15-4112

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID GRENIER,

Defendant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK (SYRACUSE)

OPENING BRIEF OF APPELLANT DAVID GRENIER

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JURISDICTIONAL STATEMENT

Appellant David Grenier appeals from an amended final judgment disposing of all charges against him entered by the United States District Court for the Northern District of New York on December 8, 2015. A-66-71.[1] Grenier filed a timely notice of appeal on December 22, 2015. The district court had jurisdiction pursuant to 18 U.S.C. §§ 3231 and 3238. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Grenier's conviction must be overturned because the district court plainly erred in failing to conduct a hearing under Federal Rule of Criminal Procedure Rule 11(b)(3) before sentencing after the district court received the Presentence Report, which indicated that Grenier, who was suffering from schizophrenia and self-medicating with methamphetamine, had been mentally incapable of acting "knowingly and intentionally" on the date of the offense.

2. Whether Grenier's mental illness on the date of the offense precluded any finding that he had imported narcotics because knowing or intentional conduct is an element of that offense.

[1] "A-" citations refer to the Joint Appendix filed with Appellant's moving brief. Citations to the "PSR" refer to the Presentence Report prepared in anticipation of sentencing and filed separately under seal in this Court.

3. Whether the district court erred in sentencing Grenier without consideration or application of U.S.S.G. § 5K2.13.

STATEMENT OF THE CASE

In the early evening of April 23, 2013, Grenier approached the Port of Entry in Ogdensburg, New York. PSR ¶ 8. He was driving a rented car with the radio blaring. PSR ¶ 8. The driver in front of Grenier reported that he "was driving erratically on the bridge and was possibly intoxicated." PSR ¶ 8. The driver behind Grenier "indicated Grenier had been weaving in and out of lanes." PSR ¶ 8. Grenier appeared "somewhat incoherent and unfocused," when asked about his citizenship. PSR ¶ 8. He presented no passport. PSR ¶ 8. Nor did he offer any coherent reason for his travel to the United States:

> When asked where he was going, Grenier stated he "did not really know, but might go to California." . . . [Concerning his plans in the United States, Grenier] stated he was going to "save the world."

PSR at ¶ 8. The Customs and Border Patrol inspector noticed a large cardboard box in the back seat of the car, at which Grenier periodically grabbed. PSR ¶ 8.

Based on his behavior, Grenier was diverted to secondary inspection, where he was again asked about his citizenship and reason for travel to the United States. PSR ¶ 9. He stated again that he might go to California, (PSR ¶ 9) but wrote on his

United States Customs declaration that he intended to go to New York.[2] A records check revealed that Grenier was ineligible for entry into the United States based on several Canadian narcotics convictions. PSR ¶ 9.

While Grenier was detained for secondary inspection, Customs and Border Patrol agents searched the rental car. PSR ¶ 9. Within the large cardboard box on the back seat of the car, officers found a smaller box labeled "Opti-Free Replenish," which contained a sandwich bag of 847 methamphetamine pills. PSR ¶ 9. Grenier denied knowledge of the pills' origin or substance. PSR ¶ 11. "When asked if he was on any type of drug such as cocaine, marijuana, or methamphetamine, Grenier responded that he wanted an attorney." PSR ¶ 11. Grenier was taken into custody, where Ogdensburg Police found an additional two methamphetamine pills in his pocket (PSR ¶ 12), and has been detained ever since.

On December 20, 2012, Grenier pled guilty to an Information filed that same date charging him with a single count of Importation of a Controlled Substance, specifically "50 grams or more of a mixture and substance containing a detectable amount of methamphetamine" in violation of 21 U.S.C. §§ 952(a) and 960(b)(2). A-9. The plea agreement specified that the elements of the offense to which Grenier had agreed to plead guilty were:

[2] Because there is no evidence that this document was ever reviewed by the district court, it is not included in the Joint Appendix. It is available for production for this Court's consideration on request.

a) First, that the defendant brought into the United States from a place outside the United States a controlled substance;

b) Second, that the defendant knew the substance he was bringing into the United States was a controlled substance; and

c) Third, that the defendant knew that the substance would enter the United States.

d) Fourth, the quantity of the substance was 50 grams or more of a mixture and substance containing a detectable amount of methamphetamine.

