No. 17-20811

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

v.

OMAR FARAJ SAEED AL HARDAN,
Defendant–Appellant.

On Appeal from the United States District Court
for the Southern District of Texas,
Houston Division, No. 4:16-CR-00003

BRIEF OF PLAINTIFF–APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. The record and briefs adequately present the facts and legal arguments to resolve this appeal, which raises a premature claim of ineffective assistance of counsel. Fed. R. App. P. 34(a)(2)(C).

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules and Statutes

TABLE OF AUTHORITIES

Rules and Statutes **Page(s)**

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BRIEF OF PLAINTIFF–APPELLEE

The United States of America, Plaintiff–Appellee, by and through the United States Attorney for the Southern District of Texas, files this brief in response to that of Defendant–Appellant Omar Faraj Saeed Al Hardan ("Al Hardan").

STATEMENT OF JURISDICTION

This appeal arises from Al Hardan's federal criminal prosecution, for which the district court had jurisdiction. *See* 18 U.S.C. § 3231. The district court (Hughes, J.) imposed judgment of conviction and sentence on December 18, 2017, which the clerk formally entered on December 21. ROA.7.[1] Al Hardan timely filed a notice of appeal on December 26. ROA.225; *see* Fed. R. App. P. 4(b)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUE

Whether Al Hardan's claim of ineffective assistance of counsel is premature on direct appeal.

STATEMENT OF THE CASE

On January 6, 2016, a federal grand jury indicted Al Hardan on one count of attempted provision of material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B (Count One); one count of unlawfully procuring citizenship or naturalization, in violation of 18 U.S.C. § 1425(a) (Count Two); and one count of making a

[1] The record on appeal ("ROA.") is cited by the page number(s) next to the "17-20811" stamp in the lower right corner of the document.

false statement or representation to an agency of the United States, in violation of 18 U.S.C. § 1001(a)(1) (Count Three). ROA.21–26.

Al Hardan pleaded guilty to Count One of the indictment under the terms of a written plea agreement. ROA.672–87. The agreement detailed the factual basis for the guilty plea. ROA.678–82. It also stated the punishment range:

> 2. The statutory maximum penalty for the violation of Title 18, United States Code, Section 2339B, is imprisonment of not more than 20 years and a fine of not more than $250,000. Additionally, Defendant may receive a term of supervised release after imprisonment of up to life. *See* Title 18, United States Code, sections 3559(a)(3) and 3583(b)(2). Defendant acknowledges and understands that if he should violate the conditions of any period of supervised release which may be imposed as part of his sentence, then Defendant may be imprisoned for the entire term of supervised release, without credit for time already served on the term of supervised release prior to such violation. *See* Title 18, United States Code, sections 3559(a)(3) and 3583(e)(3). Defendant understands that he cannot have the imposition or execution of the sentence suspended, nor is he eligible for parole.

ROA.672–73.

As part of his agreement, Al Hardan agreed to waive his right to challenge his conviction or sentence, whether through a direct appeal or a post-conviction motion under 28 U.S.C. § 2255, with an exception allowing him to raise a claim of ineffective assistance of counsel.

ROA.674–75. In exchange, the Government made various agreements, which included dismissal of the remaining two counts. ROA.675.

At the rearraignment hearing, Al Hardan confirmed that he had sufficient time to discuss the case with his attorney and that he was "happy" with his attorney's representation. ROA.412–13. He then pleaded guilty to Count One. ROA.413. The district court reviewed the various trial rights that Al Hardan was giving up by pleading guilty. ROA.413–14. The district court also reviewed the elements of the crime, and Al Hardan stated that he understood them. ROA.415–20. Thereafter, the district court reviewed the maximum penalties, stating:

> Now, the maximum penalty -- I'm not saying this is what I'm going to give you – that the statute would allow on your plea of guilty is for you to be imprisoned for 20 years, fined $250,000 and supervised release with up to you – up to life and there is a $100 tax.

ROA.420. Al Hardan again stated that he understood. ROA.420.

