No. 95-06092

IN THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DONALD STEVEN ROGERS,

Defendant-Appellant.

Appeal from the United States District Court
Western District of Oklahoma
Honorable Wayne E. Alley, District Judge Presiding

OPENING BRIEF FOR DEFENDANT-APPELLANT

ORAL ARGUMENT IS REQUESTED

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LIST OF ALL PRIOR OR RELATED APPEALS

1. Mr. Rogers brought a direct appeal from his conviction and sentence. That appeal was docketed in this Court as No. 88-2926. This Court's decision was published as United States v. Rogers, 921 F.2d 975 (10th Cir.) (as amended), cert. denied, 498 U.S. 839, 111 S.Ct. 113, 112 L.Ed.2d 83 (1990).

2. Mr. Rogers brought a motion, pursuant to 28 U.S.C. section 2255, to vacate his sentence. That motion remained before the district court, fully briefed, for eighteen months. On December 22, 1994, Mr. Rogers filed a mandamus petition in this Court to compel the district court to rule. The petition was docketed in this Court as Rogers v. Alley, No. 95-6092. After the mandamus petition was filed, the district court decided Mr. Rogers' section 2255 motion. On February 3, 1995, this Court dismissed the mandamus petition as moot.

PRELIMINARY STATEMENT OF GROUNDS FOR JURISDICTION

I. BASIS FOR JURISDICTION IN THE DISTRICT COURT

This appeal is from the district court's denial of Mr. Rogers' Motion to Vacate Sentence by a Person in Federal Custody pursuant to 28 U.S.C. section 2255. The district court had jurisdiction under 28 U.S.C. section 2255.

II. BASIS FOR JURISDICTION IN THE COURT OF APPEALS

This Court has jurisdiction of appeals from final decisions of the district courts under 28 U.S.C. sections 1291 and 2253.

III. THE JUDGMENT OF THE DISTRICT COURT IS APPEALABLE

The district court's order is appealable, pursuant to 28 U.S.C. sections 1291 and 2253, because the order is final and it is not subject to direct review by the Supreme Court.

IV. THE NOTICE OF APPEAL WAS TIMELY FILED

The order denying Mr. Rogers' section 2255 motion was

entered on December 29, 1994. The Notice of Appeal was timely filed on February 23, 1995. See Fed. R. App. P. 4(a)(1); Rule 11, Rules Governing Proceedings in the U.S. District Courts Under Section 2255 of Title 28, United States Code.

ISSUES PRESENTED FOR REVIEW

I. Whether the district court sentenced Mr. Rogers under a misunderstanding of the law, because the judge believed that a drug sentence should be based upon an estimate of "street level quantity at the retail level," rather than upon the amount of uncut drugs that Mr. Rogers actually possessed.

II. Whether Mr. Rogers' sentence should be vacated on the grounds of ineffective assistance of counsel, because Mr. Rogers' court-appointed counsel failed to raise on appeal the conversion from an uncut quantity of drugs to "street level quantity at the retail level."

III. Whether this Court may reverse without remanding for an evidentiary hearing.

IV. Whether this Court is procedurally barred from reaching the merits of Mr. Rogers' section 2255 motion.

STATEMENT OF THE CASE

Defendant-Appellant Donald Steven Rogers was convicted,

after a jury trial, of drug and racketeering charges. Appellant's Appendix ("Aplt. App.") at 2, 152; Addendum to Appellant's Brief, infra, at A23.[1] He was sentenced to 13 years in custody. Aplt. App. at 153; infra at A24. The district court calculated the sentence by using a multiplier to convert the uncut drugs that Mr. Rogers delivered to street level quantities. Aplt. App. at 153-154; infra at A24-A25. This Court affirmed the conviction and sentence. It noted that Mr. Rogers' court-appointed counsel did not raise the conversion issue on appeal, and the Court declined to reach it. United States v. Rogers, 921 F.2d 975, 984, 977 n.5 (10th Cir.) (as amended), cert. denied, 498 U.S. 839, 111 S.Ct. 113, 112 L.Ed.2d 83 (1990).

On November 18, 1992, Mr. Rogers filed a motion to vacate his sentence, pursuant to 28 U.S.C. section 2255. Aplt. App. at 1-10. The motion was referred to a magistrate judge, who filed his findings on May 4, 1993. Aplt. App. at 151-163; infra at A22-A34. Mr. Rogers objected to the magistrate judge's findings. Aplt. App. at 164-189. On December 29, 1994, the district court denied Mr. Rogers' section 2255 motion. Aplt. App. at 190-194; infra at A35-A39. Mr. Rogers

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[1] The Appellant's Appendix contains the documents required by Circuit Rule 30. The Addendum to Appellant's Brief contains Mr. Rogers' sentencing transcript, the magistrate judge's findings, and the district court's final order. Cites to the Addendum are to "infra at A__."

filed a timely notice of appeal. Aplt. App. at 195.

STATEMENT OF FACTS

I. TRIAL AND SENTENCING

On September 22, 1988, after a jury trial in the United States District Court for the Western District of Oklahoma, Donald Rogers was convicted of drug and racketeering charges. Pre-Sentence Investigation Report ("PSI") (submitted as the Under Seal Addendum to Appellant's Appendix) at 9. Mr. Rogers' conviction was based upon his transportation of heroin from California to Oklahoma. At trial, there was evidence that Mr. Rogers drove to Oklahoma with five ounces of heroin, which he delivered to Johnny Sanders. PSI at 11; see also Aplt. App. at 47; infra at A11.

After the trial, Mr. Rogers admitted to the probation officer that he had sold an additional 19 ounces of heroin to Sanders. PSI at 11. The probation officer, Derald T. Riggs, included the 19 ounces in the PSI, for a combined total of 24 ounces. PSI at 11-12. Officer Riggs estimated that the heroin would be cut seven times before it was sold on the street. PSI at 11-12. Mr. Rogers, however, did not cut the heroin or participate in street level sales. His role was solely to deliver ounce quantities to Johnny Sanders. See PSI at 9-11 (listing others who made street sales, and detailing

Mr. Rogers' role, which did not include cutting the heroin or participating in street sales). Nevertheless, Officer Riggs recommended that the Court apply a multiplier of seven to convert the heroin to street level quantities. PSI at 12. Consequently, Mr. Riggs urged the Court to sentence Mr. Rogers according to the guidelines applicable to 168 ounces of heroin; 168 ounces represents the 24 ounces that Mr. Rogers delivered, multiplied by seven. PSI at 12.

Mr. Rogers was sentenced on November 28, 1988. His court-appointed counsel, Joseph L. Wells, objected to the use of the multiplier. Aplt. App. at 40; infra at A4; see also PSI at 17. Mr. Wells asked the court to sentence Mr. Rogers only with respect to the 24 ounces, the amount that Mr. Rogers actually delivered. Aplt. App. at 39-40; infra at A3-A4. However, the court disagreed and sentenced Mr. Rogers under the guidelines for trafficking in 168 ounces, following the recommendation in the presentence investigation report. Aplt. App. at 43-45; infra at A7-A9. In so doing, the judge stated that "the street quantity is the quantity that the Court will use for purposes of resolving any differences here and not the raw or uncut heroin." Aplt. App. at 43; infra at A7. The judge stated that "the street quantity is clearly what is referred to, for example, in illustrative cases given in the commentary to the [guidelines]," and thus that "street

quantity at the retail level is the reference" for sentences in drug cases. Aplt. App. at 44; infra at A8.