A-12-13. Grenier signed the plea agreement, which stated that he "was aware that he was transporting methamphetamine tablets" when he arrived at the Ogdensburg Port of Entry. A-13; A-28.

During the change of plea hearing, the district court discussed with Grenier the rights that he would be giving up by pleading guilty and confirmed that he had reviewed the plea agreement with counsel and understood its contents. A-33-35. Through an interpreter, Grenier confirmed that he understood the plea agreement, the rights he was forfeiting, the sentencing range of 5-40 years, and the appeal waiver of a sentence less than 121 months. A-33-37. After confirming that Grenier understood that a sentence would be determined by the district court (A-37-38), the district court then asked the government to "put in a summary fashion the factual basis for the pleas [*sic*] on the record." A-38. The AUSA responded:

> April 23rd, 2012, the defendant arrived at the port of entry in Ogdensburg, New York. During secondary inspection of the defendant's vehicle, which the defendant was the sole occupant of, CBP officers discovered a cardboard box containing approximately

> 847 tablets. Those tablets weighed approximately 397 grams. Lab results showed that those tablets were methamphetamine.
>
> The defendant had an additional two tablets in his pocket, making that an additional 30 grams . . .

A-38.

The district court then asked Grenier, "In essence is that correct?" And Grenier answered, "Yes." A-38. Finding the plea knowing and voluntary and supported by a sufficient factual basis, the district court accepted Grenier's plea. A-39.

During his presentence interview, Grenier explained that he had a history of paranoid schizophrenia. PSR ¶ 17. He explained that he had purchased 1,000 methamphetamine tablets from a friend for $1,000 one week prior to his arrest, and had used 151 of them during that week. PSR ¶ 17. He had been taking methamphetamine for 10 years, and explained that he is "better when he takes the drugs . . . they open a door in his brain and he can see things." PSR ¶¶ 17-18. On the date of the offense, Grenier told the interviewing officer that:

> "[T]hey" were speaking to him over a website and convinced him to travel to a meeting in New York City because "they" need him to "help save the world." He also reported hearing subliminal messages in songs and in television shows. Grenier stated he would ultimately be meeting with NASA to save the world, but NASA was not located in New York City. He believed he was the victim of a conspiracy at the hands of the individuals instructing him to come to the New York City meeting to save the world.

PSR ¶ 18.

Although he had been taking antipsychotic medication for approximately three weeks" before the offense, he did not recall the name of the medication. Moreover, "he was still experiencing psychotic episodes and hearing voices which were instructing him to do things." PSR ¶ 19. The presentence report also reveals an extensive history of mental health treatment and substance abuse. PSR at ¶¶ 45-49.

In its sentencing memorandum, the defense stressed Grenier's long history of schizophrenia and symptoms including "extreme paranoia and outlandish delusional thoughts." A-49. The defense explained that a "reasonable" explanation for Grenier's conduct on April 23, 2012, was that "the defendant was a mentally ill drug addict who was hearing voices that instructed him to come to the U.S." based on his "delusional thoughts . . . that people were telling him to go to New York to 'save the world.'" A-50. Defense counsel explained that, in numerous conversations, Grenier had asserted that, "his true motivation behind his attempt to come to the U.S. on that date was provoked by an international conspiracy that had presented itself to him via subliminal messages in the television shows he had watched." *Id.* Therefore, the defense urged that the sentencing court impose no more than the mandatory minimum sentence of 60 months. A-52.

In response, the government urged imposition of the Guidelines maximum sentence of 108 months. A-44. Although there was no evidence in the record of

intent to distribute, the government doubted that Grenier could have intended to use all of the methamphetamine pills found in his car. *Id.* Even if he had, however, the government argued that, "Given the defendant's reported history of mental health problems, the defendant's use and abuse of methamphetamine appears to be very reckless and potentially dangerous for the defendant and for others." A-44-45. Thus, both parties raised Grenier's mental health as an issue to be considered at sentencing and agreed that it had had an impact on his conduct on April 23, 2012.