The district court then reviewed the terms of the plea agreement, and then the parties signed it. ROA.421–23. After ascertaining the factual basis, the district court accepted Al Hardan's guilty plea. ROA.424–29. At the prosecutor's request, the court informed Al Hardan of the immigration consequences that could result from his guilty plea.

ROA.429–30. After this, Al Hardan engaged in further discussion with the court regarding his offense conduct. ROA.430–37.

The district court subsequently sentenced Al Hardan to 192 months of imprisonment, to be followed by supervised release for life. ROA.218–22. The Government dismissed the remaining counts. ROA.523.

SUMMARY OF THE ARGUMENT

Al Hardan's ineffective-assistance claim is premature on direct appeal. He did not raise the claim below, nor is the record sufficiently developed for this Court to fairly evaluate the claim's merits. As to that latter point, the record is silent regarding his counsel's reasons for not objecting to the district court's noncompliance with Rule 11 of the Federal Rules of Criminal Procedure. Consistent with this Court's general rule this Court should decline to review Al Hardan's ineffective-assistance claim on direct appeal, without prejudice to renewal in a post-conviction motion before the district court.

To the extent that Al Hardan contends that the Rule 11 omission rendered his guilty plea not knowing and involuntary, this Court should decline to address it because it is part of his premature ineffective-

assistance claim or, alternatively, waived by inadequate briefing. Assuming arguendo that such a claim is properly before this Court, it must fail because Al Hardan cannot show that the Rule 11 omission affected his substantial rights. The effect and operation of supervised release was clearly stated in the plea agreement, which Al Hardan signed during the guilty plea. As such, the Rule 11 omission does not invalidate his guilty plea or his appellate waiver.

ARGUMENT

This Court should decline to review Al Hardan's premature ineffective-assistance claim on direct appeal.

A. Al Hardan's Assertions

Al Hardan's sole argument on appeal is that his trial counsel was ineffective by failing to object to the district court's failure to admonish him of the consequences of a revocation of his supervised release. Appellant Br. 12–28. He did not raise this claim in the district court. Under long-established precedent, this Court should decline to review it on direct appeal without prejudice to future consideration in a postconviction motion under 28 U.S.C. § 2255.

B. Standard of Review

Al Hardan asserts that this Court should review his claim under plain error. Appellant Br. 12–13. He is incorrect. Courts review ineffective-assistance claims under the two-prong standard established in *Strickland v. Washington*, 466 U.S. 668 (1984): deficient performance and prejudice. *E.g., Harrington v. Richter*, 562 U.S. 86, 104 (2011). "If proof of one element is lacking, the court need not examine the other." *United States v. Pringler*, 765 F.3d 445, 450 (5th Cir. 2014) (quotation marks omitted).

"To establish deficient performance," the defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Harrington*, 562 U.S. at 104 (quotation marks omitted). The burden to show deficiency "rests squarely on the defendant," and "the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt v. Titlow*, 571 U.S. 12, 17 (2013) (quotation marks and alterations omitted).

Next, to establish prejudice, a defendant "must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding"—here, the sentencing proceeding—"would have been different." *Harrington*, 562 U.S. at 104 (quotation marks omitted).[2] Establishing prejudice under *Strickland* in this context requires the defendant to show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).[3]

C. Al Hardan's ineffective-assistance claim is premature.

"The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court[.]" *United States v. Montes*, 602 F.3d 381, 387 (5th Cir. 2010) (quotation marks and alterations omitted). This rule is no mere "procedural technicality." *United States v. Bounds*, 943 F.2d 541, 544 (5th Cir. 1991). It exists because, without having been litigated in the district court, "no

[2] Al Hardan's appellate and collateral-attack waivers do not bar his claims of ineffective assistance of counsel because "an ineffective assistance of counsel argument survives a waiver of appeal . . . when the claimed assistance directly affected the validity of that waiver or the plea itself." *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002); *see* ROA.674–75.

[3] For the same reasons set forth in Section (I)(D)(4), Al Hardan cannot succeed in establishing prejudice.

opportunity existed to develop the record on the merits of the allegations" that allows this Court to fairly evaluate the claim. *Montes*, 602 F.3d at 387 (quotation marks omitted); *accord generally Bounds*, 943 F.2d at 544.