The prosecutor argued that Mr. Rogers should be sentenced for an even greater amount of heroin. He stated that Mr. Rogers had been convicted of conspiracy, and that he should be accountable for 30 kilograms, the full amount that other members of the conspiracy allegedly distributed. Aplt. App. at 40-43; infra at A4-A7. The court, however, expressly rejected that claim. The sentencing judge determined that there was insufficient evidence that Mr. Rogers participated in the larger conspiracy, and that Mr. Rogers should be accountable under the guidelines only for the heroin that he actually supplied. Aplt. App. at 44; infra at A8.

Mr. Rogers was given a base offense level of 34, the level appropriate under the Federal Sentencing Guidelines for a crime involving 168 ounces (4.76 kilograms) of heroin. See United States Sentencing Commission, Federal Sentencing Guidelines Manual, § 2D1.1 (West ed. 1988) (hereafter, "U.S.S.G.").[2] The court then reduced the base offense by two levels for Mr. Rogers' acceptance of responsibility; this gave Mr. Rogers a final offense level of 32. Aplt. App. at 47; infra at A11. With a criminal history category of III, Mr.

[2] Unless otherwise indicated, references to the Sentencing Commission's guidelines will be to the 1988 edition. That was the version in effect at the time of Mr. Rogers' conviction and sentencing.

Rogers' guideline range was 151-188 months, and he received 156 months (13 years) in prison. Aplt. App. at 54-55; infra at A18-A19. Had the district court sentenced Mr. Rogers based upon 24 ounces (680 grams) of heroin, the amount without the multiplier conversion to street level quantities, he would have received a base offense level of 28. U.S.S.G., § 2D1.1. With a two-level reduction for acceptance of responsibility, Mr. Rogers would have been sentenced for a level 26 offense. Considering a criminal history category of III, such an offense level would have placed Mr. Rogers in the guideline range of 78-97 months. Id. at § 5A.

II. DIRECT APPEAL

Mr. Rogers appealed his conviction and sentence, again represented by Mr. Wells. Counsel argued three issues on appeal before this Court, but failed to raise the multiplier conversion to street level quantities, despite his argument in the district court. See United States v. Rogers, 921 F.2d 975, 984, 977 n.5 (10th Cir.) (as amended), cert. denied, 498 U.S. 839, 111 S.Ct. 113, 112 L.Ed.2d 83 (1990). This Court affirmed Mr. Rogers' conviction and sentence, but noted the absence of the multiplier argument on appeal. This Court wrote: "Although Rogers contested the 'seven' multiplier at sentencing, and uses figures in his appellate brief which ignore the multiplier, Principal Brief of Defendant/Appellant at 13, he does not raise the matter as an issue on appeal." Id. Because Mr. Rogers' lawyer did not raise the multiplier on appeal, this Court did not reach the issue. Id.

III. SECTION 2255 PROCEEDING

On November 18, 1992, Mr. Rogers filed a Motion to Vacate Sentence by a Person in Federal Custody, Pursuant to 28 U.S.C. Section 2255. Aplt. App at 1-10. Mr. Rogers' motion was referred to United States Magistrate Judge Ronald L. Howland.

The section 2255 motion raised two grounds. First, Mr. Rogers explained that he was sentenced under a misunderstanding of the law, in violation of the Due Process Clause. As Mr. Rogers demonstrated in his legal memoranda, drug sentences are based upon quantities at the level that the defendant dealt; courts do not "even out" sentences for people at different stages of the distribution chain by converting uncut quantities of drugs to street level quantities. Aplt. App. at 19-27, 116-122. The sentencing judge's statement that "street quantity at the retail level is the reference" for sentences in drug cases, Aplt. App. at 44; infra at A8, demonstrated the district court's fundamental misunderstanding of the narcotics guidelines, and the resulting sentence must be vacated. Aplt. App. at 28-30, 116-122. In addition, Mr. Rogers pointed out that the facts did not support a "cut" of seven. Aplt. App. at 120-121.

Mr. Rogers' second ground for relief in the district court was ineffective assistance of counsel on appeal. Counsel should have raised the multiplier conversion on direct appeal. Aplt. App. at 30-33, 122-123. Mr. Rogers supported this point with the affidavit of a legal expert, Federal Public Defender Tova Indritz, Esq. In her eight-page affidavit, Ms. Indritz carefully analyzed the case and counsel's performance. Aplt. App. at 140-147. She stated

that in drafting the guidelines, the Sentencing Commission determined that "[n]o consideration would be given to purity or potential of a drug to be further diluted with non-controlled substances for later redistribution in determining the base offense level." Aplt. App. at 146. Ms. Indritz wrote that she was "not aware of any published decision which sanctions the use of 'street quantity' or potential for dilution before re-sale to determine the base offense level." Aplt. App. at 146. Because no reported cases support the method of sentencing used by the district court, Ms. Indritz concluded that "a challenge to the sentencing court's use of a 'multiplier' factor to determine drug quantity upon which to calculate base offense level was an exceptionally meritorious appellate issue and it was ineffective assistance of counsel for Mr. Wells to fail to raise that issue on appeal." Aplt. App. at 147 (emphasis added).

Mr. Rogers' former lawyer, Joseph Wells, gave a one-page affidavit, which the government submitted to the district court. Aplt. App. at 108. Only one paragraph of the affidavit addressed the multiplier and the conversion to street level quantity. In its entirety, that paragraph states:

> That in response to Donald Steven Rogers' 2255 motion alleging incompetent counsel, I would hereby state that I did not raise the issue of the "MULTIPLIER" in the appeal of Donald Steven Rogers

because I did not feel that the issue had merit.

Aplt. App. at 108 (emphasis in original). Mr. Wells did not provide the court with any details as to why he felt the issue lacked merit. He did not allege, for example, that he had relied upon any legal authority to support the conclusion that the issue lacked merit. Indeed, he did not allege that he had even conducted any legal research on the issue. Nor did he allege that there was a strategic reason not to raise the multiplier issue, such as if it would detract from any of the other claims on appeal. See Aplt. App. at 108.

On May 4, 1993, Magistrate Judge Howland filed his Findings and Recommendation, recommending that the section 2255 motion be denied without a hearing. Aplt. App. at 151-152, 163; infra at A22-A23, A34. The magistrate judge determined that the "multiplier" issue could not be brought on a section 2255 motion, unless Mr. Rogers could show "cause" -- such as ineffective assistance of counsel -- for the failure to raise it on direct appeal. Aplt. App. at 154-155; infra at A25-A26. The magistrate judge found no Sixth Amendment violation: "[Mr. Rogers] has not shown that Mr. Wells' decision not to raise the issue of the 'multiplier' on appeal was professionally unreasonable." Aplt. App. at 162; infra at A33.

The magistrate judge also concluded that the district

court's conversion to street level quantities was proper. Aplt. App. at 157-162; infra at A28-A34. The magistrate judge impliedly found that the district judge did not misunderstand the narcotics guidelines. The magistrate judge held that because Mr. Rogers had been convicted of a conspiracy, the sentencing court could consider the "entire amount" of the drugs involved. Aplt. App. at 158; infra at A29 (citations omitted). Further, any later "cutting" of the drugs Mr. Rogers delivered was foreseeable because the price Mr. Rogers received for the drugs depended upon the number of times it could be cut. Aplt. App. at 161; infra at A32. In other words, the price was a function of the drugs' purity.

Mr. Rogers objected to the magistrate judge's findings on May 19, 1993. Aplt. App. at 164-89.

IV. BAIL MOTION

After the magistrate judge's ruling, a year went by without a decision or final order on Mr. Rogers' section 2255 motion. Because of the lapse of time, on May 16, 1994, Mr. Rogers filed a bail motion. See Dist. Ct. Docs. 1295-1298. A supplement to the bail motion was filed on July 22, 1994. See Dist. Ct. Doc. 1308.

