

## “THE FEDERAL CORNER”

### Do Your Research Before Predicting Your Client’s Advisory Sentencing Guidelines Range

#### Buck Files

This is an experience that we have all had: The evidence against your client in his federal criminal case is overwhelming and he has realized that a plea of guilty is probably inevitable. He asks, “What am I looking at?” The answer to his question may be more or less complex. In either instance, though, he is entitled to an intelligent – and accurate – answer. If he receives something less, there is always the possibility of a post-conviction writ alleging ineffective assistance of counsel. This is something that every lawyer should want to avoid.

Unfortunately, the lawyer for Aluro Pablo Valdez, Jr., did not give him such an answer. Even so, a divided panel of the United States Court of Appeals for the Fifth Circuit held that Valdez’ lawyer’s performance in incorrectly advising him about the applicable Sentencing Guidelines range was *not* ineffective. *United States v. Valdez*, 973 F.3d 396 (5<sup>th</sup> Cir. 2020) [Panel: Circuit Judges Wiener, Engelhardt and Oldham. Opinion by Engelhardt; dissenting opinion by Wiener.]

Judge Engelhardt’s opinion reads, in part, as follows:

#### [Valdez’ Claim of Ineffective Assistance of Counsel]

Defendant-Appellant Lauro Valdez, Jr., federal prisoner # 76629-080, appeals the denial of his 28 U.S.C. § 2255 motion to set aside his conviction for being a felon in possession of a firearm. *Valdez advanced several grounds for relief in the district court, but this court granted a certificate of appealability as to only one: Valdez’s claim that before he pleaded guilty, he received ineffective assistance of counsel because his trial attorney underestimated the range of imprisonment recommended by the United States Sentencing Guidelines* (‘Guidelines’). *United States v. Valdez*, No. 18-40495 (5th Cir. Feb. 28, 2019) (one-judge order). (emphasis added)

\* \* \*

#### [An Overview of Valdez’ Plea and Sentencing in the District Court]

After a jury was empaneled for his trial, Valdez pleaded guilty—with no plea agreement—to one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). *Valdez used the firearm to commit murder, so the Guidelines recommended a range of 324 to 405 months’ imprisonment. Valdez’s attorney estimated that his Guidelines range would be between twenty-four and thirty-three months, but the district court, after two colloquies pursuant to Fed.R.Crim.P. 11(b), accepted the guilty plea and sentenced Valdez to the statutory maximum term of 120 months in prison.* (emphasis added)

\* \* \*

### [The Background of the Case]

Valdez was arrested and charged in state court with murder. While the state case was pending, Valdez was charged in federal court for being a felon in possession of a firearm. In the federal matter, Valdez planned to assert a justification defense. Someone had fired shots at Valdez's house ten days before the killing of Rodriguez, and Valdez claimed that he had received threatening phone calls. Valdez argued that he was justified in possessing the firearm because, in the context of those prior incidents, he feared for his life when Rodriguez arrived outside his door and yelled threats.

Valdez decided to go to trial for the possession charge. On October 19, 2015, after the jury had been selected, the district court conducted a hearing on whether to allow Valdez to assert the affirmative defense of justification at trial. The court clarified that Valdez would not be permitted to raise his affirmative defense unless he could make a prima facie showing on all four elements of justification.

\* \* \*

... after conferring with his counsel, Valdez then, before the district court officially ruled on any pretrial motions, sought to change his plea to guilty. The court specifically noted that only his sentence and any § 2255 issues would be appealable, and his counsel confirmed that was correct.

### [The Plea Colloquies]

During the Rule 11 colloquy, the district court told Valdez, appropriately, correctly, and expressly, that

right now you don't know what sentence I would give you, I don't know what sentence I would give you and I don't know that because a Probation officer has to meet with you, your lawyer gets to be present and they have to give me a report about your criminal history and then they've got to give me a report about this case and where you score.

Valdez initially said that his attorney had not reviewed the Guidelines with him, but after being shown a copy of the manual, he said that he was familiar with them. The court thoroughly explained how the Guidelines arrive at a recommended sentence, noted clearly that the court had the power to sentence *above* or *below* that range, and stated the factors that the court must consider when choosing a sentence. *The court asked, 'Are you aware of the penalties?' to which Valdez replied, 'Yes, ma'am.'* *The court then explained that the statutory maximum penalty was ten years in prison. Valdez again said that he understood and that he had no questions about the penalty.* The court explicitly addressed the

issue of an estimated sentence, including one from Valdez's counsel (emphasis added):

And this is important because I will tell you that [your attorney] may have given you a good faith estimate where he thinks you may fall in that chart and -- and he may tell you, 'You know, I've been in front of this Judge a lot of times, I think she may or may not do this,' but at the end of the day *he really has no idea and you really have no idea and I have no idea because I don't know where you're going to score and I don't know everything about your life history, and so whatever your lawyer may have said to you is not a promise, it's not a guarantee and it's not binding on this Court.* Do you understand that? (emphasis in the opinion)

Valdez said, 'Yes, ma'am,' and confirmed that he wanted to proceed with pleading guilty.