The rare occasion in which this Court will review an ineffective-assistance claim on direct appeal is "where the record is sufficiently developed[.]" *Montes*, 602 F.3d at 387 (quotation marks omitted). The record must provide details about defense counsel's "conduct and motivations." *United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014) (quotation marks omitted). If "the record reveals neither the reasons for [counsel]'s decisions nor the availability of alternative strategies," this Court follows the "general rule" of declining to review an ineffective-assistance claim on direct appeal. *Montes*, 602 F.3d at 387.

Al Hardan states that his "case falls squarely within this rare exception to the general rule because the record is adequately developed" and that "the record is adequately developed" as to the district court's actions. Appellant Br. 19–20. But these conclusory assertions are insufficient to show the record's development for reviewing an ineffective-assistance claim on direct appeal because the

record is undeveloped as to trial counsel's conduct and motivations. *See Isgar*, 739 F.3d at 841; *Bounds*, 943 F.2d at 544. Because Al Hardan did not raise this claim in the district court, the record reveals nothing about his counsel's reasons for not objecting to the Rule 11 omission—for example, details on counsel's discussions with Al Hardan regarding the punishment range or why counsel may have believed that an objection lacked merit. Without such a record on these points, this Court cannot fairly evaluate the merits of Al Hardan's claim. This Court should decline to review Al Hardan's claim, without prejudice to raising it in a future § 2255 motion in the district court.

D. Al Hardan knowingly and voluntarily pleaded guilty to Count One of the indictment.

1. This Court should decline to review this issue because Al Hardan presents it as part of his ineffective-assistance claim, which is premature.

Again, Al Hardan's sole issue on appeal is an ineffective-assistance claim that this Court should decline to review. In presenting his ineffective-assistance claim to this Court, Al Hardan fleetingly and summarily asserts that the district court's purported Rule 11 error—and counsel's lack of an objection to it—"fell below the standard required for a knowing and voluntary guilty plea[.]" Appellant Br. 16.

He does not, however, raise this legal theory as an issue separate from his ineffective-assistance claim. Al Hardan's brief is not entitled to liberal construction because he is represented by counsel. *See Woodfox v. Cain*, 609 F.3d 774, 792 (5th Cir. 2010); *Beasley v. McCotter*, 798 F.2d 116, 118 (5th Cir. 1986). As such, because any assertion that his guilty plea is not knowing or involuntary is cabined within his ineffective-assistance claim, it is not properly before this Court.

2. Alternatively, Al Hardan has not adequately briefed this issue and therefore it is waived.

Al Hardan has waived this issue by failing to adequately brief it. "It is not enough to merely mention or allude to a legal theory." *United States v. Scroggins*, 599 F.3d 433, 446–47 (5th Cir. 2010). Pursuant to Rule 28(a)(8)(A) of the Federal Rules of Appellate Procedure, an appellant's brief must include argument that contains his "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."

Al Hardan has not satisfied this rule. Al Hardan makes two summary assertions that his guilty plea was not entered into knowingly and voluntarily. He first mentions it in the last sentence of his summary of the argument without citation to the record or caselaw.

Appellant Br. 11. Later, when addressing whether the district court committed an error that was clear or obvious, Al Hardan asserts that "the district court's admonishment fell below the standard required for a knowing and voluntary guilty plea established under Fifth Circuit precedent." Appellant Br. 16. He then cites and discuses cases addressing whether the district court's failure to admonish was a clear or obvious error to which counsel should have objected. *See* Appellant Br. 16–18.

While it is clear that Al Hardan is arguing that the district court erred and counsel was ineffective for failing to point that out, it is not clear whether he is also making a separate claim that his guilty plea was not knowing and voluntary. He provides no caselaw, record citation, or clear presentation of the issue. Due to these deficiencies, this issue has been waived for inadequate briefing. *See United States v. Reagan*, 596 F.3d 251, 254–55 (5th Cir. 2010); *United States v. Stalnaker*, 571 F.3d 428, 439–40 (5th Cir. 2009) (waiver for failure to explain adequately or cite authority); *United States v. Vu Anh Le*, 512 F.3d 128, 129 n.2 (5th Cir. 2007) (finding that a vague assertion was not clearly explained and thus waived for inadequate briefing).