V. MANDAMUS PROCEEDING

The section 2255 motion had been fully briefed as of May 1993. The bail motion was filed in May 1994. Mr. Rogers did not receive a decision on either his original section 2255 motion or his bail motion by December 1994. Mr. Rogers therefore filed a petition for writ of mandamus with this Court. The petition sought to compel District Judge Wayne E. Alley to decide Mr. Rogers' section 2255 and bail motions. _See_ Petition, _Rogers v. Alley_, No. 95-6092 (10th Cir. filed Dec. 22, 1994). On December 29, 1994, the district court denied Mr. Rogers' section 2255 motion on the merits. This Court subsequently dismissed the mandamus petition as moot. _See_ Order, _Rogers v. Alley_, No. 95-6092 (10th Cir. filed Feb. 3, 1995).

VI. THE RULING IN THE DISTRICT COURT

On December 29, 1994, the district court denied Mr. Rogers' section 2255 motion. Aplt. App. at 194; _infra_ at A39. The court adopted the magistrate judge's findings, with the exception of one point that is not relevant here. Aplt. App. at 193-194; _infra_ at A38-A39.[3] Otherwise, the district court

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[3] In his section 2255 motion, Mr. Rogers urged an additional (continued...)

agreed with the magistrate judge's legal analysis. Aplt. App. at 193; infra at A38.

Mr. Rogers filed a timely notice of appeal. Aplt. App. at 195.

SUMMARY OF ARGUMENT

The district court sentenced Mr. Rogers not according to the amount of drugs he actually delivered, but rather according to the same drugs converted to "street quantity at the retail level." To determine this amount, the district court multiplied the actual amount of drugs by the court's estimate of the number of times the heroin would be "cut" before it was sold on the street. The use of a multiplier at sentencing was incorrect. Under both the sentencing guidelines and 21 U.S.C. § 841, courts sentence defendants only according to the amount of drugs actually distributed, without regard to purity. Therefore, the district court erred in using a multiplier to convert the drugs Mr. Rogers possessed to "street quantity at the retail level."

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[3](...continued)
ground for ineffective assistance of counsel, based upon Mr. Wells' failure to accompany Mr. Rogers to his interview with the probation officer. The district court found no constitutional violation, though with different reasoning than employed by the magistrate judge. Aplt. App. at 193; infra at A38. Mr. Rogers does not raise that issue in this appeal.

Sentencing under such a misunderstanding of the law violates the Fifth Amendment's Due Process Clause. The district court erred in denying Mr. Rogers' section 2255 motion.

Moreover, Mr. Rogers' counsel failed to provide effective assistance on Mr. Rogers' direct appeal. Counsel objected to the use of the multiplier at sentencing, and -- in his brief in this Court -- used figures that ignored the multiplier. Nevertheless, counsel failed to raise the issue properly on appeal. Had he done so, this Court would have vacated Mr. Rogers' sentence. This Court must find that Mr. Rogers' court-appointed counsel provided ineffective assistance on appeal.

Mr. Rogers' sentence should be vacated without the need to remand for an evidentiary hearing. The record is clear and well-developed, and the facts support relief. There can be no dispute that the district court erred in applying the guidelines. And there should be no reasonable dispute that counsel failed to provide effective assistance. Mr. Rogers provided the district court with the affidavit of a legal expert, Tova Indritz. Ms. Indritz reviewed the case in detail and explained that the multiplier issue was "exceptionally meritorious" and should have been raised on appeal. To counter this showing, the government provided only the summary allegation of former counsel, asserting -- without any facts

or legal support -- that counsel "did not feel that the issue had merit." The record thus supports relief.

Finally, there is no procedural bar to this motion. Ineffective assistance of counsel is "cause" to excuse any failure to raise the "multiplier" issue on direct appeal. And the fact that Mr. Rogers was sentenced under a misunderstanding of law led to a fundamental miscarriage of justice, which also excuses any alleged procedural default.

ARGUMENT

I. THE DISTRICT COURT SENTENCED MR. ROGERS UNDER A MISUNDERSTANDING OF THE LAW, AND HIS SENTENCE MUST BE VACATED

Standard of Review: Whether the district court applied the appropriate legal standard is a question of law, reviewed de novo. United States v. Sapp, 53 F.3d 1100 (10th Cir. 1995). Further, a district court's legal interpretation of the sentencing guidelines is reviewed de novo. Sapp; United States v. Johnson, 42 F.3d 1312, 1320 (10th Cir. 1994); United States v. Lyons, 992 F.2d 1029, 1032 (10th Cir. 1993).[4]

A. Under the Guidelines, a Drug Sentence Is Based upon the Quantity Possessed by the Defendant; the Court Erred in Converting the Uncut Quantity to "Street Quantity at the Retail Level"

The sentencing guidelines do not authorize courts to convert a wholesale quantity of drugs to the "street quantity

[4] Any factual determinations at sentencing, however, are reviewed under the "clearly erroneous" standard. Sapp; Johnson, 42 F.3d at 1320.

at the retail level;" rather courts must sentence defendants based upon the "total weight" and "entire amount" of the drugs possessed. The applicable section of the Sentencing Commission's Guidelines Manual explains that:

> The scale amounts for all controlled substances refer to the **total weight** of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the **entire amount of the mixture** or compound shall be considered in measuring the quantity.

U.S.S.G. § 2D1.1, note * (emphasis added). "Total weight" and "entire amount," as used in the guidelines, mean the actual weight of the mixture containing the drugs that is possessed by the defendant. If a person distributes wholesale quantities of uncut drugs, that person is sentenced based on those quantities. Nowhere do the guidelines indicate that uncut drug quantities should be converted to street level retail quantities.

That sentences are based upon actual weight of drugs is evidenced by the guidelines' adoption of the quantity calculation of 21 U.S.C. § 841. Section 841 was amended by Congress in 1986 to provide for mandatory minimum penalties for offenses involving specific quantities of narcotics. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to 3207-4 (1986). The amended statute establishes minimum penalties for defendants convicted for

possession of certain quantities "of a mixture or substance containing a detectable amount" of drugs. 21 U.S.C. § 841(b). The term "mixture" in section 2D1.1, note *, follows this statutory language. Thus, drug quantity calculations under the guidelines are identical to those for mandatory minimum sentences. United States v. Leazenby, 937 F.2d 496, 497-98 (10th Cir. 1991).

Calculating drug sentences on the basis of the "total weight," without regard to purity, was challenged soon after Congress amended section 841(b) in 1986. Several defendants argued that the statute was unconstitutional because the drug quantity calculation is based solely upon weight and does not consider purity. These defendants claimed that the actual-weight test unfairly prejudiced defendants at the bottom of the drug distribution chain. Thus, for example, a wholesale supplier who distributed 200 grams of uncut, 100 % pure cocaine would not receive a mandatory minimum sentence. However, a street level dealer with an equivalent amount of narcotics -- say, 600 grams of cocaine at 33 % purity -- would receive a mandatory minimum sentence. This unfairness could be corrected, defendants argued, by adopting a test based on drug purity. Taking purity into account would "even out" the sentences of defendants who are caught at different stages of the drug distribution chain. The courts, however, uniformly

rejected these arguments and held that Congress intended to punish defendants based on the total weight of the drug mixtures and substances they possessed, at the level at which they dealt. See, e.g., United States v. Mendes, 912 F.2d 434, 438-40 (10th Cir. 1990) (rejecting the claim that purity affected the application of a mandatory minimum sentence, even though a street dealer possessing impure cocaine could receive a higher sentence than a high-level distributor); United States v. Whitehead, 849 F.2d 849, 859-60 (4th Cir.), cert. denied, 488 U.S. 983, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988) (upholding "Congress' approach of classifying punishment in relation to the quantity of substances containing narcotics rather than to their purity").

