

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

APR 03 2024
kts

MITCHELL R. ELFERS
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PROCOPIO MONTOYA ATKINSON,

Defendant.

Cr. No. 22-CR-01091 DHU

PLEA AGREEMENT

Pursuant to Rule 11(c)(1)(C), Fed. R. Crim. P., the parties notify the Court of the following agreement between the United States Attorney for the District of New Mexico, the Defendant, Procopio Montoya Atkinson, and the Defendant's counsel, Megan Dorsey:

REPRESENTATION BY COUNSEL

1. The Defendant understands the Defendant's right to be represented by an attorney and is so represented. The Defendant has thoroughly reviewed all aspects of this case with the Defendant's attorney and is fully satisfied with that attorney's legal representation.

RIGHTS OF THE DEFENDANT

2. The Defendant further understands the Defendant's rights:

- a. to plead not guilty, or having already so pleaded, to persist in that plea;
- b. to have a trial by jury; and
- c. at a trial:
 - 1) to confront and cross-examine adverse witnesses,
 - 2) to be protected from compelled self-incrimination,

- 3) to testify and present evidence on the Defendant's own behalf, and
- 4) to compel the attendance of witnesses for the defense.

WAIVER OF RIGHTS AND PLEA OF GUILTY

3. The Defendant agrees to waive these rights and to plead guilty to Counts 1, 2, 5, 5, and 7 of the indictment:

- a. Count 1 of the indictment, charging a violation of 18 U.S.C. §1951, that being Interference with Commerce by Robbery;
- b. Count 2 of the indictment, charging a violation of 18 U.S.C. § 924(c)(1)(A)(iii), that being Using and Carrying a Firearm During and in Relation to a Crime of Violence, and Possessing a Firearm in Furtherance of Such Crime; Discharging Said Firearm;
- c. Count 3 of the indictment, charging a violation of 18 U.S.C. §§ 111(a) and (b), that being Assault Upon a Federal Officer Involving Use of a Deadly Weapon;
- d. Count 5 of the indictment, charging a violation of 18 U.S.C. § 2119, that being Carjacking; and
- e. Count 7 of the indictment, charging a violation of 18 U.S.C. §§ 922(g)(1) and 924, that being Felon in Possession of a Firearm and Ammunition.

SENTENCING

4. The Defendant understands that the maximum penalty provided by law for Count 1 of the indictment, charging a violation of 18 U.S.C. §1951, that being Interference with Commerce by Robbery, is:

- a. imprisonment for a period of not more than 20 years;
- b. a fine not to exceed the greater of \$250,000 or twice the pecuniary gain to the Defendant or pecuniary loss to the victim;
- c. a term of supervised release of not more than 3 years to follow any term of imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the Defendant's supervised release could be revoked — even on the last day of the term — and the Defendant could then be returned to another period of incarceration and a new term of supervised release.);
- d. a mandatory special penalty assessment of \$100.00; and
- e. restitution as may be ordered by the Court.

5. The Defendant understands that the minimum and maximum penalty provided by law for Count 2 of the indictment, charging a violation of 18 U.S.C. § 924(c)(1)(A)(iii), that being Using and Carrying a Firearm During and in Relation to a Crime of Violence, and Possessing a Firearm in Furtherance of Such Crime; Discharging Said Firearm, is:

- a. imprisonment for a period of not less than 10 years and not more than life;
- b. a fine not to exceed the greater of \$250,000 or twice the pecuniary gain to the Defendant or pecuniary loss to the victim;
- c. a term of supervised release of not more than 5 years to follow any term of imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the Defendant's supervised release could be revoked — even on

the last day of the term — and the Defendant could then be returned to another period of incarceration and a new term of supervised release.);

- d. a mandatory special penalty assessment of \$100.00; and
- e. restitution as may be ordered by the Court.