3. If this Court finds that Al Hardan has properly presented this issue to this Court and not waived it, the standard of review is plain error.

To the extent that Al Hardan argues that his guilty plea, including his appellate waiver, was unknowing and involuntary, this Court reviews his claim for plain error because he did not contemporaneously object to the district court's Rule 11 colloquy. *See Puckett v. United States*, 556 U.S. 129, 131 (2009); *United States v. Vonn*, 535 U.S. 55, 62–63 (2002).

To establish plain error, Al Hardan must show that (1) there is error; (2) the error was clear and obvious, not subject to reasonable dispute; and (3) the error affected his substantial rights. *Puckett*, 556 U.S. at 135. To show that an error affected a defendant's substantial rights, he "must show a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 76, 81–83 (2004). Even if the first three prongs are met, this Court will exercise its discretion to remedy the error only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Puckett*, 556 U.S. at 135 (citation and internal quotation marks omitted). "Meeting all four prongs is difficult, 'as it

should be.'" *Id.* (quoting *Dominguez Benitez*, 542 U.S. at 83, n.9).

4. Al Hardan cannot demonstrate that the Rule 11 omission affected his substantial rights.

The district court properly informed Al Hardan about the maximum possible imprisonment penalty as well as the maximum possible term of supervised release. ROA.420; *see* Fed. R. Crim. P. 11(b)(1)(H). However, to satisfy Rule 11, a district court should also inform a defendant of the effect and operation of supervised release. *United States v. Reyes*, 300 F.3d 555, 560 (5th Cir. 2002); *United States v. Tuangmaneeratmun*, 925 F.2d 797, 803 (5th Cir. 1991). Here, the district court did not advise Al Hardan of the specific amount of additional prison time he might face in the event that he violated a condition of supervised release or that he would not receive any credit for time already served under the term of supervised release. *See Tuangmaneeratmun*, 925 F.2d at 803. This failure constitutes clear error. *See Reyes*, 300 F.3d at 560.

Al Hardan cannot show, however, that the error affected his substantial rights. At the outset, the United States notes that Al Hardan cannot meet his burden because he equivocates about whether, but for the error, he would not have entered the guilty plea. *Compare*

Appellant Br. 24 ("Al Hardan can demonstrate that he would not have entered a plea of guilty if he had known that a violation of supervised release could result in a life-time of imprisonment as opposed to the statutory maximum of 20 years the district court mentioned during the plea colloquy[.]") *with* Appellant Br. 26 ("Al Hardan can show that he *might have* risked a trial rather than plead guilty had he been informed of the possibility of spending a life-time in prison based upon a revocation of supervised release.") (emphasis added).

Regardless, this Court has found that there is no effect on a defendant's substantial rights when information omitted from a plea colloquy was nevertheless included in the plea agreement. *See, e.g., United States v. Crain*, 877 F.3d 637, 644 (5th Cir. 2017) (finding no plain error under Rule 11 in failure to advise of maximum term of supervised release where the plea agreement included this information); *United States v. Jimenez*, 427 F. App'x 327, 328 (5th Cir. 2011) (unpublished)[4] ("As Jimenez signed her plea agreement and acknowledged that she had read and understood it, this provided

[4] Unpublished opinions issued on or after January 1, 1996 are not precedent, except under certain circumstances not present here. An unpublished opinion may, however, be persuasive. *See* 5th Cir. Loc. R. 47.5.4; *see also Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

sufficient notice of the Rule 11 provision."); *United States v. Cuevas-Andrade*, 232 F.3d 440, 444–45 (5th Cir. 2000) (finding multiple Rule 11 omissions harmless where plea agreement included the information and defendant signed the plea agreement and understood it).