Any doubt about the meaning of "total weight" was resolved by the Supreme Court in Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). There the Court made clear that "total weight" refers to the actual weight of the drugs possessed by a defendant, rather than the street level quantity. The defendants in Chapman were arrested with 10 sheets of blotter paper containing LSD. By itself, the LSD weighed roughly 50 milligrams; however, with the paper, the LSD weighed 5.7 grams. Id., 500 U.S. at 455-56. The Supreme Court determined that the defendants were properly sentenced according to the "total weight" of the LSD

and paper, even though this drug quantity calculation made defendants eligible for mandatory minimum sentences under 21 U.S.C. § 841(b) and increased their sentences under the guidelines. Id., 500 U.S. at 459-462.

The Chapman Court recognized that sentencing disparities may result from the "total weight" test of the statute and guidelines. The Court hypothesized that a "major wholesaler caught with 19,999 doses of pure LSD" might receive a lesser sentence than a "minor pusher with 200 doses on blotter paper, or even one dose on a sugar cube." Id., 500 U.S. at 458. Regardless, Congress "intended the penalties for drug trafficking to be graduated according to the weight of the drugs **in whatever form they were found -- cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level**." Id., 500 U.S. at 461 (citing House Comm. on the Judiciary, Narcotics Penalties and Enforcement Act of 1986, H.R. Rep. No. 845, 99th Cong., 2d Sess., pt. 1, p. 12 (1986); emphasis added).

This Court has agreed that "total weight" does not mean "street level retail quantity." It has routinely affirmed sentences based upon the amount of drugs possessed by a defendant, without any attempt to convert to street level retail quantities. See, e.g., United States v. Reyes, 40 F.3d 1148, 1150 (10th Cir. 1994) (affirming a sentence based on

defendant's "related conduct" in delivering at least five additional kilograms; no suggestion that the defendant's sentence should have been enhanced by conversion to street level retail quantity); United States v. Saucedo, 950 F.2d 1508, 1510 n.3 (10th Cir. 1991) (defendant sentenced on the basis of the drugs that he and his codefendant possessed, and which were part of a common plan; no effort to calculate street level retail quantity); United States v. Padilla, 947 F.2d 893, 895-96 & n.3 (10th Cir. 1991) (defendant sentenced on the basis of 82.3 grams of heroin, much of which was 70% pure; no effort to convert to street level retail quantity, despite relatively high purity of the heroin); United States v. Mathews, 942 F.2d 779, 785 (10th Cir. 1991) (remand so that defendant could be sentenced only for 2-3 ounces of cocaine he possessed; no indication that the amount should be converted to street level retail quantity); United States v. Easterling, 921 F.2d 1073, 1076-78 (10th Cir. 1990), cert. denied, 500 U.S. 937, 111 S.Ct. 2066, 114 L.Ed.2d 470 (1991) (defendant sentenced following specific finding that he distributed 1,815.2 grams of methamphetamine; despite sales to others in two-pound packages, no suggestion that the drugs should be converted to street level retail quantity).

In sum, Chapman and a plethora of Tenth Circuit cases demonstrate what is meant by the terms "total weight" and

"entire amount." These terms mean the weight of the drugs possessed by the offender at the level that he dealt. They do not mean that a defendant is to be sentenced based upon the weight that the drug might attain if it is diluted with a non-controlled substance at a later time. At Mr. Rogers' sentencing, the district judge expressed his belief that "the street quantity is clearly what is referred to" in the guidelines commentary, and that "street quantity at the retail level is the reference" for sentences in drug cases. Aplt. App. at 44; infra at A8. Indeed, the judge even stated that "in past sentencings I've used the street quantity myself." Aplt. App. at 40; infra at A4. The district court was wrong. The judge misunderstood the basic principles of the drug guidelines. Mr. Rogers received a much higher sentence because of the court's misunderstanding.

B. The District Court's Conversion from Uncut Quantity to Street Level Quantity Was Not Made Proper Merely Because Mr. Rogers Was Convicted of a Conspiracy

In denying Mr. Rogers' section 2255 motion, the district court adopted the magistrate judge's findings and conclusions. Aplt. App. at 193. The magistrate judge based his decision in part upon the fact that Mr. Rogers had been convicted of

conspiracy. Aplt. App. at 157-160; <u>infra</u> at A28-31. This was error. That Mr. Rogers was convicted of conspiracy does not provide a broad license to convert drugs from wholesale to retail quantity. Further, the guidelines and cases relied upon by the magistrate judge only support the consideration of drug transactions by co-conspirators when those transactions are both reasonably foreseeable and are part of jointly undertaken activity. The district court's finding at sentencing that Mr. Rogers had a limited role in the conspiracy precludes the magistrate judge from holding that Mr. Rogers was somehow accountable for any street level sales made by others further down the chain of distribution.

In reaching his decision, the magistrate judge relied primarily upon former Application Note 2 to U.S.S.G. § 2D1.4 and the relevant conduct guideline, U.S.S.G. § 1B1.3. <u>See</u> Aplt. App. at 157-159; <u>infra</u> at A28-A30. Former Application Note 2 states in part that "[w]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance." U.S.S.G. § 2D1.4, Application Note 2. The relevant conduct guideline permits a sentencing court to consider other quantities of drugs that a defendant possessed or delivered. U.S.S.G. § 1B1.3.

Former Application Note 2 and section 1B1.3 permit a

district court to sentence a defendant based upon the defendant's true role in a drug case conspiracy. Indeed, it was these provisions that permitted the district court to consider Mr. Rogers' admission to the probation officer that he delivered 19 ounces of heroin in addition to the 5 ounce delivery proved at trial. These guidelines allowed the district court to consider Mr. Rogers' offense as involving 24 ounces of heroin, instead of only 5 ounces. However, nothing in the language of these provisions instructs a court to convert wholesale quantities to street level quantities, simply because others in a conspiracy may be involved in street level sales. Though the magistrate judge cited a number of cases for the proposition that Mr. Rogers is accountable for street level quantities because he was convicted of conspiracy, Aplt. App. at 158-160; infra at A29-A31, not a single one of the cases involves a conversion from wholesale to street level quantities.[5] Rather, the teaching

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[5] See United States v. Saucedo, 950 F.2d 1508, 1519 (10th Cir. 1991) (defendant accountable for quantity of drugs in dismissed counts, so long as part of same course of conduct or common plan; no indication in record of any conversion to street quantity); United States v. Coleman, 947 F.2d 1424, 1427-28 (10th Cir. 1991), cert. denied, 112 S.Ct. 1590 (1992) (court may estimate total amount of drug deliveries from testimony of number of trips that defendant and associate made); United States v. Reid, 911 F.2d 1456, 1461-63 (10th Cir. 1990), cert. denied, 111 S.Ct. 990 (1991) (defendant accountable for co-conspirator's sales from apartment that defendant used; further, court properly estimated total amount of drug sales, based upon testimony of amount sold per day); United States v. Boyd, 901 F.2d 842, 844 (10th Cir. 1990) (court may aggregate defendant's drug (continued...)

of these cases is that the sentencing court must make a careful determination of the defendant's role.