6. The Defendant understands that the maximum penalty provided by law for Count 3 of the indictment, charging a violation of 18 U.S.C. §§ 111(a) and (b), that being Assault Upon a Federal Officer Involving Use of a Deadly Weapon, is:

- a. imprisonment for a period of not more than 20 years;
- b. a fine not to exceed the greater of \$250,000 or twice the pecuniary gain to the Defendant or pecuniary loss to the victim;
- c. a term of supervised release of not more than 3 years to follow any term of imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the Defendant's supervised release could be revoked — even on the last day of the term — and the Defendant could then be returned to another period of incarceration and a new term of supervised release.);
- d. a mandatory special penalty assessment of \$100.00; and
- e. restitution as may be ordered by the Court.

7. The Defendant understands that the maximum penalty provided by law for Count 5 of the indictment, charging a violation of 18 U.S.C. § 2119, that being Carjacking, is:

- a. imprisonment for a period of not more than 15 years;

- b. a fine not to exceed the greater of \$250,000 or twice the pecuniary gain to the Defendant or pecuniary loss to the victim;
- c. a term of supervised release of not more than 3 years to follow any term of imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the Defendant's supervised release could be revoked — even on the last day of the term — and the Defendant could then be returned to another period of incarceration and a new term of supervised release.);
- d. a mandatory special penalty assessment of \$100.00; and
- e. restitution as may be ordered by the Court.

8. The Defendant understands that the maximum penalty provided by law for Count 7 of the indictment, charging a violation of 18 U.S.C. §§ 922(g)(1) and 924, that being Felon in Possession of a Firearm and Ammunition, is:

- a. imprisonment for a period of not more than 10 years;
- b. a fine not to exceed the greater of \$250,000 or twice the pecuniary gain to the Defendant or pecuniary loss to the victim;
- c. a term of supervised release of not more than 3 years to follow any term of imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the Defendant's supervised release could be revoked — even on the last day of the term — and the Defendant could then be returned to another period of incarceration and a new term of supervised release.);

- d. a mandatory special penalty assessment of \$100.00; and
- e. restitution as may be ordered by the Court.

9. The parties recognize that the federal sentencing guidelines are advisory, and that the Court is required to consider them in determining the sentence it imposes.

10. The parties are aware that the Court will decide whether to accept or reject this plea agreement. The Court may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report. Pursuant to Federal Rule of Criminal Procedure 11(c)(5), if the Court rejects this plea agreement, the defendant shall have the right to withdraw the defendant's plea of guilty.

11. Regardless of any other provision in this agreement, the United States reserves the right to provide to the United States Pretrial Services and Probation Office and to the Court any information the United States believes may be helpful to the Court, including but not limited to information about the recommendations contained in this agreement and any relevant conduct under U.S.S.G. § 1B1.3.

ELEMENTS OF THE OFFENSE

12. If this matter proceeded to trial, the Defendant understands that the United States would be required to prove, beyond a reasonable doubt, the following elements for violations of the charges listed below:

Count 1 of the indictment, charging a violation of 18 U.S.C. §1951, that being

Interference with Commerce by Robbery:

First: the defendant obtained property from another, without that person's consent;

Second: the defendant did so by wrongful use of actual threatened force, violence, or fear; and

Third: as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree.

Count 2 of the indictment, charging a violation of 18 U.S.C. § 924(c)(1)(A)(iii), that being Using and Carrying a Firearm During and in Relation to a Crime of Violence, and Possessing a Firearm in Furtherance of Such Crime; Discharging Said Firearm:

First: the defendant committed the crime of interference with interstate commerce by robbery, as charged in count one of the indictment, which is a crime of violence;

Second: the defendant used or carried a firearm;

Third: during and in relation to interference with commerce by robbery; and

Fourth: the firearm was discharged.