The hearing continued to the next day, October 20, 2015, when the district court again confirmed that Valdez understood that he could not withdraw his guilty plea if he was unhappy with the sentence he received. The court then gave Valdez a chance to withdraw his plea. He declined, and the court accepted Valdez's plea of guilty.

[The Advisory Sentencing Guidelines Range]

The district court determined that the Guidelines recommended a range of imprisonment of 324 to 405 months. Valdez had a criminal history category of II, which the district court found significantly underrepresented Valdez's criminal activity. The district court determined that Valdez's base offense level was forty-three because he committed first degree murder ... The court then applied a three-level reduction for acceptance of responsibility.

Under the Guidelines, when a firearm is possessed or used in connection with another offense that results in death, the base offense level for illegal possession of that firearm is taken from the homicide subpart of the Guidelines that is most analogous to the conduct, if the resulting offense level is greater than it would be otherwise. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(c)(1) (U.S. SENTENCING COMM'N 2015). First degree murder results in an offense level of forty-three, second degree murder an offense level of thirty-eight, voluntary manslaughter an offense level of twenty-nine, and involuntary manslaughter an offense level of twelve to eighteen. *Id.* §§ 2A1.1, 2A1.2, 2A1.3, 2A1.4.

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[Valdez' Argument at Sentencing and the Court's Response]

Despite the ... undisputed facts, Valdez urged the district court not to apply the homicide cross-reference because he had not been convicted of homicide in state court, making the base offense level twenty. That would have resulted in a Guidelines range of twenty-seven to thirty-three months of imprisonment after a three-level reduction for acceptance of responsibility. *See Id.* Ch. 5, Pt. A. The court overruled Valdez's objection to the cross-reference and sentenced him to the statutory maximum term of 120 months in prison. The court observed that, although it found that Valdez committed first degree murder, the Guidelines recommendation would also have exceeded the statutory maximum if Valdez had only committed second degree murder. *Important to the issue raised here, the district court further explained that even if it had not used a first or second degree murder application to calculate the Guidelines range, the court would have relied on Valdez's extensive and underrepresented criminal history to vary upwards to the maximum sentence of 120 months.* (emphasis added)

[Valdez' Allegation in a § 2255 Petition and  
His Lawyer's Response]

Valdez then filed a motion under 28 U.S.C. § 2255, seeking to set aside his conviction. Valdez ... asserted ... that his trial counsel was ineffective in substantially underestimating Valdez's Guidelines range and therefore failing to advise Valdez that he faced a significant risk of receiving the statutory maximum term of imprisonment.

\* \* \*

Valdez's trial counsel submitted an affidavit stating that he 'informed him of the guideline levels' and the statutory maximum of ten years but admitting that he did not inform Valdez that the base offense level could be forty.

[The District Court's Ruling]

The district court denied Valdez's § 2255 motion. As to the issue now on appeal, the district court found that Valdez understood that he faced a maximum possible sentence of 120 months, and there was no evidence that his counsel promised him a particular sentence. With that understanding, the court reasoned, Valdez could not show that he was prejudiced by ignorance of section 2K2.1(c)(1)(B)'s potential application before his decision to plead guilty.

[Valdez' Burden at the Fifth Circuit]

To prevail on an ineffective assistance of counsel claim, a defendant must satisfy the test from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), by showing that (1) his 'counsel's performance fell below an objective standard of reasonableness,' and (2) that his counsel's deficient performance caused him prejudice. *United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004).