The November 1, 1989 amendments to section 1B1.3 and to Application Note 1 to section 2D1.4 make clear that a defendant is not automatically accountable for all drugs distributed by co-conspirators. Effective November 1, 1989, the Sentencing Commission amended Application Note 1 to section 1B1.3 to provide in part:

> In the case of criminal activity undertaken in concert with others, . . . the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. . . . **Where it is established that the conduct was neither within the scope of the**

(...continued)
deliveries with deliveries of her mother and sister; all deliveries were part of common plan); United States v. Rutter, 897 F.2d 1558, 1560-63 (10th Cir.), cert. denied, 498 U.S. 829, 111 S.Ct. 88, 112 L.Ed.2d 60 (1990) (defendant responsible for all sales he made to DEA agent even though those sales were not all in count of conviction); United States v. Ware, 897 F.2d 1538, 1542-43 (10th Cir.), cert. denied, 496 U.S. 930 (1990) (defendant who sold heroin at street level may be accountable for drugs distributed by co-conspirator, even if those amounts not alleged in indictment); United States v. Garcia, 954 F.2d 12, 16-17 (1st Cir. 1992) (court may consider drugs possessed by co-conspirator, where defendant introduced co-conspirator to another); United States v. Schaper, 903 F.2d 891, 896-99 (2d Cir. 1990) (court may consider other transactions defendants made, even if not included in indictment); United States v. Turner, 898 F.2d 705, 710-11 (9th Cir.), cert. denied, 495 U.S. 962 (1990) (court may consider defendant's drug transactions contained in indictment, even if those transactions are not contained in count of conviction); United States v. Vinson, 886 F.2d 740, 742 (4th Cir. 1989), cert. denied, 493 U.S. 1062, 110 S.Ct. 878, 107 L. Ed. 2d 961 (1990) (court may sentence defendant on basis of his other transactions not included in plea).

> **defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included** in establishing the defendant's offense level under this guideline.

U.S.S.G. § 1B1.3, Application Note 1 (West ed. 1990) (emphasis added). The Sentencing Commission stated that "[t]he purpose of the amendment [to Application Note 1 to section 1B1.3] is to **clarify** the definition of conduct for which the defendant is 'otherwise accountable.'" U.S.S.G. App. C, amendm. 78 (West ed. 1990) (emphasis added). At the same time, Application Note 2 to section 2D1.4 was amended to refer specifically to this amended Application Note. See U.S.S.G. § 2D1.4, Application Note 2 (West ed. 1990).[6] Clarifying amendments are frequently considered by courts "to discern the Sentencing Commission's intent as to the application of the pre-amendment guideline." United States v. Saucedo, 950 F.2d 1508, 1514 (10th Cir. 1991).

Thus, under the relevant conduct provision, section

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[6] Further, in 1992, the Commission deleted section 2D1.4 and Application Note 2. The Commission amended section 2D1.1, the substantive offense drug guideline, to include conspiracy offenses. See U.S.S.G. § 2D1.1 & App. C., amendm. 447 (West ed. 1993). The relevant conduct provision, section 1B1.3, was also amended to provide specific examples of when defendants may be sentenced on the basis of their codefendants' conduct. U.S.S.G. § 1B1.3 & App. C., amendm. 439 (West ed. 1993). As before, the amendment merely clarified the pre-existing relevant conduct guideline. Id., amendm. 439 (stating that the amendment to section 1B1.3 "clarifies and more fully illustrates the operation of this guideline").

1B1.3, an accused is only responsible for acts of others that are "reasonably foreseeable," within the scope of the defendant's agreement, and are part of the "jointly undertaken activity." It is not enough simply to find that the conduct by co-defendants was foreseeable.

The pre-sentence investigation report accurately states Mr. Rogers' true role in the offense. Mr. Rogers sold heroin to Johnny Sanders. PSI at 11. The report also gives the names of people who distributed heroin after it was brought to Oklahoma, including people who were involved in street level sales. Mr. Rogers was not one of these people. PSI at 9-10. At sentencing, the district court found insufficient evidence to support the government's claim that Mr. Rogers participated in the conspiracy beyond selling uncut drugs to Johnny Sanders. See Aplt. App. at 44; infra at A8. Mr. Rogers' only role was to deliver heroin to Johnny Sanders. He did not cut the heroin. Nor did he participate in any later distribution. On these facts, Mr. Rogers cannot be accountable for street level sales. Those sales were not part of any activity jointly-taken with others. The street sales were not within the scope of Mr. Rogers' agreed joint activity.

This Court must note that the ruling below was truly remarkable. Because the price of Mr. Rogers' heroin was determined by its purity (i.e., by how many times it could be

cut), the district court found that the subsequent cuts by others were "foreseeable." Based on that finding alone, the district court held Mr. Rogers responsible for street level sales. But this proves too much. Heroin and powdered cocaine are **never** used in their pure forms. They are **always** cut.[7] There is absolutely nothing to distinguish Mr. Rogers from any other defendant who sells drugs at the wholesale level. Every person who sells drugs at the wholesale level may foresee that the drugs will be cut before being sold on the street. If Mr. Rogers is accountable for street level quantities merely because he sold heroin that would be cut later by others, then every person who sells drugs is accountable for street level quantities. If upheld by this Court, the ruling below will work a sea change in the way drug sentences are calculated. When defendants who distribute wholesale drug quantities are sentenced, district courts will now conduct hearings to

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[7] As the Department of Justice reports, "[b]efore sale heroin is **diluted** with substances such as sugars, starch, powdered milk, and quinine at a ratio of 1 part heroin to between 9 and 99 parts other substances." U.S. Department of Justice, Bureau of Justice Statistics, Drugs, Crime, and the Justice System at 43 (Publication NCJ-133652) (Dec. 1992) (emphasis in original). Further, "[d]ilution may occur at each point in the transportation chain." Id. The price of heroin also typically relates to purity. At the time that the Justice Department issued its report, it noted that "[a]t 70-90% purity, 1 lb. of Southeast Asian heroin sells for $40,000-$110,000 at the wholesale level in the U.S." Id. By comparison, "1 gram of cut heroin (0.3 ounces) with an average purity of 40% sells for $50-$400 on the street in the U.S." Id. Furthermore, cocaine -- like heroin -- is also "diluted or cut for retail sale." Id. at 42.

estimate the street quantities of same drugs. And the circuits will hear appeal after appeal in which it will be claimed that the estimates of street quantities were erroneous or unreliable.

The district court's decision was a radical departure from precedent. Indeed, counsel for Mr. Rogers has not located a single reported decision upholding a conversion from wholesale quantities to street level retail quantities. Tens of thousands of defendants have been sentenced under the guidelines for narcotics offenses. During fiscal year 1990 (the year Mr. Rogers' appeal was decided), 11,286 defendants received guidelines sentences for drug importation and distribution offenses. See U.S. Sentencing Comm'n, Annual Report Table J (1990). That number has increased, as drug cases have come to dominate the federal criminal justice system.[8] In fiscal year 1994, 15,204 defendants were sentenced for drug trafficking under U.S.S.G. section 2D1.1. See U.S. Sentencing Comm'n, Annual Report Table 44 (1994).[9] If allegations of foreseeability alone permitted courts to

[8] For discussions of the dominance of drug cases, see generally Eric Simon, "The Impact of Drug-Law Sentencing on the Federal Prison Population," 6 Fed. Sent. R. 29 (1993); Terence Dunworth & Charles D. Weisselberg, "Felony Cases and the Federal Courts: The Guidelines Experience," 66 S. Cal. L. Rev. 99, 122-124 (1992).

[9] Of these defendants, 1,464 were convicted of trafficking in heroin and 4,828 were convicted of trafficking in powder cocaine. U.S. Sentencing Comm'n, Annual Report Table 44 (1994).

sentence on the basis of street level retail quantities, the federal courts would by now have decided many thousands of appeals in which defendants challenged conversions from uncut quantities to street level quantities. That there are no such reported decisions confirms that sentences are not based upon street level quantities, even in conspiracy cases.