Count 3 of the indictment, charging a violation of 18 U.S.C. §§ 111(a) and (b), that being Assault Upon a Federal Officer Involving Use of a Deadly Weapon:

First: the defendant forcibly assaulted, resisted, opposed, impeded, intimidated, or interfered with TFO Booth;

The term 'forcible assault' means any intentional attempt or threat to inflict injury upon someone else, when coupled with an apparent present ability to do so, and includes any intentional display of force that would give a reasonable person cause to expect immediate bodily harm, whether or not the threat or attempt is actually carried out or the victim is injured.

Second: the person assaulted, resisted, opposed, impeded, intimidated, or interfered with, was a federal officer who was then engaged in the performance of their official duties, as charged;

Third: the defendants did such acts intentionally; and

Fourth: in doing such acts, the defendant used a deadly or dangerous weapon.

Count 5 of the indictment, charging a violation of 18 U.S.C. § 2119, that being

Carjacking:

First: the defendant intentionally took a 1962 Chevrolet pickup truck from a person;

Second: the defendant did so by means of force, violence, and intimidation;

Third: the motor vehicle had been transported, shipped, or received in interstate commerce; and

Fourth: the defendant intended to cause death or serious bodily injury.

Count 7 of the indictment, charging a violation of 18 U.S.C. §§ 922(g)(1) and 924, that

being Felon in Possession of a Firearm and Ammunition:

First: the defendant knowingly possessed a firearm or ammunition;

Second: the defendant was convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year, before he possessed the firearm or ammunition;

Third: the defendant knew that he had been previously convicted of a felony; and

Fourth: before the defendant possessed the firearm or ammunition, the firearm or ammunition had moved at some time from one state to another.

DEFENDANT'S ADMISSION OF FACTS

13. By my signature on this plea agreement, I am acknowledging that I am pleading guilty because I am, in fact, guilty of the offense(s) to which I am pleading guilty. I recognize and accept responsibility for my criminal conduct. Moreover, in pleading guilty, I acknowledge

that if I chose to go to trial instead of entering this plea, the United States could prove facts sufficient to establish my guilt of the offense(s) to which I am pleading guilty beyond a reasonable doubt, including any facts alleged in the indictment that increase the statutory minimum or maximum penalties. I specifically admit the following facts related to the charges against me, and declare under penalty of perjury that all of these facts are true and correct:

On November 12, 2021, I robbed the Dollar General store at 201 Montano Rd NW, in Albuquerque, New Mexico. I selected a bottle of water, approached the register, and paid in cash. When the cashier, Jane Doe 1, opened the register, I tried to take money from the drawer, but the cashier closed the register drawer. I pulled out a firearm, discharged it into the ceiling, and demanded money. Another employee, John Doe 1, opened the register drawer and I took approximately \$192. As a result of the robbery, the business was closed to allow for a criminal investigation.

On December 17, 2021, I forcibly assaulted John Doe 2 with a firearm. A fugitive task force attempted to arrest me on outstanding warrants. John Doe 2 was a part of that unit and I now know through discovery that he was a Task Force Officer with the United States Marshal Service and was a federal officer engaged in the performance of his official duties. I saw John Doe 2 stopped on the side of a road and I intentionally pointed a firearm at him as I passed by.

On December 20, 2021, I was being chased by Belen police when I committed a carjacking. I ran out of gas and approached a truck occupied by John Doe 3. I now

know it was a 1962 Chevrolet pickup truck. I pointed a firearm at John Doe 3 and told him to get out of the truck. While I struggled with John Doe 3, I shot him. I got into the truck and tried to drive away, but I was blocked in by police. I intended to cause death or great bodily injury, as evidenced by the fact that I shot John Doe 3. I now know that the truck had been transported, shipped, or received in interstate commerce before I possessed it.

The firearm I possessed and used on December 20, 2021 was a loaded and functioning firearm. I knew that I possessed that firearm and ammunition. I also knew that I was convicted of several felony offenses, as detailed in paragraph 21, before I possessed the firearm on this date. I now know that the firearm and ammunition I possessed had moved at some time from one state to another before I possessed them because they were not manufactured in New Mexico.

