No. 10-50636

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FELICIANO SANCHEZ,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF BAIL/DETENTION STATUS

Defendant Feliciano Sanchez was sentenced on December 22, 2010, to nine years' imprisonment. Pursuant to Circuit Rule 28-2.4, I state that according to the Federal Bureau of Prisons inmate locator database, defendant Feliciano Sanchez is currently confined and has an actual or projected release date of March 31, 2016.

s/April J. Anderson
APRIL J. ANDERSON
Attorney

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

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JURISDICTION

Defendant was charged with federal criminal law violations. ER 4:633-635. The district court had jurisdiction under 18 U.S.C. 3231. After a mistrial, Sanchez pled guilty and waived his right to appeal his sentence. ER 3:392-393. The court entered judgment on December 22, 2010. SER 107-114; ER 1:61-64. Sanchez filed a timely notice of appeal on December 29, 2010. ER 2:66. This Court has jurisdiction under 28 U.S.C. 1291.

ISSUES PRESENTED

1. Did the district court abuse its discretion in denying Sanchez's motion to withdraw his guilty plea, given that the court reviewed the Rule 11 colloquy, ruled the plea valid, and found the record did not support Sanchez's claim of innocence?

2. May this court review Sanchez's sentence, given that he waived appeal? Assuming this Court may address the issue, did the district court err in rejecting Sanchez's claim of unwarranted disparity compared with six dissimilar cases?

STATEMENT OF THE CASE

Bell City police officer Feliciano Sanchez was indicted for sexually assaulting Rosa Hernandez, after pulling her over for speeding. ER 4:633-635.[1] He was charged with deprivation of constitutional rights under color of law under 18 U.S.C. 242 and use of a firearm in a crime of violence under 18 U.S.C. 924. ER 4:633-635.

After a hung jury resulted in a mistrial, Sanchez pled guilty to violating 18 U.S.C. 242. ER 3:379-380, 382. Almost six months later, on January 13, 2010, he filed a motion under Federal Rule of Criminal Procedure 11(d) to withdraw his plea. ER 3:320-339. The court denied the motion and sentenced Sanchez to nine

[1] "ER _" refers to the excerpts of record filed with the defendant's brief. "SER _" refers to the supplemental excerpts of record filed with the United States' brief. "Br. _" refers to the defendant's opening brief.

years in prison – one year below the statutory maximum and 102 months below the guidelines range. ER 3:382, 389; ER 1:61. The court entered judgment on December 22, 2010. ER 1:61-64.

STATEMENT OF THE FACTS

1. The Traffic Stop

Sanchez, a four-year veteran of the Bell City Police Department, stopped motorist Rosa Hernandez for speeding on May 15, 2007. SER 8-10; ER 3:384. Finding she had no valid driver's license, he impounded her car. ER 3:384; ER 4:578-580. Hernandez did not have a license because she was an undocumented immigrant. SER 48; ER 4:570.

Sanchez asked Hernandez if she had been drinking. ER 4:581. She admitted she had. SER 48-49; ER 4:581. Nevertheless, Sanchez did not conduct a field sobriety test to determine if she was driving under the influence, an offence requiring arrest. SER 67.

Sanchez and Hernandez waited some 20 minutes for a tow truck. ER 4:581, 585. Another officer arrived at the scene, but Sanchez waived him on. ER 4:486. Sanchez asked Hernandez to wait in the back of his police car. SER 16. After her car was towed, he said he would give her a ride to the Tarasco bar where she worked. ER 3:384; ER 4:588.

The Tarasco bar was approximately 10 blocks away, but Sanchez did not take Hernandez directly there. SER 79. Nor did he notify his dispatcher, as was customary, that he was transporting someone. SER 70-73. Instead, he falsely notified the dispatcher that the traffic stop was concluded and he was back in service, available for other calls. SER 69-70. There were no entries in the computerized log between 1:18 and 1:56 am. SER 94. Sanchez claimed that at some point during the drive, his laptop computer became disconnected from the dispatcher system. SER 28-31.

2. The Rape

Sanchez drove to a small parking lot near a liquor store. SER 75, 81-90. A view of the parking lot was obscured by block walls on three sides. SER 90-91. Sanchez got out of the car and opened the passenger door. ER 4:592. Hernandez turned to get out but Sanchez stood in the doorway. ER 4:592. He handed her a ticket and said he was "doing [her] a favor" by not giving her a citation for driving under the influence. ER 4:592. Hernandez took the ticket. ER 4:592.

Sanchez then exposed his penis, holding it in one hand, and placed the other hand on the service revolver which hung from his belt. ER 4:592-596. He forced Hernandez to perform oral sex. ER 4:596. Hernandez began crying. ER 4:606. At one point Sanchez took her out of the seat, turned her around, pulled down her jeans and underwear, and pushed her up against the car. ER 4:597-598; SER 166.