C. Mr. Rogers' Sentence Was Imposed on the Basis of a Misunderstanding of the Law and Therefore Violates the Due Process Clause and Constitutes Plain Error

Mr. Rogers was sentenced in violation of the Fifth Amendment's Due Process Clause. Sentencing on the basis of materially false information violates the Due Process Clause and is grounds for remand to the district court for resentencing. United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1971). In Tucker, the defendant was convicted of bank robbery and sentenced according to his three prior felony convictions. Two of these three prior convictions, however, were constitutionally invalid. The Supreme Court held that such a sentence offended the due process and affirmed the Ninth Circuit's remand of the case to the district court for resentencing: "[W]e deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude." Id., 404 U.S. at 447; see also United States v. Sunrhodes, 831 F.2d 1537, 1541-42 (10th Cir. 1987) (stating that the Fifth Amendment Due Process Clause protects a defendant's right not to be sentenced on materially false information); United States v. Jones, 640 F.2d 284, 286 (10th Cir. 1981) (describing the due

process right to be sentenced only on accurate information).

This Court has held that misapplication of the sentencing guidelines may constitute plain error and warrant resentencing. United States v. Saucedo, 950 F.2d 1508 (10th Cir. 1991). In Saucedo, this Court ruled that the district court erred in interpreting section 3B1.1 of the guidelines. Id. at 1516. The misapplication was an "obvious and substantial error." Id. The district court's mistake resulted in a "manifest injustice," given its effect on the defendant's overall prison sentence. Id. This Court remanded the case to the district court with instructions to resentence the defendant under a correct reading of the sentencing guidelines. Id. at 1519; see also United States v. Jefferson, 925 F.2d 1242, 1259 (10th Cir.), cert. denied, 502 U.S. 884, 112 S.Ct. 238, 116 L.Ed.2d 194 (1991) (vacating sentence where court believed that it lacked legal power to depart below the guidelines.

Mr. Rogers' sentence, which is based on a materially false understanding and misapplication of the sentencing guidelines, violates his rights under the Fifth Amendment's Due Process Clause. As a result, Mr. Rogers' guidelines range increased from 78-97 months to 151-188 months and he received a sanction far in excess of his proper sentence under the guidelines. This Court should remand Mr. Rogers' case to the

district court for resentencing under the guidelines for an offense involving 24 ounces of heroin.

II. BECAUSE MR. ROGERS' APPELLATE COUNSEL DID NOT RAISE THE DISTRICT COURT'S CONVERSION TO STREET LEVEL QUANTITIES, MR. ROGERS' SENTENCE SHOULD BE VACATED ON THE GROUNDSOF INEFFECTIVE ASSISTANCE OF COUNSEL

Standard of Review: A claim of ineffective assistance of counsel presents a mixed question of law and fact that is reviewed de novo. United States v. Whalen, 976 F.2d 1346, 1347 (10th Cir. 1992).[10]

The Sixth Amendment provides the right to counsel to criminal defendants. The right to counsel includes the right to "effective" assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449 n.14, 25 L.Ed.2d 763, 773 n.14 (1970). To establish a claim of ineffective assistance of counsel, an accused must meet both prongs of the test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This test applies to claims of ineffective assistance of counsel on appeal. United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995); Tapia v. Tansy, 926 F.2d 1554, 1564 (10th Cir.), cert. denied, 502 U.S. 835, 112 S.Ct. 115, 116 L.Ed.2d

[10] If a district court has made findings of fact following an evidentiary hearing, those findings are reviewed under the "clearly erroneous" standard. Whalen, 976 F.2d at 1347. However, no hearing was held in this case. Thus, the decision below is reviewed de novo.

84 (1991). Under the Strickland test, a person must first show that counsel's conduct was objectively unreasonable and fell outside the wide range of professionally competent assistance. Strickland, 466 U.S. at 690. Second, there must be a "reasonable probability" that the result of the proceeding would have been different if counsel had provided competent representation. Id., 466 U.S. at 694. Mr. Rogers' claim meets both prongs of the Strickland test.

A. Counsel's Performance Fell Below an Objective Standard of Reasonableness

The first prong of the Strickland test requires the defendant to identify acts or omissions that fall outside the range of competent assistance. Strickland, 466 U.S. at 690. The representation must be unreasonable under prevailing professional norms and counsel's challenged act or omission must not be sound strategy. Kimmelman v. Morrison, 477 U.S. 365, 381, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305, 323 (1986). The reviewing court is to consider the totality of the circumstances surrounding counsel's representation and to review counsel's conduct with considerable deference. Id. Nevertheless, the challenged acts or omissions need not be numerous; a single error may constitute the breakdown in the

adversarial process requisite for ineffective assistance of counsel. United States v. Cronic, 466 U.S. 648, 657 n.20, 104 S.Ct. 2039, 2046 n.20, 80 L.Ed.2d 657, 666-67 n.20 (1984) (companion case to Strickland).

Mr. Rogers' court-appointed counsel, Mr. Wells, raised three issues on direct appeal. He claimed that Mr. Rogers' Fifth Amendment privilege against self-incrimination was violated when Mr. Rogers was not given a Miranda warning in his presentence interview; that Mr. Rogers' right to a speedy trial was violated; and that the district court abused its discretion in denying Mr. Rogers' severance motion. Mr. Wells neither raised the "multiplier" issue nor challenged the district court's conversion to street level retail quantities, even though counsel objected to the use of the multiplier at sentencing and used figures in his appellate brief that ignored the multiplier. United States v. Rogers, 921 F.2d 975, 977 n.5 (10th Cir.) (as amended). cert. denied, 498 U.S. 839, 111 S.Ct. 113, 112 L.Ed.2d 83 (1990).

Mr. Wells' conduct was objectively unreasonable under prevailing professional norms. The Supreme Court in Strickland noted that effective assistance of counsel depends largely upon fulfillment of counsel's duty to make reasonable investigations. Strickland, 466 U.S. at 690-91. Mr. Wells could not have made the reasonable investigation required by

Strickland. Had he made a reasonable investigation, he would have determined, as he argued in the district court, that the sentencing guidelines do not support a converstion to street level retail quantities. A reasonable investigation would have revealed that at the time of the direct appeal (and to this date) courts have not used a multiplier to arrive at street level retail quantities. And if counsel had any doubt about the meaning of the conspiracy guidelines, the 1989 clarifying amendments were published by the Commission for public comment in March 1989. See U.S. Sentencing Commission, Notice of Proposed Amendments, 54 Fed. Reg. 9122 (Proposed amendments 12, 94) (March 3, 1989). Mr. Wells did not file his brief on direct appeal until May 1989. See Aplt. App. at 85. The November 1, 1989 amendments became effective while Mr. Rogers' direct appeal was pending in this Court. Counsel could also have moved the Court for leave to supplement his brief after those amendments became law.

In her Affidavit, legal expert Tova Indritz stated that she was "not aware of any published decision which sanctions the use of 'street quantity' or potential for dilution before re-sale to determine the base offense level." Aplt. App. at 146. Ms. Indritz described the "multiplier" issue as "an exceptionally meritorious appellate issue." Aplt. App. at 147. She affirmed that "it was ineffective assistance of

counsel for Mr. Wells to fail to raise that issue on appeal." Aplt. App. at 147.

