute Puig's counsel first spoke with the government, the decision had already been made to indict Puig on two charges and to seek his arrest from Korea, Puig's options were limited, and his decisions were placed on a tight timeline. When counsel contacted AUSA Mitchell on May 25, the final response date listed in the target letter, she was told that charges were written up, approved, and would imminently be submitted to the grand jury. The only way to avoid this imminent result was by entering into plea discussions.

At the government's June 6, 2022 proffer, the government presented what it characterized as overwhelming evidence of his guilt, and gave Puig a two-day deadline to indicate his willingness to discuss a plea. (*See* Axel Decl. Dkt. 61 at ¶ 2.) A plea offer was then made on June 16, with a one-week response deadline. (*See* Mitchell Decl. Dkt. 50, Ex. D.)

In retrospect, and given the unique circumstantial and Puig's personal challenges, these time periods were simply too short for the defense to do a complete analysis of the facts, even of the text messages at issue, much less the two-and-a-half years of gambling and payment history that serves as the basis of Puig's purported falsehoods. To this day, the government continues to operate under the flawed belief that the case comes down to a two-hour interview and is but "a relatively-straightforward false statement and obstruction case." (*See* Dkt. No. 121 at 2.) But the charges put at issue not only what was said in the interview itself but

what Puig remembered, which in turn puts at issue his course of conduct regarding gambling over the two-and-a-half years before the interview.

Despite this reality, the government gave Puig exactly one week to understand and to agree to the plea agreement's terms, including the lengthy factual basis. As Puig was weighing his options, he was also enduring a grinding work schedule 17 hours across the world in Korea and faced with the challenges of booking meetings with counsel between the challenging time zones, and having to have a Spanish translator lined up for each meeting.

Under these circumstances, it would have been hard for any average American to have understood the nuances of the complex plea agreement, much less the attenuated waiver section buried within the plea. But Puig is not an average American: Puig suffers from PTSD, ADHD, and executive function deficits, and has a limited educational background (even in Spanish). (*See* Sealed Declaration of Dr. Paola Suarez ("Suarez Decl.") ¶¶ 5-7.) While more detail is provided under seal, the fact of Puig's ADHD means that he is highly distractible and has difficulty paying attention and following complex verbal directions or discussions. Given this condition, he simply could not remain focused and attentive for the lengthy translation of, and discussion of, the government's plea agreement over the phone while in Korea, and his counsel and translator would have had no ability to tell when he was not focusing. In addition, Puig's executive functioning deficit, and limited education, cause him to be highly concrete in his understanding, rendering it impossible for him to evaluate and appreciate the nuance of the waiver and the factual basis to which he was purportedly agreeing. (*Id.*)

Ultimately, for someone with Puig's concrete mentality and limited education, the decision to enter the plea agreement came down to a harsh and immediate Hobson's choice: fight the charges, which would likely result in a foreign arrest and subsequent extradition proceedings, which would be sure to sully his professional reputation forever, or accept the government's plea offer. The Hobson-

esque nature of these two "options" was magnified by Puig's mental condition and the post-traumatic stress disorder ("PTSD") he suffers related to his effective kidnapping by a Mexican drug cartel to be smuggled out of Cuba. (*See* Suarez Decl. ¶ 7.) When confronted with a choice of possible international arrest and extradition reminiscent of his PTSD trigger, and signing an agreement that would avoid the trigger altogether, there was no choice at all.