He put his penis between her legs and then changed his mind, stating he did not have a condom. ER 4:598; SER 166. He put her back into the car and again forced her to perform oral sex. ER 4:599; ER 166. Hernandez did not cry out or struggle to escape because Sanchez was armed. ER 4:596-597. She testified he "had all the power over me" and that she believed no one would help her, "[b]ecause when a policeman has somebody under arrest, nobody gets involved." ER 4:599.

Afterwards, Sanchez took Hernandez to the parking lot outside the Tarasco bar. ER 4:606-607. He cleaned her hands and clothes with antibacterial gel. ER 4:607. Hernandez entered the bar upset and crying and her boss put her in his office. SER 141. Shortly afterwards, Sanchez arrived to see Hernandez. SER 142. He asked why she was crying and told her to stop. ER 4:608-609. He warned her he would be "watching" her. ER 4:609. Later that night Hernandez told her boss that Sanchez had raped her. SER 146.

Sanchez returned again after the bar was closed, explaining to Hernandez that he had to "fix" her ticket. ER 4:612; SER 147-149. He warned he would be "coming back" on the days she worked, and ordered her "not to say anything" because he would be watching. ER 4:612.

3. The Investigation

Hernandez was crying when her boyfriend Carlos Sandoval picked her up. She told him what happened. ER 4:618. She called 211, a help number she had used in a prior case of domestic violence. ER 4:618-619. The hotline told her to call 911. She did not call 911 "[b]ecause I was scared that another policeman might come out for me." ER 4:619.

Later that day Hernandez went to a hospital, where she was examined by a forensic nurse and interviewed by the FBI. ER 4:623-624; SER 97-99, 159. Hernandez told the nurse that Sanchez forced her to perform oral sex, and that he threatened her with a gun. SER 164-166. Twice during that day Hernandez grew ill and vomited. ER 4:624. She explained she felt nauseated because Sanchez "had been putting his penis in my mouth." ER 4:624.

The FBI identified several samples of Sanchez's semen on Hernandez's clothing. SER 151-152, 155. In addition, they found Sanchez's semen on the doorjamb of his police cruiser. SER 155-156.

Hernandez also told the FBI that Sanchez took his gun partway out of its holster during the encounter. SER 54-55. At some point, she also told Sandoval, falsely, that Sanchez had held a gun to her head. SER 128, 135-136. She later explained that she did not tell Sandoval the truth because she was "very embarrassed not to have done anything" to stop the attack. ER 4:610.

4. Hernandez Suffers Continuing Harm

After the attack, Hernandez was afraid to return home, realizing that she had given Sanchez her address when he filled out the citation. ER 4:628; SER 97, 129. The day after the rape, she left her apartment and stayed at her boyfriend's mother's home for two or three weeks. ER 4:629; SER 129. After she returned to her apartment, she would place furniture in front of the door to prevent anyone from coming in. SER 130. She and Sandoval moved out of the apartment six to eight months afterwards. SER 132.

Hernandez found it difficult to sleep and to care for her young son. ER 4:630. She was "crying all the time" and "had to take pills to calm down." ER 4:630. After a few weeks passed Hernandez became convinced she had contracted AIDS. ER 4:630-631. She took an overdose of pills and had to be taken to the hospital. ER 4:630-631; SER 131.

5. The Trial

At trial, Hernandez recounted the rape and her boyfriend and boss testified about her earlier reports of the attack. ER 4:592-601; SER 59, 61-64, 146. Bell police officials testified that the city's GPS system showed Sanchez had stopped at the walled parking lot at 1:24 am for about five minutes. SER 74, 93. FBI agents explained the DNA matches they found on Hernandez's clothing and Sanchez's police cruiser. SER 151-152, 155.

The United States also called Rosana Castillo, who testified that Sanchez had behaved inappropriately during a traffic stop. SER 172. He tried to touch her leg and then her breast, but Castillo pushed him away. SER 173-174.

Sanchez testified in his own defense. SER 7. He claimed that during the traffic stop Hernandez told him he was handsome and asked him if he "want[ed] to fuck." SER 15, 7. She asked if he had a girlfriend, if he would go out with her, and if she could kiss him. SER 17, 20, 22-23. She once placed his hand on her breast and repeatedly brushed up against his leg as he searched her car. SER 12-14, 16, 26.

Sanchez said Hernandez asked for a ride home and he decided to drive her to the police station and call a taxi for her. SER 27, 31. When they got to the station, Hernandez said she did not want to wait there. SER 34. He asked her where she wanted him to take her but she did not answer. SER 36. He grew frustrated, pulled over, got out of the car, and went back to question her. SER 38.