At sentencing on June 24, 2013, the district court "accept[ed] and adopt[ed] the factual information and the Guideline applications in the presentence investigation report" without objection by defense counsel or the government. A-56. Defense counsel rested on the sentencing memorandum. A-56. The government urged the district court to impose a sentence at the high end of the Guidelines range, arguing that mental illness was no excuse for Grenier's "extremely dangerous conduct" of self-medication and that Grenier posed a "serious threat to society." A-58. Without discussing its reasons for the sentence, the district court then sentenced Grenier to the high end of the applicable Guidelines range (108 months), as calculated in the presentence report and recommended that he participate in substance abuse and mental health treatment programs while incarcerated. A-59.

The defense filed no notice of appeal. One year later, on June 30, 2014, Grenier filed a motion to vacate under 28 U.S.C. § 2255, arguing that he had received ineffective assistance of counsel for reasons including his trial counsel's failure to file a notice of appeal. A-5 at Dkt. No. 19; *see also* A-63.

In the interim, on May 8, 2015, the district court found that Grenier qualified for a sentence reduction under Guidelines Amendment 782 and reduced Grenier's sentence to 87 months, the high end of the newly applicable Guidelines range (CHC I, level 27, 70-87 months). *See* A-6 at Dkt. Nos. 26, 27. Grenier is serving that sentence.

On December 8, 2015, the district court granted Grenier's § 2255 petition on the limited basis that he received ineffective assistance of counsel when his attorney failed to file a notice of appeal. A-63-65. Consequently, on December 8, 2015, the district court filed a new Amended Judgment, and advised Grenier that he must file a notice of appeal within 14 days thereafter. A-66-71; A-65. On December 22, 2015, Grenier filed a timely notice of appeal. A-72-73. This brief perfects his appeal.

SUMMARY OF THE ARGUMENT

Grenier asserts three grounds of reversible error on appeal. First, Grenier's conviction must be overturned because the district court committed plain error by failing to hold a hearing or otherwise assess the adequacy of the factual basis for Grenier's plea under Federal Rule of Criminal Procedure Rule 11(b)(3) after the district court received the presentence report and learned of Grenier's mental illness at the time of the offense.

Second, Grenier's conviction must be overturned because he did not commit the crime with which he was charged. Grenier was charged with having knowingly and intentionally imported narcotics, that is, methamphetamine, into the United States. Yet, at all times relevant, he was suffering from delusions caused by his paranoid schizophrenia and was, therefore, incapable of acting knowingly or intentionally. Because mental state is an element of the offense, the inescapable conclusion that Grenier's actions were neither knowing nor intentional requires reversal of his conviction.

Third, in the event this Court declines to reverse Grenier's conviction, his case should be remanded to the district court for re-sentencing with the application of U.S.S.G. § 5K2.13 (Diminished Capacity [Policy Statement]) because Grenier's paranoid schizophrenic delusions contributed substantially to his commission of the offense.

ARGUMENT

I. The District Court Plainly Erred in Accepting Grenier's Guilty Plea Because the Facts As Set Forth in the Presentence Report Called the Sufficiency of the Factual Basis for the Plea Into Doubt.

A. Standard of Review

Because Grenier did not challenge the sufficiency of his guilty plea before the district court, this Court's review is for plain error. *See United States v. Garcia*, 587 F.3d 509, 515 (2d Cir. 2009) (referencing *United States v. Vonn*, 535 U.S. 55, 58–59 (2002)); *see also United States v. Torrellas*, 455 F.3d 96, 103 (2d Cir. 2006) (same). To satisfy the plain-error standard, the defendant must demonstrate, inter alia, "that (1) there was error, (2) the error was 'plain,' [and] (3) the error prejudicially affected his 'substantial rights.'" *United States v. Flaharty*, 295 F.3d 182, 195 (2d Cir. 2002) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993))."A defendant has the further burden to persuade the court that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (other internal quotation marks omitted). "In assessing the likely effect of a Rule 11 error, the court examines the entire record." *Torrellas*, 455 F.3d at 103 (citations omitted).