\* \* \*

[Valdez' Lawyer's Advice and the Court's Holding]

Here, although Valdez's counsel's estimate of what he 'hoped' Valdez's sentence would be was well below the 120 months to which Valdez was ultimately sentenced, counsel properly apprised Valdez, prior to his pleading guilty, of the maximum penalty the court could impose. And counsel also made abundantly clear to Valdez that no estimation he offered was a guarantee or a promise. It is no doubt that counsel's estimated sentencing range was far lower than Valdez's actual sentence. *Nevertheless, we do not find any deficiency in counsel's estimation to be unreasonable.* (emphasis added)

\* \* \*

[Valdez Was Aware of What He was Facing]

...Valdez was clearly aware that the maximum possible prison term was 120 months, even though he and his attorney were operating with the understanding that the Guidelines with a plea would suggest a significantly lower sentence. *...Valdez and his attorney knew full well the circumstances of the charge against him, including most significantly the use of the subject firearm to murder Rodriguez, ... as well as Valdez's significant criminal history aside from this incident. It came as no surprise to the defendant or his counsel that the district court would indeed factor in all of the circumstances in determining a sentence, whether after trial or following a guilty plea. See Lee, 137 S. Ct. at 1966 ('The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea.')* (emphasis added)

\* \* \*

Valdez was clearly advised—multiple times—by both the court and his counsel of the maximum sentence he could receive, such that he was 'fully aware of his plea's consequences.'

[Be Aware That This Analysis Will Not Apply to Every Case]

This is not to say that every defendant whose attorney makes an error in estimating his Guidelines range has not suffered prejudice. But, in this instance, Valdez has not shown that his counsel's estimation of the applicable Guidelines range alone caused him to plead guilty. Rather, the record indicates that Valdez's decision to plead guilty at the eleventh hour was logically motivated by the exposure of evidence which proved fatal to his affirmative defense, all but guaranteeing a conviction at trial, without any possible sentencing benefits he knew might be available with a plea of guilty.

Accordingly, the judgment of the district court is affirmed.

Judge Wiener filed a dissenting opinion in which he cited cases from the D.C., Sixth, Seventh, Ninth and Tenth Circuits in support of his conclusion that Valdez' lawyer had not provided the effective assistance of counsel.

Judge Wiener's opinion reads, in part, as follows:

I respectfully dissent in the belief that Valdez has satisfied both prongs of *Strickland* and that the majority deeply undermines the Sixth Amendment's guarantees in contemporary criminal defense by rendering counsel's familiarity with the Sentencing Guidelines optional when advising a client of the consequences of a guilty plea.

\* \* \*

Because of the importance of sentencing guidelines in contemporary criminal practice, professional standards for defense counsel repeatedly emphasize that defense counsel must be familiar with the law and procedures applicable to sentencing, including any applicable sentencing guidelines. Such standards can inform the attorney conduct that is reasonable. 'Although they are "only guides," ... and not "inexorable commands," ... these standards may be valuable measures of the prevailing professional norms of effective representation....'

\* \* \*

Recognizing the importance of the Guidelines in the sentencing process, several other circuit courts require defense counsel to make a minimally competent Guidelines estimate, or at least a good faith attempt. They do so, for the most part, even in the era of advisory Guidelines, and so by implication hold that defense counsel does not discharge his duty by merely informing his client of the statutory maximum sentence.

\* \* \*

*The consistent theme in the foregoing decisions is that defense counsel's performance in making a Guidelines calculation is unreasonable under prevailing professional norms when, because of his ignorance of basic Guidelines provisions, counsel makes an error of significant magnitude. And that is precisely what happened here. (emphasis added)*

\* \* \*

At the very least, Valdez has shown enough to merit an evidentiary hearing in the district court, which he was denied. 'A district court must hold an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" Valdez's claim is plausible enough that he should be allowed to present evidence regarding (1) why counsel failed to advise him of the cross reference provision and (2) the benefits that counsel erroneously advised Valdez might accrue from his pleading guilty.

These are the reasons why I respectfully dissent.

My Thoughts

- I liked Judge Wiener’s dissent and can see where another panel might have come to a different conclusion than the one that decided *Valdez’s* appeal.
- Valdez appeared for his plea and sentencing before United States District Judge Marina Garcia Marmolejo of the United States District Court of the Southern District of Texas. Her plea colloquys with Valdez and her explanation as to the sentence imposed provided the basis for the panel’s holding in *Valdez*.
- After all these years, I can still find some federal sentencing issues to be confusing. My “go to” resource is *Federal Sentencing Guidelines Handbook* by Roger W. Haines, Jr., Frank O. Bowman, III, and J. Douglas Wilson 2019 Thomson Reuters. I would recommend it.

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Buck Files is a member of TDCLA’s Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA’s Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 246<sup>th</sup> column or article. He practices in Tyler with the law firm of Files Harrison, P.C., and can be reached at [bfiles@bainfiles.com](mailto:bfiles@bainfiles.com) or (903) 595-3573.