Sanchez said that when he opened the back door, Hernandez grabbed his belt buckle. SER 40. She asked to kiss him, he refused, and she grabbed his crotch. SER 41. Sanchez was "startled" but eventually "went along with it," unzipping his pants. SER 42, 45.

Sanchez claimed he dropped Hernandez off at the Tarasco bar, and returned around closing time after realizing she did not sign the ticket. SER 46-47. In cross

examination he admitted that he had previously gone into the bar to return the identification card Hernandez had left on his car. SER 51. He returned again, later in the evening, to ask her to sign the ticket. SER 50-51.

After eight days of testimony and argument and two days of deliberations, the jury failed to reach a unanimous verdict, the court declared a mistrial. ER 4:646. Jurors had voted eight to four for conviction. ER 4:446.

6. The Detention Hearing

Shortly after the trial, the court conducted a hearing on Sanchez's motion for release pending retrial. The court questioned both sides about issues relevant to Sanchez's detention, including the evidence against him, his risk of flight, and his dangerousness. ER 4:450-452. The parties discussed whether a hung jury and the fact that Sanchez garnered four votes for acquittal affected consideration of his detention status. ER 4:446-447. The United States argued that Sanchez posed a potential danger to the community, and recounted evidence that Hernandez moved out of her residence in fear of him. ER 4:453. The court, in response, asked the United States about evidence Hernandez visited Bell two months after the attack. ER 4:453-458. After the hearing, the court ordered Sanchez be detained. ER 4:646-647.

7. Sanchez's Plea Agreement

Less than two weeks before a scheduled retrial, Sanchez pled guilty to violating 28 U.S.C. 242. ER 3:382. In return, the United States agreed to withdraw the firearms charges, to recommend a two-level reduction for acceptance of responsibility, and to move for an additional one-level reduction if available under U.S.S.G. 3E1.1(b). ER 3:390-391.

The plea agreement included a mutual appeal waiver. ER 3:392. The parties "g[ave] up the right to appeal any sentence imposed * * * provided that the sentence is within the statutory maximum * * * and is constitutional." ER 3:392. Sanchez retained limited rights to collateral appeal, including "a post-conviction collateral attack based on a claim of ineffective assistance of counsel, a claim of newly discovered evidence, or an explicitly retroactive change in the applicable Sentencing Guidelines." ER 3:392-393. Sanchez acknowledged that he understood the agreement, that he had "carefully discussed every part of it" with his attorney, and that he was "satisfied" with the representation of his attorney. ER 3:395; see also ER 3:369.

Sanchez and the United States stipulated to a total offense level of 37 under the federal sentencing guidelines, yielding a recommended sentence of 210 to 262 months. ER 3:389.

8. The Change Of Plea Hearing And Rule 11 Colloquy

At the change of plea hearing on July 17, 2009, the court reminded Sanchez that it must be "sure that you are fully informed of your rights and that you understand your rights," and requested that he interrupt and ask for an explanation whenever he did not understand the proceedings. ER 3:343. It then conducted a plea colloquy as required under Rule 11 of the Federal Rules of Criminal Procedure. Repeatedly throughout the proceedings and at their conclusion, the court again asked Sanchez if he understood the agreement and whether he needed more time to consult his attorney. ER 3:359, 362, 369. Sanchez did occasionally ask for a pause or a clarification. See ER 3:353-354, 361, 371-372. When asked, Sanchez confirmed that he had had enough time to discuss the agreement with his attorney and that he understood the charge and his rights. ER 3:346-347, 351, 362-363.

The court also read Sanchez the limited appeal waiver and asked Sanchez whether he understood he would be limiting his appeal rights. ER 3:363-364. Sanchez said, "Yes, your honor." ER 3:364. The court then directed the United States to read the appeal waiver and asked Sanchez to "listen carefully." ER 3:364. Afterwards, Sanchez affirmed that he had discussed giving up appeal rights with his attorney, and agreed that he was giving up the right to appeal as stated in the waiver. ER 3:365.

The court accepted Sanchez's plea. ER 3:373-374. It found that he was "aware of the nature of the charges and the consequences of the plea," and that the plea was voluntarily and intelligently made. ER 3:374. Furthermore, the court found that the plea was supported by an independent factual basis as to each element of the offense. ER 3:374.