To that end, the government's contention that Puig's attorney-client privilege should be invaded is misplaced. There is more than sufficient evidence without an *in camera* review of Puig's attorney-client communications to find that, on June 6, 2022, the government made clear that if Puig was not interested in a plea disposition, the government would go forward with the already- approved grand jury indictment, and that DHS would put a warrant for his arrest into the system resulting in his international arrest. (*See* Axel Decl. Dkt. 61 ¶ 2; Fernandez Decl. ¶ 5 ("[b]ased on the discussion, I literally pictured Puig being arrested in the middle of a game in Korea and hauled off to jail to be extradited to the United States"). That the government's rush to indictment presented genuine threat of international arrest and extradition is an ineluctable conclusion based on the undisputed facts, as AUSA Mitchell has himself acknowledged. (*See* Mitchell Decl. (Dkt. 50) ¶ 15 ("I confirmed . . . that an indictment could result in a foreign arrest and extradition".[6]

[6] The government also cannot escape from the fair inference it created by suggesting that Puig's counsel should have tried to bargain around his foreign arrest. (*Cf.* Mitchell Decl. Dkt. 50 ¶ 16.) As discussed above, the defense's bargaining power is limited when the government controls the power of the state (and sometimes the power of a foreign state), and must carefully balance when and how it can ask for anything at all. Further, given that DOJ does not control South Korea's Justice Department, or even the foreign affairs practices of its own constituent agencies (*see id.* ¶ 15 (Homeland Security "is required to enter arrest warrants in a central database shortly after they receive a warrant")), it is far from clear that the government could have promised anything that would have avoided a foreign arrest if an indictment had been announced, even if it attempted to do so.

Given the credible threat of foreign arrest, coupled with the other unique issues raised above, the Court should find that he could not have knowingly and intelligently waived Rule 410.

3. In Light of the Subsequently-Discovered Evidence, Puig Did Not Understand the Waiver or the Factual Basis and Counsel Lacked the Information to Advise Him

The fact that Puig did not fully understand the Rule 410 waiver, and its consequences – which could include the use of the factual basis at trial – is further evidenced by the fact that he could not and did not in fact understand the factual basis itself, and defense counsel lacked the information adequately to advise him.

As an initial matter, while the government seeks to introduce the factual basis as alleged statements against interest, in fact, the factual basis is littered with statements for which Puig has no personal knowledge and therefore could neither confirm nor deny. For example, the factual basis states that "Wayne Nix was a minor league baseball player from 1995 to 2001." It further states that, "[s]ometime after 2001, Nix began operating an illegal bookmaking business" and created a client list "[t]hrough contacts he had developed during his own career in professional sports." (*See* Mot., Appx. A.) These are facts that Puig could not have sworn were true or not true. Having included information in the factual basis that is beyond a defendant's purview, it would be quite natural for any defendant to simply tune out to the details. But here particularly, given the linguistic and cognitive issues discussed above, including his ADHD, as well as the rushed schedule, it should not be surprising that Puig did not have the ability, educational background, critical thinking skills, or even the time, to begin to pick apart the government's lengthy statements.[7]

[7] The government attempts to hold the defendant to the statement in his certification that defendant had "carefully and thoroughly discussed [the plea agreement] with counsel." (Mot. at 11.) This statement can be true and nevertheless, given the unique circumstances discussed above, with the government exerting pressure to

Moreover, the factual basis contains purported "facts" that Puig can now disprove. (*See* March 2, 2023 *In Camera* Submission at pp. 4-9.) This proves two things: (1) that Puig did not knowingly and intelligently agree to the Rule 410 waiver and factual basis; and (2) that his counsel lacked information sufficient to advise him as to such waiver. Defense counsel certainly would not have advised Puig to agree to inaccurate or disputable statements, but, at the time of the plea discussions, counsel lacked access to the information necessary to disprove them. As set forth below, upon Puig's return to the United States, and with direct access to Puig to help him focus on the details, to refresh his recollection with his own records, and to investigate the government's claims, the defense discovered exculpatory evidence. The defense then asked the government for additional evidence, which further undermined the factual basis and supported Puig's defenses, at which time he concluded that he could not enter a guilty plea.[8] Understanding that, in this case, the issue must be evaluated in retrospect, it is clear that counsel would not have advised Puig to agree to the factual basis as written. Because counsel did not have the information necessary to advise the defendant,[9] the

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make a quick decision while threatening immediate indictment, and evaluated against the backdrop of this defendant's location, work, and unique personal characteristics, the specific waiver in paragraph 22 and the factual basis itself were not adequately understood.