In *Crain*, 877 F.3d at 644, the defendant complained that the district court failed to advise him of (1) the maximum term of supervised release and (2) the maximum sentence if he violated a condition of supervised release. This Court determined that Crain could not show a reasonable probability that, but for the error, he would not have entered the plea. This was so because Crain's plea agreement stated what "the maximum term of his supervised release was and that he could be returned to prison for the entire supervised release term—namely, his lifetime—for violating its conditions." *Id.* In addition, Crain testified that he had read every provision of the agreement before he signed it. *Id.* As such, there was "nothing to indicate that if Crain had received this same information from a different source—specifically, the district court—he would have made a different decision." *Id.*

Here, the plea agreement specifically stated that Al Hardan "may receive a term of supervised release after imprisonment of up to life."

ROA.672. In addition, if Al Hardan "should violate the conditions of any period of supervised release which may be imposed as part of his sentence, then Defendant may be imprisoned for the entire term of supervised release, without credit for time already served on the term of supervised release prior to such violation." ROA.673. In the plea agreement addendum, Al Hardan certified that he had "read and carefully reviewed every part of this plea agreement with [his] attorney," that he understood the agreement, and that he voluntarily agreed to its terms. ROA.687. Defense counsel signed a similar certification: "I have carefully reviewed every part of this plea agreement with Defendant. To my knowledge, Defendant's decision to enter into this agreement is an informed and voluntary one." ROA.686. At the rearraignment hearing, Al Hardan confirmed that he had sufficient time to discuss the case with his attorney and that he was "happy" with his attorney's representation. ROA.412–13.[5] Al Hardan (and the attorneys) signed the plea agreement at the time of Al Hardan's guilty plea. ROA.421–23.

[5] Indeed, Counsel had reviewed the plea agreement with Al Hardan for at least two weeks prior to the guilty plea. ROA.409.

Thus, Al Hardan's post hoc claim that he would not have pleaded guilty without the Rule 11 omission is contradicted by his signing of the plea agreement and addendum. "Any documents signed by the defendant at the time of the guilty plea are entitled to 'great evidentiary weight.'" *United States v. Thibodeaux*, 608 F. App'x 270, 272 (5th Cir. 2015) (unpublished) (quoting *United States v. Abreo*, 30 F.3d 29, 32 (5th Cir. 1994)). Al Hardan was given the correct information in the plea agreement and there is no indication that, had the district court reiterated that same information, he would not have pleaded guilty. *See Crain*, 877 F.3d at 644.

"[W]hen the record of the Rule 11 hearing clearly indicates that a defendant has read and understands his plea agreement, and that he raised no question regarding a waiver-of-appeal provision, the defendant will be held to the bargain to which he agreed[.]" *United States v. Portillo*, 18 F.3d 290, 293 (5th Cir. 1994). Al Hardan has not shown "a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83. The Rule 11 error does not invalidate his guilty plea or his appellate waiver.

CONCLUSION

The district court's judgment should be affirmed. Should this Court decline to reach the merits of Al Hardan's ineffective-assistance claim, the affirmance should be without prejudice to raising this claim in a 28 U.S.C. § 2255 motion before the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anna E. Kalluri, Assistant United States Attorney, hereby certify that on October 25, 2018, an electronic copy of Appellee's Brief was served by notice of electronic filing via this Court's CM/ECF system upon opposing counsel, Attorney Yolanda Jarmon.

Upon notification that the electronically-filed brief has been accepted as sufficient, and upon the Clerk's request, seven paper copies of this brief will be submitted to the Clerk. *See* 5th Cir. R. 25.2.1; 5th Cir. R. 31.1; 5th Cir. CM/ECF filing standard E(1).

s/Anna E. Kalluri
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,591 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century School Book, 14-point font for text and 12-point font for footnotes.

3. This brief complies with the privacy redaction requirement of 5th Cir. R. 25.2.13 because it has been redacted of any personal data identifiers.

4. This brief complies with the electronic submission of 5th Cir. R. 25.2.1, because it is an exact copy of the paper document.

5. This brief has been scanned for viruses with the most recent version of McAfee Endpoint Security and is free of viruses.

s/Anna E. Kalluri
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Dated: October 25, 2018