9. Sanchez's Motion To Withdraw His Plea

After the change of plea hearing, Sanchez retained a new attorney. ER 324. On January 13, 2010, Sanchez filed a motion to withdraw his plea. ER 3:320-339. He argued that his prior counsel was ineffective, that counsel coerced him into signing the plea, and that he was innocent. ER 3:323, 331. He stated "the evidence [wa]s insufficient to support a guilty plea as a matter of law." ER 3:323. In addition, he claimed that he did not understand that pleading guilty and thereafter registering as a sex offender might impede visitation rights with his young daughter.[2] ER 3:323, 339. Accordingly, Sanchez asserted that his plea was "not knowingly and understandingly made." ER 3:323.

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[2] In the text of the plea agreement, Sanchez admitted that he understood he might be required to register as a sex offender under both state and federal law. ER 3:383-384. At the change of plea hearing, the court pointed out that Sanchez might be subject to federal and state sex registration requirements. ER 3:356. Sanchez confirmed that he understood the provision and had discussed it with counsel. ER 3:356.

At a hearing on the motion, Sanchez's newly retained counsel affirmed he had no other evidence to present, aside from that cited in the briefing. SER 104. The court denied the motion, rejecting each of Sanchez's arguments. ER 3:266; SER 104. The court found that a claim of innocence "is not supported by the record." ER 3:266. The court further found that Sanchez had not established ineffective assistance of counsel or coercion. ER 3:266.

Less than two weeks before scheduled sentencing, Sanchez fired his second retained counsel and requested new counsel be appointed. ER 655. The court granted the motion. SER 105. The next month, newly appointed counsel requested to be relieved and the court again appointed new counsel. SER 106, 119.

10. Sentencing

Sanchez's presentence report calculated an offense level of 37 and a criminal history category of 1. ER 1:39; ER 3:389. This yielded a guidelines range of 210 to 262 months, but 18 U.S.C. 242 provided a statutory maximum of 120 months. ER 1:48. The United States concurred with the Presentence Report and recommended Sanchez be sentenced to the statutory maximum, which was seven-and-a-half years below the guidelines range. ER 2:77; SER 100.

Sanchez objected to the presentence report and requested that paragraph 29, discussing Rosana Castillo's testimony, be struck as "lack[ing] credible evidentiary support." ER 2:85.

In his brief to the court, Sanchez requested a reduced sentence of 60 months – five years below the statutory maximum and twelve-and-one-half years below the guidelines range. ER 2:90. Sanchez claimed the lower sentence was justified because the encounter with Hernandez was "consensual," because his daughter would suffer if he were incarcerated, and because his prison conditions were particularly onerous where, as a former law enforcement officer, he was placed in administrative segregation. ER 2:91, 94-95.

Sanchez further claimed that a reduced sentence was necessary to avoid disparities with the sentences or likely sentences of six other defendants in assorted cases of sexual misconduct. ER 2:95-98. The six examples Sanchez provided were a mixture of federal and state cases ranging from prostitution-related charges to obstruction of justice. ER 2:95-98.

Sanchez read a statement at sentencing. He addressed Hernandez – who was seated in the courtroom, and offered to "forgive" her for her "sinful actions of bringing false witness." ER 1:32. He accused her of "imprison[ing] an innocent man," exposing him to "potential murder while falsely imprisoned," and "nearly caus[ing] * * * an act of suicide." ER 1:32-33, 35. He further told Hernandez she had "orphan[ed] [his] 6-year old daughter" and prevented him from attending to the "death beds" of eight family members while he was in prison. ER 1:32-33. He called on Hernandez to "truly repent," not to "condemn [her] soul for riches" and

"tell[] the truth in order to save my life and the lies of destruction your sin has caused." ER 2:34-35.

The court sentenced Sanchez to 108 months. ER 1:51. It partially granted Sanchez's motion regarding use of Castillo's testimony. ER 1:47-48. In applying the factors of 18 U.S.C. 3553(a)(1), the court concluded the offense was serious and involved "predatory" conduct. ER 1:48. Sanchez's stable background, the court noted, also weighed against mitigation. ER 1:49. Sanchez had "egregiously misus[ed] his authority as a police officer," and this outweighed any mitigating force of Sanchez's police service. ER 1:48-49. Other mitigating factors included Sanchez's lack of criminal history, the unlikelihood of his reoffending, the support of his family, and his relationship with his daughter. ER 1:49.

The court also noted that "in light of Mr. Sanchez's comments, I carefully reviewed the record and I find that Mr. Sanchez committed the offense." ER 1:50. He was "not contrite, has not shown remorse." ER 1:50. At the close of the hearing, the court again read Sanchez the limited appeal waiver. ER 1:57.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying Sanchez's motion to withdraw his guilty plea. Sanchez's bare assertions of innocence do not amount to a "fair and just reason" for withdrawing his plea. Federal Rule of Criminal Procedure 11(d)(2)(B); *United States* v. *Bonilla*, 637 F.3d 980, 983 (9th Cir. 2011).