In his affidavit, Mr. Wells only stated that he did not raise the multiplier issue "because [he] did not feel that the issue had merit." Aplt. App. at 108. Mr. Wells did not allege that the decision to omit the issue was based upon any legal authority. Indeed, Mr. Wells did not allege that he even conducted any legal research. In Strickland, the Supreme Court noted that counsel's "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. In Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988), this Court affirmed the grant of habeas corpus relief where an attorney failed to undertake a proper sentencing investigation. Though the attorney pursued a deliberate strategy, this Court found that counsel's performance was unreasonable since he had failed to conduct an adequate investigation before making strategic choices. Id. at 626-628. Since Mr. Wells did not conduct legal research on the "multiplier" issue, the choice not to raise the issue cannot be deemed objectively reasonable. But, even assuming that Mr. Wells had researched the issue, the choice not to raise it could not be reasonable since there was (and is) no authority to support the

application of the multiplier.

Further, the decision not to raise the "multiplier" issue served no strategic purpose. The issue would have in no way detracted from the issues that Mr. Wells did raise on appeal. By raising the Miranda claim, counsel already challenged one aspect of Mr. Rogers' sentence. This is not a case where, for example, counsel determined not to challenge a sentence on appeal out of fear that a higher sentence might be imposed on remand. Mr. Wells challenged the sentence by raising the Miranda issue, and he even used figures in the brief that ignored the multiplier. In short, there was no strategic advantage to omitting the "multiplier" issue. There was no "down-side" to the claim.

This Court has held that counsel may "weed out" weak claims and decide to present only the strongest claims on direct appeal. Cook, 45 F.3d at 394-395; Tapia, 926 F.2d at 1564. But omitting an obvious and meritorious issue may amount to ineffective assistance, even if the omission is the product of a deliberate strategic choice. In Cook, this Court ruled that counsel's failure to present a "dead-bang winner" was "objectively unreasonable because the omitted issue [was] obvious from the trial record." Cook, 45 F.3d at 395. There this Court found that counsel's performance was unreasonable even though counsel presented several other strong claims on

appeal. Id.

Under the circumstances, Mr. Wells' performance was not objectively reasonable. While he raised other strong issues on appeal, he omitted an obvious and meritorious issue. There was no strategic "down-side" to raising the "multiplier" issue on direct appeal. Further, counsel's omission is not due any deference by this Court. From the present record, it appears that counsel's failure to raise the claim was caused by an inadequate investigation; it was not the product of a fully reasoned strategic decision. Mr. Rogers meets the first prong of the Strickland test.

B. Counsel's Performance Prejudiced Mr. Rogers

The second prong of the Strickland test requires that the defendant show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id., 466 U.S. at 693. Rather, the defendant need only show "a probability sufficient to undermine confidence in the outcome." Id., 466 U.S. at 694. Of course, the performance and prejudice prongs of the Strickland test "partially overlap," Cook, 45 F.3d at

394 (citing Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989)), because the merits of the "multiplier" issue demonstrate both that counsel's omission was unreasonable and that this Court would likely have ruled for Mr. Rogers had the issue been raised on direct appeal. Mr. Rogers' sentence would have been different had Mr. Wells raised the "multiplier" issue. As already demonstrated, no case supports a district court's conversion of wholesale drug quantities to street level retail quantities. The "multiplier" issue would have been of first impression to this Court and the absence of case law supporting its use sufficiently undermines this Court's affirmation of Mr. Rogers' sentence.

Mr. Rogers meets both prongs of the Strickland test. Counsel failed to provide effective assistance on Mr. Rogers' direct appeal. Had the "multiplier" issue been raised, the sentence would have been vacated.

III. THIS COURT SHOULD VACATE MR. ROGERS' SENTENCE WITHOUT AN EVIDENTIARY HEARING

Standard of Review: Whether the district court applied the appropriate legal standard is a question of law, reviewed de novo. United States v. Sapp, 53 F.3d 1100 (10th Cir. 1995). Further, a district court's legal interpretation of

the sentencing guidelines is reviewed de novo. Sapp; United States v. Johnson, 42 F.3d 1312, 1320 (10th Cir. 1994). The district court denied Mr. Rogers' section 2255 motion without a hearing. The decision not to grant an evidentiary hearing is reviewed for abuse of discretion. United States v. Whalen, 976 F.2d 1346, 1348 (10th Cir. 1992).

The record in this case supports the grant of relief under 28 U.S.C. section 2255. The record demonstrates that the district court sentenced Mr. Rogers in a way that is not supported by the federal sentencing guidelines or by the case law interpreting the guidelines. The district court misapplied the law, as the record plainly shows. No hearing is needed to establish that the district court committed a legal error, and this Court may therefore grant Mr. Rogers' motion and vacate his sentence, without a remand for an evidentiary hearing.

The record in this case also supports the grant of relief under section 2255 based upon ineffective assistance of counsel. Counsel failed to raise the "multiplier" issue on direct appeal. Affidavits were submitted to the district court by Mr. Rogers' legal expert, Tova Indritz, and by Mr. Rogers' former counsel, Joseph Wells. As Mr. Rogers has already explained, Mr. Wells' conclusory affidavit is entitled

to no deference, and the record demonstrates that he failed to conduct a reasonable investigation into the "multiplier" issue. Ms. Indritz's affidavit was detailed, credible and specific. Ms. Indritz carefully explained that Mr. Wells omitted an "exceptionally meritorious" issue, and that his performance was unreasonable. There is no specific and credible information in the record to counter this showing.

A district court may grant a habeas corpus petition without a hearing when the record is clear. In Bliss v. Lockhart, 891 F.2d 1335 (8th Cir. 1989), the court of appeals affirmed the grant of habeas corpus relief without an evidentiary hearing. The district court found that trial counsel had provided ineffective assistance due to a conflict of interest. Id. at 1337-1338. The decision granting the habeas corpus petition was based upon the trial transcript, testimony at a bail hearing, and affidavits. Id. at 1337. The warden appealed, arguing in part that it was error to grant the petition without an evidentiary hearing. Id. at 1338. The court of appeals rejected that argument:

> [The warden] has not presented to this court, nor did he present to the district court, any showing that he was deprived of an opportunity to present evidence at any stage in these proceedings. [The warden's] assertion that live testimony of trial counsel is necessary to resolve the conflict of interest issue carries little weight absent some showing that such testimony would conflict with the record made in this case. Moreover, even if a contrary view were expressed by [trial counsel],

> that view could not alter the clear record here which shows that counsel made no investigations . . . .

Id.

In the case at hand, the record is clear and supports relief. The government has not been prevented from building its record in the district court. It placed in the record only a summary and non-specific affidavit by trial counsel. That affidavit cannot alter the clear record, which shows that counsel failed to raise an "exceptionally meritorious" issue on direct appeal.

Finally, if for some reason this Court is unable to grant Mr. Rogers relief on the basis of the record, the matter should be remanded for a hearing. While this Court can **grant** relief without a hearing, Mr. Rogers submits that the Court may not **deny** relief without one. Mr. Rogers made a specific and credible showing in the district court. When a person has made specific and credible allegations that would entitle him to relief under section 2255, it is an abuse of discretion to refuse to conduct an evidentiary hearing. See United States v. Whalen, 976 F.2d 1346, 1348-1349 (10th Cir. 1992) (district court abused its discretion by denying a section 2255 motion without a hearing; the accused's allegations that his plea was involuntary were specific and, if true, would entitle him to relief); United States v. Estrada, 849 F.2d 1304, 1305 (10th

Cir. 1988) (same). At a hearing, Mr. Wells could be examined about his decision not to raise the "multiplier" issue and Mr. Rogers could show that counsel's decision was constitutionally deficient. A hearing would allow Mr. Rogers and the district court to resolve any lingering questions about Mr. Wells' short, conclusory statement that he felt that the issue lacked merit.

Thus, this Court should grant relief without a hearing. There is no need to remand this cause to the district court, except for the purpose of resentencing. However, this Court may not **affirm** without a hearing.