[8] To support its claim that the plea agreement was knowing, the government cites certain defense letters to the USAO requesting dismissal or diversion, arguing the letters prove that "counsel and defendant" "carefully discussed this matter." (Mot at 11 n. 5, citing Dkt. 73). But the defense letter from November 22, 2022 (*id.*, 73-1, Ex. C) proves exactly the opposite: as the letter expressly states, the evidence it references had only just come to the defense's attention upon Puig's return. Once the defense learned of the facts, it promptly requested dismissal. (*Id.*; *see also* Axel Decl. Dkt. 61 ¶ 4.)

[9] The government here too attempts to rely on counsel's certification that she had "carefully and thoroughly discussed the plea agreement with the defendant." (Mot.

defendant could not have been adequately advised. Under these circumstances, the Court should find that there was not a knowing and intelligent waiver.

Relatedly, the government's assertion that Puig was able to "engage in negotiations and edit [the plea agreement] to his liking" (Mot. at 14) is detached from reality and "does not reflect the reality of the bargaining table." *United States v. Osorto*, 445 F. Supp. 3d 103, 109 (N.D. Cal. 2020); *see United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) ("As the Government conceded… defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice."). In *United States v. Mutschler*, 152 F. Supp. 3d 1332, 1335-37 (W.D. Wash. 2016), the court accepted the plea agreement but refused to enforce the provision that waived defendant's appellate rights as offending the basic principles of fair play. Recognizing the adhesive nature of waivers in plea agreements, the court reasoned that "the unilateral waiver at issue was neither specifically negotiated nor, in any real sense, optional." *Id.* at 1335.

This is decidedly true here. The Rule 410 waiver was non-negotiable, as were the alleged false statements charged, given that the government already had drafted its indictment. The defense effectively had one week to raise any issue with the plea agreement and factual basis, and it knew only limited changes to the factual basis would even be considered. The government's feigned ignorance as to the defendant's unequal bargaining power is transparent. As succinctly put by Judge Breyer:

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at 6, 11.) But given the limited information available, and the government's certainty as to its charges and the facts supporting them, counsel could truthfully and in good faith make this statement in July 2022, only to later realize – in November 2022 – that Puig's defenses had not been adequately explored. Again, the point of the November 22 letter and email to the USAO (Dkt. 73-1, Ex. C; Dkt. 80, Ex. 3) was to seek relief given that new facts undermined the premises on which counsel had relied in signing the certification and recommending that defendant plead guilty.

> It is no answer to say that [defendant] is striking a deal with the Government, and could reject this term if he wanted to, because that statement does not reflect the reality of the bargaining table. (Citations omitted). . . . . [P]lea agreements are contracts of adhesion. The Government offers the defendant a deal, and the defendant can take it or leave it. *Id.* ("American prosecutors . . . choose whether to engage in plea negotiations and the terms of an acceptable agreement."). If he leaves it, he does so at his peril. And the peril is real, because on the other side of the offer is the enormous power of the United States Attorney to investigate, to order arrests, to bring a case or to dismiss it, to recommend a sentence or the conditions of supervised release, and on and on.

Osorto, 445 F. Supp. 3d at 109-110 (citations omitted). As Judge Breyer concluded, as this Court should as well, "[t]hat Faustian choice is not really a choice at all for a man in the defendant's shoes. But the Court has a choice, and it will not approve the bargain." (*Id.*)

Here, too, under the unique circumstances presented in this case, and evaluated under the totality of the circumstances as to this defendant, the defendant did not knowingly and intelligently agree to the waiver, and the Court should not enforce the Rule 410 waiver.

C. The Court Should Find That There Was No Knowing Breach Due to Later-Discovered Exculpatory Evidence

The Court also has discretion not to enforce the waiver because the defendant would not have signed it had he known of the exculpatory evidence that was not discovered until November 2022. Again, the government's motion should be rejected because the plea agreement was never entered in open court and accepted by this Court. But even if defendant had entered a guilty plea and the Court had accepted the plea agreement, this Court could decline to enforce the Rule 410 waiver against him on the basis of new exculpatory evidence.