He presented no new evidence of his innocence to the district court. He now claims – for the first time on appeal – that the court's questions and comments at a pretrial detention hearing amount to "credible evidence" in his favor. Br. 15. During the detention hearing the court made no findings supporting Sanchez's claim of innocence, and the court's statements are not evidence – much less new evidence – that would justify withdrawal of his plea. Sanchez's requests for a pause at his change of plea hearing also fail to support his claim of innocence.

Nor did the court abuse its discretion in ruling that a valid Rule 11 colloquy undermined Sanchez's claims. Sanchez challenged the colloquy when he moved to withdraw his plea and, accordingly, the district court properly evaluated its adequacy. Furthermore, the court gave additional reasons for denying the withdrawal motion, addressing each of Sanchez's arguments.

Sanchez's plea agreement included a limited appeal waiver and he may not now challenge his below-guidelines sentence. At any rate, the district court did not abuse its discretion in rejecting Sanchez's proposed examples of disparity as none of the defendants he cites were convicted under Section 242 as was Sanchez. Because the applicability of the examples is not a question of fact, the court was not required to issue findings pursuant to Federal Rule of Criminal Procedure 32(h) before discounting the examples.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING SANCHEZ'S MOTION TO WITHDRAW HIS GUILTY PLEA

A. Standard Of Review

This court reviews the district court's denial of Sanchez's motion to withdraw his plea for abuse of discretion. *United States* v. *Bonilla*, 637 F.3d 980, 983 (9th Cir. 2011). Findings of fact supporting the district court's ruling are reviewed for clear error. *United States* v. *McTiernan*, 546 F.3d 1160, 1166 (9th Cir. 2008).

B. The District Court Did Not Abuse Its Discretion In Finding Sanchez's Assertions Of Innocence Did Not Constitute A Fair Or Just Reason For Withdrawing His Plea

Before sentencing, a defendant may withdraw a plea of guilty upon showing "a fair and just reason." Federal Rule of Criminal Procedure 11(d)(2)(B); *Bonilla*, 637 F.3d at 983. The defendant "has no right" to withdrawal of the plea after it has been accepted. *United States* v. *Castello*, 724 F.2d 813, 814 (9th Cir.) (internal quotation marks and citation omitted), cert. denied, 467 U.S. 1254 (1984). "[I]t is no trifling matter to allow a defendant to withdraw a guilty plea '[a]fter [he] has sworn in open court that he actually committed the crimes.'" *United States* v. *Robinson*, 587 F.3d 1122, 1133 (D.C. Cir. 2009) (quoting *United States* v. *Hyde*, 520 U.S. 670, 676 (1997)). Without proper application of this standard, "the

otherwise serious act of pleading guilty" would become "something akin to a move in a game of chess." *Hyde*, 520 U.S. at 677.

A fair and just reason for withdrawal of a guilty plea includes an inadequate plea colloquy or a change in circumstances, such as newly discovered evidence or intervening events. *McTiernan*, 546 F.3d at 1167. "The defendant has the burden of demonstrating the existence of at least one of these conditions." *United States* v. *Showalter*, 569 F.3d 1150, 1154 (9th Cir. 2009).

Sanchez claims that the court should have allowed him to change his plea because there was credible evidence of his innocence. In deciding a motion based on a claim of innocence, a district court may consider all the evidence; it does not abuse its discretion where it chooses to credit a defendant's testimony at the Rule 11 colloquy rather than his later assertions in a motion to withdraw a plea. *Castello*, 724 F.2d at 815. Reversal is not warranted simply because defendant's motion to withdraw a plea "directly contradicts his statements at the change of plea hearing." *United States* v. *Jones*, 381 F.3d 615, 618-619 (7th Cir. 2004); see also *United States* v. *Rubalcaba*, 811 F.2d 491, 494 (9th Cir. 1987) (noting that "[s]olemn declarations in open court" at a Rule 11 hearing "carry a strong presumption of verity") (internal quotation marks and citation omitted). Thus, contrary to Sanchez's suggestion (Br. 15) a defendant is not entitled to withdraw a plea whenever he can point to some scrap of "credible evidence he was innocent."

In any event, Sanchez does not cite any exculpatory evidence – much less evidence discovered *after* his plea. As "evidence," Sanchez points to comments the trial court made at his post-trial detention hearing and the fact that Sanchez requested a pause during his Rule 11 colloquy. Br. 16-21. Sanchez did not discuss any of these incidents in his motion to withdraw his plea and they may not be considered for the first time on appeal. *United States* v. *Jeffers*, 228 F. App'x 643 (9th Cir. 2006) (holding this Court will not entertain new justifications for defendant's motion to withdraw a plea).