IV. NO PROCEDURAL BAR PREVENTS THIS COURT FROM REACHING THE MERITS OF THIS APPEAL

Standard of Review: A district court's analysis of procedural default is reviewed de novo. Macklin v. Singletary, 24 F.3d 1307, 1311-1313 (11th Cir. 1994).

A section 2255 motion is not a replacement for a direct appeal. United States v. Frady, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982). A person's failure to raise a matter on direct appeal may bar him from bringing the issue on a section 2255 motion, unless he can show "cause and

prejudice," or that "a fundamental miscarriage of justice will occur if his claim is not addressed." United States v. Cook, 997 F.2d 1312, 1320 (10th Cir. 1993). In this case, the district court properly found no procedural bar to the consideration of the ineffective assistance of counsel claim. As the district court ruled, a section 2255 motion provides the first opportunity for a person to raise that claim; because it cannot be raised on direct appeal, there is no default of that issue. Aplt. App. at 154-155; infra at A25-A26. There is, similarly, no bar to this Court's consideration of the point that Mr. Rogers was sentenced under a misunderstanding of law. Ineffective assistance of counsel is cause to excuse counsel's failure to raise the issue earlier. See Murray v. Carrier, 477 U.S. 478, 492, 106 S.Ct. 2639, 2648, 91 L.Ed.2d 397, 411 (1986). But even without a showing of ineffective assistance of counsel, this Court may review the question whether Mr. Rogers was sentenced under a misunderstanding of the law. The issue stands alone.

The misunderstanding of law issue is not defaulted because failure to address the claim would result in a fundamental miscarriage of justice. The Supreme Court has made clear that a fundamental miscarriage of justice may occur when a person is "actually innocent" of the sentence imposed. Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d

269 (1992). To assess whether a person is "actually innocent" of a sentence, courts focus on the elements that make a person eligible for the penalty, and not just on mitigating evidence that may be presented at sentencing. Id., 112 S.Ct. at 2523, 120 L.Ed.2d at 285. This Court has already determined that a legal misapplication of the sentencing guidelines may result in manifest injustice when it increases a defendant's offense levels, making him eligible for a substantially increased penalty. United States v. Saucedo, 950 F.2d 1508, 1516-1517 (10th Cir. 1991) (misinterpretation of guidelines may result in manifest injustice, amounting to plain error, given its effect on the overall prison term).

Saucedo provides helpful guidance to this Court. Granted, Saucedo addresses whether the district court's misapplication of the guidelines amounts to plain error. Yet the plain error standard requires the Court to consider the level of harm to the accused if the issue is not reviewed. The Court's characterization of the legal error in that case as resulting in a "manifest injustice" is sufficiently similar to the finding that must be made in procedural default analysis as to provide guidance to this Court.

This conclusion is not altered by this Court's analysis in Selsor v. Kaiser, 22 F.3d 1029 (10th Cir. 1994) and United States v. Khan, 835 F.2d 749 (10th Cir. 1987). Khan holds

that failure to raise factual inaccuracies during sentencing generally bars their consideration on a section 2255 motion. Khan, 835 F.2d at 753-754. Selsor holds that a person is not actually innocent of a sentence due to a legal error where the sentence may be imposed without any further factual showing and there is no indication that the facts leading to the sentence are incorrect. Selsor, 22 F.3d at 1036. In Selsor, the defendant was not actually innocent of a sentence imposed in violation of double jeopardy because he was eligible for the imposition of the sentence without any further proof or findings of fact. Id. That distinguished Mr. Selsor from other defendants, such as habitual offenders, who are not eligible for increased punishments in the absence of further findings of fact. Id.

Mr. Rogers' case is closer to Sawyer and Saucedo than to Khan or Selsor. Focusing on the elements of the government's case that made Mr. Rogers eligible for his sentence, as Sawyer says we must, the district court's error increased the amount of drugs in the offense and increased the levels of the offense. Because of the error, Mr. Rogers was made eligible for a heightened sentence.

Mr. Rogers' sentence is unlike the sanction examined by the Court in Selsor. Mr. Rogers' enhanced sentence required proof of additional facts. His conviction would not, in the

absence of further facts, have allowed the imposition of his increased sentence. At sentencing, the district court was required to determine the amount of drugs involved in the offense. The court made its finding about the amount of the "cut" and also made its legal error in finding that the amount of the "cut" was relevant at all. Moreover, in the court below, Mr. Rogers introduced evidence that some of the court's sentencing facts were wrong. Mr. Rogers pointed out that the trial evidence did not support a "cut" of seven. Aplt. App. at 120-121. Thus, even the facts supporting the enhanced sentence were wrong. And, finally, Mr. Rogers is challenging the district court's erroneous interpretation of law, just as in Saucedo. This makes his case unlike Khan, where only facts were at issue.

Each of Mr. Rogers' grounds for relief stands alone. There is no procedural bar to review of the ground of ineffective assistance of counsel. That ground also provides "cause and prejudice" to excuse any possible default on the claim that Mr. Rogers was sentenced under a misunderstanding of the law. But there is also no procedural bar that would prevent this Court from granting relief on that issue, because failure to review that issue would amount to a fundamental miscarriage of justice.

CONCLUSION

For the reasons set forth in this Brief, this Court should reverse the decision below and vacate Mr. Rogers' sentence. The cause should be remanded with instructions to resentence Mr. Rogers based upon an offense involving 24 ounces of heroin. Alternatively, Mr. Rogers asks this Court to reverse the decision below and remand for an evidentiary hearing.

STATEMENT OF THE REASON WHY ORAL ARGUMENT IS NECESSARY

This appeal presents several complicated and important issues, which would benefit from oral argument. In particular, this Court should hear argument on the question whether the conspiracy guidelines permit the district courts to convert uncut drug quantities to street level quantities. If adopted by this Court, the district court's conclusion would have far-reaching implications for federal sentencing and for the workload of the courts. These implications should be fully explored at argument.

Respectfully submitted,

July 18, 1995

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ADDENDUM TO APPELLANT'S BRIEF

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A. United States v. Rogers, CR-88-81-014, Sentencing Transcript, November 28, 1988. . . . . .A1

B. United States v. Rogers, CR-88-81-014, Findings and Recommendation of United States Magistrate Judge, May 4, 1993 . . . . A22

C. United States v. Rogers, CR-88-81-014, Order, December 29, 1994 . . . . A35

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,) No. 95-06092
)
Plaintiff-Appellee,) PROOF OF SERVICE
)
v.)
)
DONALD STEVEN ROGERS,)
)
Defendant-Appellant.)
______________________________)

I, the undersigned, say:

1. That I am over eighteen years (18) years of age, a resident of the County of Los Angeles, State of California, not a party in the within action and that my business address in University of Southern California Law Center, University Park, Los Angeles, California 90089-0071; and

2. That I mailed an original and seven copies of the Appellant's Opening Brief and two sets of the Appellant's Appendix and the Under Seal Addendum to Appellant's Appendix to the United States Court of Appeals for the Tenth Circuit; and

3. That I served the within Brief for Appellant, Appellant's Appendix, and Under Seal Addendum to Appellant's Appendix on counsel for Plaintiff-Appellee by mailing two copies of the Brief and one copy of the Appendix and Under

Seal Addendum to:

Leslie Maye
Assistant United States Attorney
210 West Park Avenue, Ste. 400
Oklahoma City, OK 73102

and the same were deposited in the United States mail on July 18, 1995, at Los Angeles, California.

I certify that the foregoing is true and correct.

Executed on July 18, 1995, at Los Angeles, California.

____
Valerie Adair