This is precisely what happened in *United States v. Newbert (Newbert III)*, 504 F.3d 180 (1st Cir. 2007). After entering a guilty plea pursuant to an agreement, the defendant withdrew his plea based on new evidence of innocence, and the government claimed he was in breach of his plea agreement and thus had waived

Rule 410. *Id.* at 183 (citing *U.S. v. Newbert (Newbert II)*, 477 F. Supp. 2d 287, 292 (D. Me. 2007)). The Court of Appeals affirmed the district court's ruling that the Rule 410 waiver in the plea agreement was unenforceable, finding that withdrawal of a plea due to post-plea evidence of innocence does not constitute a breach. *Id.* at 187; *see also Newbert II*, 477 F. Supp. 2d at 292 (if circumstances "present at least a plausible claim of actual innocence from evidence obtained after the guilty plea… the defendant cannot have breached the plea agreement by [withdrawal]).[10]

Here, as in *Newbert*, Puig and the defense team only determined that he could not go through with the plea agreement after learning facts that substantially affected the basis upon which he agreed to plead guilty. Because Puig did not enter a plea, the facts here are indeed stronger than *Newbert*, where the Court had accepted the plea agreement and nevertheless set it aside. Here, Puig had merely signed an agreement that he never would have signed "since this new evidence would likely have substantially affected his decision to enter the plea agreement in the first place." *Newbert II,* 477 F. Supp. 2d at 293.[11] As the court affirmed there, and as this court also should find, there was no knowing breach, and there should be

[10] Similarly, in *Mutschler*, the Court struck the unilateral waiver from the plea agreement holding that it could not conclude that defendant "'voluntarily, knowingly, and intelligently' waiv[ed] his right to appeal the sentence" reasoning that prospective waivers are inherently unknowing. 152 F. Supp. 3d at 1338-39, 41. Here too, the facts in control of the government that were later revealed to provide Puig with factual innocence defense renders the purported waiver unknowing.

[11] The First Circuit in *Newbert* rejected the government's overzealous argument that if there is no sanction against a defendant who withdraws a guilty plea, the government would not enter into pleas and take every case to trial. *Newbert III,* 504 F.3d at 187. This case differs from *Newbert* in this respect because Puig never entered a plea so the "fair and just" standard under Fed.R.Civ.P. 32(e) is not at issue. Like *Newbert*, however, the defense has shown newly-discovered evidence it did not have at the time of the plea agreement. (*See* March 2, 2023 *In Camera* Submission at pp. 4-9, Attachments 2-4).

no Rule 410 waiver: "Ultimately, because a man's reputation and freedom hang in the balance… the better course is to allow a jury to determine whether he is guilty—as he admitted he was—or not guilty—as he now insists he is." *Newbert I*, 471 F. Supp. 2d at 199.

D. The Court Should Exclude the Factual Basis Under Rule 403 Because It Would Result in a "Trial Within a Trial" Concerning the Plea Discussions

Federal Rule of Evidence 403 ("Rule 403") gives the Court discretion to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Where evidence would cause a trial within a trial that would waste time and confuse the jury, it can be excluded. *United States v. Singh*, 995 F.3d 1069, 1080-81 (9th Cir. 2021) (cross-examination precluded that would "confus[e] the issues before the jury and wast[e] time with a mini-trial"); *AGA & Titan Inc. v. United Specialty Ins. Co.*, 2012 WL 4783636, at *4 (Oct. 12, 2021, C.D. Cal.) (evidence excluded under Rule 403 because it risked creating a "case-within-a-case" that would waste time); *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) (evidence excluded because it might "produce a trial within a trial" on "a collateral but still an important matter").