Even so, the statements made to the court at the post trial detention hearing are not evidence and cast no doubt on Sanchez's guilt. The statements addressed whether Sanchez should be detained pending retrial. The United States argued that eight votes for conviction increased the likelihood Sanchez would flee if released on bail. ER 4:445-446. The court responded that "arguments could be made on both sides" because four jurors voted for acquittal and the court could not "conclude from those facts that the defendant has more incentive to flee in light of the deadlocked jury." ER 4:446. That four jurors voted for acquittal is not "credible evidence" of innocence and the court never stated that it was. See Br. 16. Indeed, Sanchez cites no case law suggesting that dissenting jurors' votes are exculpatory evidence.

The second comment Sanchez cites arose as the parties were discussing whether Sanchez posed a danger to the community. ER 4:453-461. Citing incidents including Hernandez's change of residence, the United States argued that Hernandez was afraid of Sanchez. ER 4:453. In response, the court noted that after the incident Hernandez visited Bell. ER 4:453. The United States explained Hernandez went there two months after the attack, when she knew Sanchez had been suspended from the police force. ER 4:454, 457-458; SER 56-58.[3] The court did not make any rulings on Sanchez's guilt or innocence at the hearing.

Contrary to Sanchez's suggestion, the district court never "rule[d] that Sanchez's 'denial of the offense' was credible." Br. 21. It never stated "there was credible evidence he was innocent." Br. 15. Several statements Sanchez cites were, in fact, *questions* posed to counsel. Br. 16-17. In deciding the motion for release, the court noted "that counsel for both sides presented significant issues that deserve careful consideration" and ultimately ruled against Sanchez. ER 4:646-647. Moreover, none of the court's statements on the subject of detention post-date Sanchez's plea.

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[3] Before trial, the United States moved to exclude evidence Hernandez was drinking at a bar near the Bell police station and later drove to the station. SER 4. Hernandez claimed that she met police officers at the bar who threatened her because she had reported Sanchez's attack. SER 3-4.

Sanchez also contends (Br. 18-19) that his request to "have a minute" during the plea hearing is evidence of his innocence. See ER 3:370-372. It is hard to see how a pause can be evidence of anything, but it would seem to suggest that Sanchez took the Rule 11 plea colloquy seriously and that the court gave him every opportunity to ask questions and to reflect upon his actions.[4]

Mere "self-serving assertions" which contradict statements at the Rule 11 hearing do not provide a fair and just reason to withdraw a plea. *Jones*, 381 F.3d at 618-619. Nor is an "unsupported protest" of innocence a fair and just reason for withdrawal of a plea. *United States* v. *Turner*, 898 F.2d 705, 713 (9th Cir. 1990). That is all Sanchez points to in this appeal.

Indeed, there was ample evidence to show Sanchez raped Hernandez. Unlike most cases ending in a plea, the evidence here was fully developed through an eight-day trial. Hernandez testified at length about her ordeal. ER 4:592-601.

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[4] *United States* v. *Nahodil*, 776 F. Supp. 991, 992-994, 996 (M.D. Pa. 1991) (see Br. 20) offers no support for Sanchez. There, the defendant sought the advice of counsel seven times during the plea hearing, expressed specific concerns about one of the elements of the crime, and consulted counsel about withdrawing his plea only a week after it was entered. *Ibid*. The court nevertheless denied the motion because of prejudice to the United States and the Third Circuit summarily affirmed. *United States* v. *Nahodil*, 972 F.2d 1334 (1992). In *United States* v. *Smith*, 818 F. Supp. 123 (W.D. Pa. 1993) (see Br. 16), the court likewise denied a motion to withdraw a plea. Sanchez offers no other cases as examples of the degree or type of evidence justifying a plea withdrawal. See Br. 16-21 (citing no other cases).

Her boyfriend and her boss also testified that Hernandez was visibly upset after her encounter with Sanchez, that she could not stop crying, and that she told them Sanchez had assaulted her. SER 59, 61-64, 141-142, 146-147. DNA and GPS evidence also support Hernandez's account. ER 92-93, 151-152, 155-156. Accordingly, the court did not clearly err in finding, as a matter of fact, that Sanchez committed the crime as admitted in his plea colloquy. ER 1:50, ER 3:266.