14. By signing this agreement, the Defendant admits that there is a factual basis for each element of the crime(s) to which the Defendant is pleading guilty. The Defendant agrees that the Court may rely on any of these facts, as well as facts in the presentence report, to determine the Defendant's sentence, including, but not limited to, the advisory guideline offense level.

RECOMMENDATIONS

15. The United States and the Defendant recommend as follows:

- a. The Defendant and the United States have made an AGREEMENT pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), that a sentence between 180 months and the high-end of the guideline range as calculated by the Court is the appropriate disposition in this case. The Defendant further recognizes that while the Defendant's attorney may have made a prediction or estimate of the guideline range, the Defendant understands that the Court is not bound by any such estimate or prediction. This agreement takes into account the Defendant's acceptance of responsibility, with no further reduction to occur.
- b. The remaining components of the Defendant's sentence, including but not limited to any fine or restitution and the length and conditions of supervised release, shall be imposed by the Court after the presentation of evidence and/or argument by the parties.
- c. If the Court accepts the plea agreement, it must inform the Defendant that the agreed upon disposition will be included in the judgment, and the Court is bound by the terms of the plea agreement once the Court accepts the plea agreement.

DEFENDANT'S ADDITIONAL AGREEMENT

16. The Defendant understands the Defendant's obligation to provide the United States Pretrial Services and Probation Office with truthful, accurate, and complete information. The Defendant represents that the Defendant has complied with and will continue to comply with this obligation.

17. The Defendant agrees that any financial records and information provided by the Defendant to the Probation Office, before or after sentencing, may be disclosed to the United States Attorney's Office for use in the collection of any unpaid financial obligation.

18. Except under circumstances where the Court, acting on its own, rejects this plea agreement (or functionally rejects it, as described below under the heading Violation or Rejection of Plea Agreement), the Defendant agrees that, upon the Defendant's signing of this plea agreement, the facts that the Defendant has admitted under this plea agreement as set forth above, as well as any facts to which the Defendant admits in open court at the Defendant's plea hearing, shall be admissible against the Defendant under Federal Rule of Evidence 801(d)(2)(A) in any subsequent proceeding, including a criminal trial, and the Defendant expressly waives the Defendant's rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 with regard to the facts the Defendant admits in conjunction with this plea agreement. The Court has not acted on its own if its rejection of the plea agreement occurs after the Defendant has expressly or implicitly suggested to the Court a desire or willingness to withdraw his or her plea or not to be bound by the terms of this plea agreement.

19. By signing this plea agreement, the defendant waives the right to withdraw the defendant's plea of guilty pursuant to Federal Rule of Criminal Procedure 11(d) unless (1) the court rejects the plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(5) or (2) the defendant can show a fair and just reason as those terms are used in Rule 11(d)(2)(B) for requesting the withdrawal.

20. The Defendant recognizes that this plea agreement has already conferred a benefit on the Defendant. Consequently, in return for the benefit conferred on the Defendant by

entering into this agreement, the Defendant agrees not to seek a downward departure or variance from the specific sentence of between 180 months and the high-end of the guideline range as calculated by the Court, as agreed to by the parties pursuant to Rule 11(c)(1)(C) of the Federal rules of Criminal Procedure.