The government maintains that Rule 403 is "inapplicable" because Puig waived his right to "any claim under . . . any other federal rule, that the statements or any evidence derived from the statements . . . are inadmissible." (Mot. at 15, citing plea agreement ¶ 22). But Rule 403 is not a rule of admissibility; rather, the rule permits a district court to exclude even otherwise admissible and relevant evidence. *United States v. Cruz-Garcia*, 344 F.3d 951, 956 (9th Cir. 2003) (explaining that "even though evidence is admissible under 404(b), it may nonetheless be excluded under Rule 403's balancing test"); *United States v. Two Eagle*, 633 F.2d 93, 96 (8th Cir. 1980) ("Evidence otherwise admissible under Rule

404(b) may be excluded, under Fed.R.Evid. 403"). Therefore, Rule 403 is not encompassed within the waiver in paragraph 22 of the plea agreement.

Indeed, the defense believes that the government can never exact a bargain that would deprive a Court of its plenary discretion under Rule 403, as the plea agreement itself recognizes by referencing only rules of admissibility. But to the extent the government nevertheless argues that Rule 403 is encompassed in paragraph 22, the Court may also reject the government's argument on the basis that the paragraph does not cite Rule 403 and ambiguities are construed in the defendant's favor. *United States v. Heredia*, 768 F.3d 1220, 1230 (9th Cir. 2014); *United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir. 2002) (the government ordinarily assumes "responsibility for any lack of clarity").

1. The Factual Basis has Little to No Probative Value.

Contrary to the government's claim, the probative value of the factual basis is extremely minimal. The factual basis is clearly a document that the government drafted and reflects their view of events. It will be clear to any reasonable juror that it was a contract of adhesion. *See Osorto*, 445 F.Supp.3d at 109 ("Plea agreements are contracts of adhesion."); *Mutschler*, 152 F.Supp.3d at 1335 (same). Unlike a spontaneous confession, or a defendant's written or oral statement, the factual basis is not from defendant's own words and clearly does not represent the way he would talk or what he would say -- in tone, words, or substance. As to the three alleged false statements, the jury will know that defendant disputes them, and will hardly find it persuasive of his guilt on those same alleged false statements that he signed onto a government form to avoid foreign arrest.

United States v. Sua, 307 F.3d 1150, 1153 (9th Cir. 2002), is instructive regarding the probative value of plea agreements. In *Sua*, a co-defendant had agreed to plead guilty in exchange for the dismissal of counts. *Id.* at 1152. Defendant Sua then sought to introduce the co-defendant's plea agreement to show "that the plea agreement was an admission by the government that [the co-defendant] was not

guilty" of the dismissed counts. *Id.* The court found the plea agreement was properly excluded under Rule 403 "because its low probative value is substantially out-weighed by 'confusion of the issues, or misleading the jury, or by considerations of undue delay.'" *Id.* at 1153. As part of this analysis, the court explained that "many factors influence the government's decision to plea bargain." *Id.*; *see also United States v. Delgado*, 903 F.2d 1495, 1499 (1990).

Many factors also influence a defendant's decision to plea bargain. *See, e.g., Corbitt v. New Jersey*, 439 U.S. 212, 222 n.12 (1978) (collecting reasons). Here, evidence would show that Puig's decision to attest to the statements within the factual basis was due to (1) the government's messaging that he needed to sign or face international arrest, and (2) the short window of time the government set that, given the unique circumstances of Puig's foreign residence, job, mental health issues and learning disabilities, eliminated a meaningful opportunity to vet plausible defenses. The jury, when shown evidence that contradicts the "facts" in the factual basis, will be able to easily infer Puig's reasons for signing. Like *Sua*, the factual basis here then has low probative value on the issue of guilt or innocence as to the charged offenses.