C. The District Court Appropriately Considered Sanchez's Rule 11 Colloquy In Denying The Motion To Withdraw The Plea

When deciding a defendant's motion to withdraw a guilty plea, a court should generally consider whether the Rule 11 colloquy was adequate. In *United States* v. *Nostratis*, 321 F.3d 1206, 1208-1209 (9th Cir. 2003), this Court noted that the trial judge "correctly examined the thoroughness of the Rule 11 plea colloquy to determine whether [defendant] comprehended his plea agreement." An inadequate colloquy suggesting a plea was not knowingly and voluntarily made "qualifies as a 'fair and just reason' for permitting withdrawal" although it is "not a prerequisite to withdrawal." *United States* v. *Garcia*, 401 F.3d 1008, 1011-1014 (9th Cir. 2005) (internal quotation marks and citation omitted).

The Rule 11 colloquy here was of particular importance because Sanchez claimed (among other things) that the evidence was inadequate to support his plea, that he was innocent, that his plea was not knowingly made, and that counsel coerced him. See Br. 16. The Rule 11 hearing touched on all of these issues,

because in it the court reviewed the factual basis for the plea, confirmed that Sanchez understood its terms, and asked whether he was coerced. The court needed to review the adequacy of the colloquy to answer all of Sanchez's claims.[5] ER 3:266.

Indeed, in Sanchez's case, the court did not rely on the Rule 11 colloquy alone to address his motion. The court reviewed the parties' voluminous filings, which included affidavits, statements of counsel, and excerpts of trial testimony. ER 3:316, 319.6, 338.[6] In addition to finding the Rule 11 colloquy valid, the court found that Sanchez's claim of innocence "is not supported by the record" and that

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[5] Sanchez improperly relies on *Garcia*, 401 F.3d at 1008, to support his assertion that "reliance on the validity of the plea colloquy was an erroneous view of the law." Br. 21. In that case, the district court inappropriately relied on the Rule 11 hearing when defendant's motion was based on newly-discovered evidence. *Garcia*, 401 F.3d at 1010. "[T]he fact that a plea is voluntary, knowing, and intelligent," this Court unsurprisingly noted, does not "foreclose[] an attempt to withdraw it" on other grounds. *Id.* at 1012. Similarly, in *United States* v. *Ortega-Ascanio*, 376 F.3d 879, 883-884 (9th Cir. 2004), the district court erred in relying on defendant's "properly entered guilty plea" when his motion for withdrawal cited an "intervening circumstance" in the form of a recent Supreme Court decision changing relevant law. The district court "did not address [defendant's] argument" for withdrawal. *Id.* at 884.

[6] In addition to its stated findings, the court explained that it had read the parties' filings, which amounted to some 132 pages of briefing and evidence. ER 3:264-265, 270, 275, 320. The United States submitted a 117-page document in response to Sanchez's claims. ER 3:275. The court "found that the defendant's motion to withdraw * * * should be denied for all of the reasons set forth in the United States' opposition, which I find to be correct and would incorporate in my analysis, specifically referring to pages 1 through 30." ER 3:265.

he "did not establish he was coerced." ER 3:266. The court further found that Sanchez had not established ineffective assistance of counsel, as counsel's advice about sex offender registration "was not ineffective" and there was "no support" for his claim counsel improperly advised him about a defense. ER 3:266.

II

SANCHEZ MAY NOT ATTACK THE DISTRICT COURT'S SENTENCING DECISION

A. Sanchez Has Waived His Right To A Direct Appeal Of His Below-Guidelines Sentence

"Where an appeal raises issues encompassed by a valid, enforceable appellate waiver, the appeal generally must be dismissed." *United States* v. *Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (citation omitted). This Court will "refuse to exercise jurisdiction" where defendant has waived appeal. *Id.* at 1204; see also *United States* v. *Castillo*, 496 F.3d 947, 957 (9th Cir. 2007) (en banc). "Generally, courts will enforce a defendant's waiver of his right to appeal if (1) the language of the waiver encompasses the defendant's right to appeal on the grounds claimed on appeal, and (2) the waiver is knowingly and voluntarily made." *United States* v. *Nunez*, 223 F.3d 956, 958-959 (9th Cir. 2000) (citation omitted), cert. denied, 534 U.S. 921 (2001).

This Court should dismiss Sanchez's appeal of his sentence, as he waived his right to a direct appeal. ER 3:392. The limited waiver permitted appeal only

on the grounds that the sentence was outside the statutory maximum or was unconstitutional. ER 3:392. Sanchez does not allege either error.

The appeal waiver was knowingly and voluntarily made. During the Rule 11 colloquy, the court asked the United States to read the waiver. ER 3:364. Sanchez affirmed he understood the limitation on his appeal rights. ER 3:363-364. See *United States* v. *Watson*, 582 F.3d 974, 987 (9th Cir. 2009) (applying appeal waiver where the court reviewed the terms with defendant and defendant indicated he understood), cert. denied, 130 S. Ct. 3461 (2010). In addition, Sanchez affirmed that he had discussed giving up appeal rights with counsel. ER 3:365. The court again read the waiver at Sanchez's sentencing. ER 1:57.