"In the context of a Rule 11 violation, to show plain error, a defendant must establish that the violation affected substantial rights and that there is a 'reasonable probability that, but for the error, he would not have entered the plea.'" *Garcia*,

587 F.3d at 515 (referencing *United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005) [quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004)]). "In assessing the likely effect of a Rule 11 error, [the Court] examine[s] the entire record." *Garcia*, 587 F.3d at 515 (footnote omitted) (quoting *Torrellas*, 455 F.3d at 103).

However, a district court's determination that the defendant's factual admissions "support conviction on the charge to which he has pleaded guilty" is reviewed for abuse of discretion. *See United States v. Culbertson*, 670 F.3d 183, 189 (2d Cir. 2012), *as amended* (Feb. 16, 2012) (quoting *United States v. Adams*, 448 F.3d 492, 498 (2d Cir. 2006)). *See also United States v. Hypolite*, 81 Fed. Appx. 751, 752 (2d Cir. 2003) (quoting *United States v. Smith*, 160 F.3d 117, 122 (2d Cir. 1998)) ("This Court 'review[s] for abuse of discretion the district court's finding that the record furnishes a factual basis sufficient to support the plea.'"). "A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008) (internal citations, quotation marks, and alteration omitted).

B. Applicable Law

(1) Rule 11 Requires that the District Court Determine the Existence of a Factual Basis for a Guilty Plea Both At the Time of the Plea and Before Entering Judgment.

Federal Rule of Criminal Procedure 11 governs the establishment of a sufficient factual basis for a guilty plea. Rule 11(b)(1) instructs that the district court must establish that the defendant understands certain rights including "the nature of each charge to which the defendant is pleading." Fed.R.Crim.P. 11(b)(1). Rule 11(b)(3) provides that, "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." The district court's "obligations under Rule 11(b)(3) continue until it has entered judgment. If it decides there was no factual basis for a guilty plea after accepting it, the court should vacate the plea and enter a plea of not guilty on behalf of the defendant." *Culbertson*, 670 F.3d at 191 n.4 (quoting *Smith*, 160 F.3d at 121).

This Court has explained that "[t]he overarching requirement" of Rule 11 "is that the [district] court 'assure itself simply that the conduct to which the defendant admits is in fact an offense under the statutory provision to which he is pleading guilty.'" *Garcia*, 587 F.3d at 514 (quoting *United States v. Maher*, 108 F.3d 1513, 1524 (2d Cir. 1997)). *See also United States v. Rodriguez*, 501 Fed. Appx. 86, 89-90 (2d Cir. 2012) (The district court must make a finding "that the factual conduct admitted by the defendant is sufficient as a matter of law to establish a violation of

the statute to which he entered his plea."). Thus, the district court is required to examine the relationship between the law and the acts to which the defendant has admitted, an inquiry designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Garcia*, 587 F.3d at 514-15 (quoting *Maher*, 108 F.3d at 1524 [quoting *McCarthy v. United States*, 394 U.S. 459, 467 (1969)]).

To avoid any question of the sufficiency of a guilty plea's factual basis, the district court should ensure "that the defendant's statement [as to his own offense conduct] includes conduct—and mental state if necessary—that satisfy every element of the offense." *United States v. Persico*, 61 F. Supp. 3d 257, 268 (E.D.N.Y. 2014), *reconsideration denied in part,* No. 10-CR-147 SLT, 2015 WL 893542 (E.D.N.Y. Mar. 2, 2015) (quoting *United States v. Tunning*, 69 F.3d 107, 112 (6th Cir. 1995)).

If an accepted guilty plea lacks a factual basis, reversal and remand is required. *See Culbertson*, 670 F.3d at 192 (quoting *Adams*, 448 F.3d at 502) ("A lack of a factual basis for a plea is a substantial defect calling into question the validity of the plea. 'Such defects are not technical, but are so fundamental as to cast serious doubt on the voluntariness of the plea,' and require reversal and remand so that the defendant may plead anew or stand trial.").