21. The Defendant agrees that the Defendant is the same person who was previously convicted of the following offenses, each of which was at the time of conviction punishable by imprisonment for a term exceeding one year:

- a. *State of New Mexico v. Procopio Montoya*, D-1314-CR-2019-00600, Thirteenth Judicial District Court, Valencia County, New Mexico, aggravated battery with a deadly weapon, convicted October 1, 2020.
- b. *State of New Mexico v. Procopio Montoya*, D-1314-CR-2019-00523, Thirteenth Judicial District Court, Valencia County, New Mexico, aggravated fleeing a law enforcement officer, convicted October 1, 2020.
- c. *State of New Mexico v. Procopio Montoya*, D-1314-CR-2019-00524, Thirteenth Judicial District Court, Valencia County, New Mexico, aggravated assault upon a peace officer and criminal damage to property (over \$1,000), convicted October 1, 2020.
- d. *State of New Mexico v. Procopio Montoya*, D-1314-CR-2019-00525, Thirteenth Judicial District Court, Valencia County, New Mexico, receiving or transferring a stolen motor vehicle, convicted October 1, 2020.

- e. The Defendant further agrees that the convictions listed above are valid and free from fundamental error, and that the Defendant's constitutional rights, including the right to counsel, were not violated when the convictions were obtained.

RESTITUTION

22. The parties agree that, as part of the Defendant's sentence, the Court will enter an order of restitution pursuant to the Mandatory Victim's Restitution Act, 18 U.S.C. § 3663A if applicable; if § 3663A is not applicable, the Court will enter an order of restitution pursuant to 18 U.S.C §§ 3663 and 3664. The Defendant agrees and acknowledges that, as part of the Defendant's sentence, the Court is not limited to ordering restitution only for the amount involved in the particular offense or offenses to which the Defendant is entering a plea of guilty, but may and should order restitution resulting from all of the Defendant's criminal conduct related to this case.

FORFEITURE

23. The Defendant voluntarily and immediately agrees to the administrative, civil, or criminal forfeiture to the United States all of the Defendant's right, title, and interest in the following assets and properties:

- a. **a Ruger model SR9 9mm pistol, bearing serial number 336-32893, and**
- b. **11 rounds of 9mm caliber ammunition.**

24. The Defendant agrees to waive the right to notice of any forfeiture proceeding involving the above-described property.

25. The Defendant knowingly and voluntarily waives the right to a jury trial on the forfeiture of the above-described property. The Defendant knowingly and voluntarily waives all constitutional, legal, and equitable defenses to the forfeiture of said property in any proceeding. The Defendant agrees to waive any jeopardy defense or claim of double jeopardy, whether constitutional or statutory, and agrees to waive any claim or defense under the Eighth Amendment to the United States Constitution, including any claim of excessive fine, to the forfeiture of said property by the United States or any State or its subdivisions.

IMMIGRATION REMOVAL AND OTHER IMMIGRATION CONSEQUENCES

26. The Defendant recognizes that pleading guilty may have consequences with respect to the Defendant's immigration status if the Defendant is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense(s) to which the Defendant is pleading guilty. Removal and other immigration consequences are the subject of a separate proceeding, however, and the Defendant understands that no one, including the Defendant's attorney or the district court, can predict to a certainty the effect of the Defendant's conviction on the Defendant's immigration status. The Defendant nevertheless affirms that the Defendant wants to plead guilty regardless of any immigration consequences that the Defendant's plea may entail, even if the consequence is the Defendant's automatic removal from the United States.

WAIVER OF APPEAL RIGHTS AND POST-CONVICTION RIGHTS

27. The Defendant is aware that 28 U.S.C. § 1291 and 18 U.S.C. § 3742 afford the right to appeal a conviction and the sentence imposed. Acknowledging that, the Defendant knowingly waives the right to appeal the Defendant's conviction(s) and any sentence imposed in

conformity with this Fed. R. Crim. P. 11(c)(1)(C) plea agreement, as well as any order of restitution entered by the Court. This waiver extends to any challenge to the manner in which the sentence was determined or imposed, including the district court's authority to make findings supporting the sentence.

28. The Defendant also waives the right to appeal any sentence imposed below or within the Guideline range upon a revocation of supervised release in this cause number but may nonetheless appeal the determination of the revocation Guideline range.