An appeal waiver will not apply under certain exceptions, such as when there is an inadequate Rule 11 colloquy, when the court informs the defendant he has the right to appeal, or when the sentence does not comply with the plea agreement. *Watson*, 582 F.3d at 987. None of these conditions exist here.

B. In Any Case, The Court Appropriately Considered And Rejected Allegations Of An Unwarranted Sentencing Disparity Under Section 3553(a)(6)

1. Standard Of Review

An abuse of discretion standard applies to all sentencing decisions. *United States* v. *Carty*, 520 F.3d 984, 993 (9th Cir.) (en banc), cert. denied, 553 U.S. 1061 (2008). A reviewing court should consider "whether the district court committed significant procedural error." *Ibid*.

2. The District Court Did Not Abuse Its Discretion In Rejecting Sanchez's Examples Of Sentences Imposed Under Other Statutes

A sentencing court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). Whether to depart due to an unwarranted disparity "is properly left within the sound discretion of the sentencing judge." *United States* v. *Caperna*, 251 F.3d 827, 831-832 (9th Cir. 2001). A defendant can rarely show a sentencing disparity where the court issues a within-guidelines sentence. *United States* v. *Becerril-Lopez*, 541 F.3d 881, 894-895 (9th Cir. 2008), cert. denied, 555 U.S. 1121 (2009).

The sentencing guidelines system "attempt[s] to equalize the sentences of those who have engaged in similar criminal conduct, have similar criminal backgrounds, *and* have been convicted of the same offense." *United States* v. *Banuelos-Rodriguez*, 215 F.3d 969, 974 (9th Cir. 2000). It achieves uniformity through specific guidelines for an offense, "not from giving judges a broad discretion" to consider "extraneous factors such as the punishment meted out to those convicted of other offenses." *Ibid*. (internal quotation marks and citations omitted). A court should not depart from the guidelines to equalize a disparity among codefendants convicted under different statutes. *Caperna*, 251 F.3d at 832; see also *United States* v. *Tzoc-Sierra*, 387 F.3d 978 (9th Cir. 2004).

Arguing that he deserved a reduced sentence to avoid an unwarranted disparity, Sanchez cited six cases. The purportedly comparable examples ranged from transporting persons with the intent to engage in prostitution to obstruction of justice. None involved a conviction for deprivation of rights under color of law under 18 U.S.C. 242. Indeed, three of the convictions were under *state* law.

The court did not abuse its discretion in declining to further reduce Sanchez's below-guidelines sentence based on sentencing examples from other statutes. See *United States* v. *Gonzalez-Perez*, 472 F.3d 1158, 1162 (9th Cir. 2007) (district court did not err where it sentenced defendant and codefendant differently, in part because they were convicted under different statutes). In particular, this Court has stated that Section 3553(a)(6) does not require a district court "to consider sentence disparities between defendants found guilty of similar conduct in state * * * courts." *United States* v. *Ringgold*, 571 F.3d 948, 951 (9th Cir. 2009).[7]

[7] The court was not required to make "findings" under Federal Rule of Criminal Procedure 32(i)(3)(B). The examples' relevance is a legal question, not a dispute of fact. See Br. 24 (quoting *United States* v. *Carter*, 219 F.3d 863, 867 (9th Cir. 2000) (findings required for "disputed fact")). Nor was the court's explanation of this sentencing factor procedurally deficient. The district court stated it had considered the factors set forth in Section 3553(a)(6) and had read Sanchez's submissions "relat[ing] to * * * sentencing disparities." ER 1:10, 50; see *United States* v. *Smith*, 365 F. App'x 781, 789 (9th Cir. 2010) (affirming where court "said it had 'received and reviewed the Defendant's sentencing memorandum and objections to the presentence report'" and "that review would have embraced [the] disparity argument"). Even where a court does not "expressly state its reasons," the record as a whole may adequately "show[] that [it] considered the

(continued . . .)

CONCLUSION

This court should affirm Sanchez's conviction and dismiss his appeal of his sentence.

Respectfully submitted,

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(. . . continued)
arguments and evidence * * * and chose to reject those arguments." *United States* v. *Daniels*, 541 F.3d 915, 922 (9th Cir. 2008), cert. denied, 129 S. Ct. 1600 (2009).

STATEMENT OF RELATED CASES

The United States is not aware of any related cases, as described in Local Rule 28-2.6, that are pending in this Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 6,500 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, which has been sent to the Court by first-class mail on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

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Date: September 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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