(2) The Elements of the Offense of Conviction Include "Knowing" or "Intentional" Conduct

Grenier pled guilty to an information charging him with having knowingly and intentionally imported over 50 grams of a mixture and substance containing a detectable amount of methamphetamine "into the United States from a place outside the United States, namely Canada" in violation of 21 U.S.C. §§ 952(a) and 960(b)(2). The statute of conviction provides in relevant part that, "It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance … [or] any narcotic drug…" 21 U.S.C. § 952(a). "The term 'import' means, with respect to any article, any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States)." 21 U.S.C. § 951(a)(1). *See also United States v. Nusraty*, 867 F.2d 759, 766 (2d Cir. 1989) (internal citations omitted) (emphasis in original) ("To convict a defendant of *importing* a controlled substance, the government must show, *inter alia*, that the defendant either imported the substance or caused it to be imported.").

This Court has held that, in order to violate § 952(a), "the defendant must knowingly or intentionally bring drugs into the United States." *Hypolite*, 81 Fed. Appx. at 752 (referencing *United States v. Londono-Villa*, 930 F.2d 994, 997 (2d

Cir. 1991)); *see also* 21 U.S.C. § 960(a)(1) ("Any person who . . . contrary to section 952 . . . of this title, knowingly or intentional imports . . . a controlled substance, . . . shall be punished . . .").

To have acted "knowingly," Grenier would had to have been "conscious and aware of his action, realized what he was doing or what was happening around him," and not have acted "because of ignorance, mistake, or accident." 1A Fed. Jury Prac. & Instr. § 17:04 (6th ed.). *But see Dixon v. United States*, 548 U.S. 1, 5 (2006) (internal citation omitted) ("[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense."). To have acted "intentionally," Grenier would had to have "desire[d] that his acts cause [certain] consequences or know[n] that those consequences [were] substantially certain to result from his acts." *Tison v. Arizona*, 481 U.S. 137, 150 (1987) (internal citations omitted). As the federal pattern jury instruction summarizes, a person's statements or acts at the time of the offense along with "all other facts and circumstances received in evidence" are considered together in order to determine "what a person knew or what a person intended at a particular time." *See* 1A Fed. Jury Prac. & Instr. § 17:07 (6th ed.).

C. Discussion

(1) The District Court Plainly Erred By Failing to Hold a Hearing Pursuant to Federal Rule of Criminal Procedure Rule 11(b)(3) to Establish the Sufficiency of the Factual Basis for Grenier's Plea After Reviewing the Presentence Report, Which Called Grenier's Mental Competence on April 23, 2012, Into Doubt.

Although the district court was entitled to rely on the written allocution in the plea agreement, the government's factual recitation of the offense conduct, and Grenier's agreement that the summary was essentially correct (A-12-13; A-38) to accept the plea at the change of plea hearing, the district plainly erred when it adopted the factual statements in the PSR at sentencing and proceeded to sentence Grenier without making further factual findings as to his competence because the PSR's factual statements concerning Grenier's mental illness on April 23, 2012, and on an ongoing basis through the date of sentencing, called the sufficiency of the plea allocution into doubt. *See* Fed.R.Crim.P. 11(b)(3) (district court is required to establish the factual basis for every element of the offense, before entering judgment).

Here, the PSR's description of the facts and circumstances of the offense added significant detail to the factual allocution offered by the government and accepted by the district court at the change of plea hearing. *Compare* A-12-13 (setting forth elements of the offense to which Grenier pled) with PSR at ¶¶ 8-12 and 17-19 (detailing mental illness sufficient to significantly impair conscious

action on the date of the offense and thereafter). More importantly, the facts in the PSR raised significant concern that Grenier had not been acting with a clear mind on the date of the offense. An individual who drives erratically to the international border without a passport, states that he is going both to California and to New York "to save the world," and who later explains that he suffers from schizophrenia and believes himself to have been the victim of a conspiracy in which voices in home electronics were directing him to travel to a secret meeting with NASA, was not acting "knowingly" or "intentionally" within the legal meaning of those terms at the time he attempted to cross the border.