2. The Dangers Listed in Rule 403 Substantially Outweigh the Probative Value of the Factual Basis.

The government suggests that the dangers listed in Rule 403 do not substantially outweigh the factual basis's probative value. The government contends that the factual basis would not confuse or mislead the jury because "the government will not inform the jury that the [f]actual [b]asis was part of any plea agreement in its case-in-chief." (Mot. at 15.) But the defense would offer the context of the factual basis to explain it, as Rule 410(a) expressly permits. Rule 410(a) ("In a civil or criminal case, evidence of the following is not admissible *against the defendant* who made the plea or participated in the plea discussions.") (emphasis added); *United States v. Biaggi*, 909 F.2d 662, 690 (1990) ("[P]lea

negotiations are inadmissible 'against the defendant' . . . and it does not necessarily follow that the Government is entitled to a similar shield."); *United States v. Maloof*, 205 F.3d 819, 824-25 (5th Cir. 2000) (affirming admission of testimony offered by the defendant to show that he rejected offers of immunity because Rule 410 does not shield the government).[12]

Accordingly, should the government offer the factual basis, Puig would not be precluded from offering plea discussion evidence, which is highly probative value of his mental state during such discussions. *See, e.g.*, *Biaggi*, 909 F.2d at 690. It would take considerable time to give the jury context of why Puig signed, and would waste the jury's time and cause confusion over the issues the jury must resolve. Relevant aspects of this "mini-trial" would include statements attorneys made across the bargaining table, which would not be desirable and would cause the jury confusion. *See, e.g. United States v. DeMarco*, 407 F.Supp. 107, 114 (C.D. Cal. 1975) (excluding evidence because it "would involve the testimony of three attorneys in the case" that would lead to the lawyers arguing for their own credibility in closing arguments, and "[n]othing could be more likely to distract the jury from a focus on the evidence"). The defense might also need additional fact witnesses, and would need to prepare a different line of expert inquiry to apply Puig's unique mental health and cognitive issues to the plea discussion context.

As such, a trial-within-a-trial would be created over one piece of evidence that carries little weight, distracting from the jury's primary job of resolving the charges presented, and would considerably lengthen the trial. *See e.g.*, *AGA &*

[12] Rule 410 further provides that, if one statement made during plea discussions is admitted, other statements made during the plea discussions are also admissible. Fed. R. Evid. 410(b)(1) ("The court may admit a statement described in Rule 410(a)(3) or (4) . . . in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together.").

Titan, 2012 WL 4783636 at *4 (excluding evidence under Rule 403 because it would risk creating a "case-within-a-case" that would waste time). The dangers associated with admitting the factual basis therefore substantially outweigh any probative value the factual basis has.

These problems would not be avoided were the Court to restrict the use of the evidence to impeachment. For example, under Fed R. Evid. 613(b), if the factual basis is used to impeach Puig, Puig must be "given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it." *See United States v. Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982) ("Rule 613(b) requires that . . . the opposite party must be afforded the opportunity to interrogate him thereon[.]") (cleaned up); *In re Corrugated Container Antitrust Litigation*, 756 F.2d 411, 415 (5th Cir. 1985) (same) As such, even if only utilized to impeach, admitting the factual basis would still lead to a trial-within-a-trial.

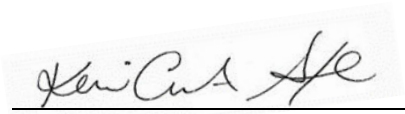
Whether used affirmatively or for impeachment, the Court has discretion to exclude otherwise admissible evidence under Rule 403, *United States v. Cruz-Garcia*, 344 F.3d 951, 956 (9th Cir. 2003) ("403 is, in a sense, incorporated into *all* other rules of evidence"); *United States v. Young*, 248 F.3d 260, 268 (4th Cir. 2001) (impeachment evidence subject to Rule 403), and should use such discretion here.

IV. CONCLUSION

For the reasons discussed above, Puig respectfully requests that this Court find that the plea agreement is unenforceable, which ends the issue. In the alternative, Puig requests that the Court find that he did not knowingly waive Rule

410, or knowingly breach the plea agreement and/or exclude the factual basis from evidence pursuant to Rule 403.

DATED: July 5, 2023 WAYMAKER LLP

By: 

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