29. The Defendant also waives the right to appeal the denial of any motion filed under 18 U.S.C. § 3582(c)(1)(A) where such denial rests upon the court's determination that a sentence reduction is not warranted under the factors set forth in 18 U.S.C. § 3553(a).

30. In addition, the Defendant agrees to waive any collateral attack to the Defendant's conviction(s) and any sentence pursuant to 28 U.S.C. §§ 2241, 2255, or any other extraordinary writ, except on the issue of defense counsel's ineffective assistance.

GOVERNMENT'S ADDITIONAL AGREEMENT

31. Provided that the Defendant fulfills the Defendant's obligations as set out above, the United States agrees that:

- a. Following sentencing, the United States will move to dismiss Counts 4 & 6 of the indictment.
- b. The United States will recommend that the sentence imposed in the instant case, other than the sentence imposed for Count 2, be run concurrently with the remaining sentence on Defendant's probation violation for the convictions listed in paragraph 21. In exchange for this agreement,

Defendant agrees not to request a downward variance on the basis that he is not expected to receive credit for his term of pre-trial incarceration on the instant case.

- c. The United States will not bring additional criminal charges against the Defendant arising out of the facts forming the basis of the present indictment or disclosed to Defendant through discovery.

32. This agreement is limited to the United States Attorney's Office for the District of New Mexico and does not bind any other federal, state, or local agencies or prosecuting authorities.

VOLUNTARY PLEA

33. The Defendant agrees and represents that this plea of guilty is freely and voluntarily made and is not the result of force, threats, or promises (other than the promises set forth in this agreement and any addenda). The Defendant also represents that the Defendant is pleading guilty because the Defendant is in fact guilty.

VIOLATION OR REJECTION OF PLEA AGREEMENT

34. The Defendant agrees that if the Court finds that the Defendant has violated any provision of this agreement, the United States may declare this agreement null and void. In such a case, or where the Court has rejected the plea agreement or has functionally rejected it by failing to accept the agreement within six months of its entry (except where the United States, in its sole discretion, agrees to an extension of that time) the United States is released from its obligations under the plea agreement and the Defendant will thereafter be subject to prosecution for any criminal violation, including but not limited to any crime(s) or offense(s) contained in or

related to the charges in this case, as well as perjury, false statement, obstruction of justice, and any other crime committed by the Defendant during this prosecution.

SPECIAL ASSESSMENT

35. At the time of sentencing, the Defendant will tender to the United States District Court, District of New Mexico, 333 Lomas Blvd. NW, Suite 270, Albuquerque, New Mexico 87102, a money order or certified check payable to the order of the **United States District Court** in the amount of \$500 in payment of the special penalty assessment described above.

ENTIRETY OF AGREEMENT

36. This document and any addenda are a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties. This agreement is effective upon signature by the Defendant and an Assistant United States Attorney.

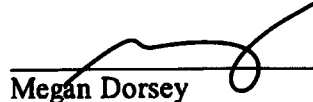
AGREED TO AND SIGNED this 14th day of March, 2024.

ALEXANDER M.M. UBALLEZ
United States Attorney



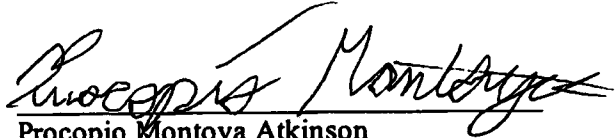
Timothy Trembley
Assistant United States Attorney
Post Office Box 607
Albuquerque, New Mexico 87102
(505) 346-7274

I have carefully discussed every part of this agreement with my client. Further, I have fully advised my client of my client's rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant Sentencing Guidelines provisions, and of the consequences of entering into this agreement. In addition, I have explained to my client the elements to each offense to which she/he is pleading guilty. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.



Megan Dorsey
Attorney for the Defendant

I have carefully discussed every part of this agreement with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant Sentencing Guidelines provisions, and of the consequences of entering into this agreement.



Procopio Montoya Atkinson
Defendant