That is, although Grenier may, on some level, have been aware that he was driving toward New York and that he possessed methamphetamine pills, the PSR's description of the offense conduct, combined with Grenier's explanation of the background for his conduct and his statement that "he was still experiencing psychotic episodes and hearing voices which were instructing him to do things" (PSR ¶ 19), raised significant questions as to whether he had, in fact, committed the offense with the requisite mens rea and whether he was competent to be sentenced. If, as appears highly likely from the PSR, Grenier's mind was impaired by his schizophrenic delusions, and if he was in fact acting in response to voices he heard in the radio telling him to go to New York "to save the world," as he informed the Customs and Border Patrol officer (PSR ¶ 8), this evidence was

highly relevant and probative as to whether he had, in fact, acted "knowingly or intentionally" during the commission of the charged offense.

Accordingly, after receiving the PSR, the district court should have held an evidentiary hearing to determine Grenier's mental competence. *See* Fed.R.Crim.P. 11(b)(3) (discussing the district court's obligation to determine that there is a factual basis for the plea); *see also* 18 U.S.C. § 4244(a) ("The [district] court . . . at any time prior to the sentencing of the defendant shall order . . . a hearing [on the present mental condition of the defendant] on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility."). *See also United States v. Polisi*, 514 F.2d 977, 979-80 (2d Cir. 1975) (finding plain error where the district court failed to hold an evidentiary hearing on the question of mental competence where, *inter alia*, the PSR "provided reasonable cause to believe [the defendant] may have been incompetent during the commission of the crime, or at the time of the trial and sentencing proceedings."); *Short v. United States*, 1997 WL 276229 at *4 (W.D.N.Y. May 21, 1997) (slip op.) (referencing *Drope v. Missouri*, 420 U.S. 162, 180 (1975); *Pate v. Robinson*, 383 U.S. 375, 385 (1966); *Rollins v. Leonardo*, 733 F. Supp. 763, 767-768 (S.D.N.Y. 1990), *aff'd*, 938 F.2d 380 (2d Cir. 1991), *cert. denied*, 502 U.S. 1062 (1992); *Williams v. Coughlin*, 664 F. Supp. 665, 666–

669 (E.D.N.Y. 1987)) ("Generally speaking, when a trial judge has reasonable cause to believe that a criminal defendant may be legally incompetent, the judge should not accept a guilty plea from the defendant . . . without first having him psychologically evaluated. . . . Failure to order a psychological evaluation under those circumstances constitutes a violation of a defendant's right to procedural due process.").

For these reasons, adopting the PSR's factual findings without such a hearing and proceeding to sentencing where every indication was that Grenier had, in fact, been unable to possess the requisite mental intent due to mental illness from which he was still suffering at the time of the presentence interview, constituted plain error.

The district court's failure to hold a hearing after receiving the PSR is sufficient to undermine confidence in the outcome of this case. If the district court had held a hearing to determine whether or not Grenier had been mentally competent on April 23, 2012, it is highly likely that the district court would have established Grenier's actual mental incompetence on that date and would not have accepted the plea. *See Dominguez Benitez*, 542 U.S. at 83 ("[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy

the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding.") (internal citations omitted).

(2) Because Grenier Was Not Competent on April 23, 2012, He Did Not Act "Knowingly" or "Intentionally" Within this Court's Interpretation of the Statute of Conviction, and His Conduct Did Not Satisfy Every Element of the Charged Offense.

Because the record establishes the lack of a factual basis for the district court's finding that Grenier acted knowingly or intentionally, the evidence is therefore also insufficient to find that he imported the drugs according to this Court's interpretation of the statutes of conviction, 21 U.S.C §§ 952(a) and 960. *See Hypolite*, 81 Fed. Appx. at 752; *Londono-Villa*, 930 F.2d at 997 (emphasis supplied) (violation of § 952(a) requires that the defendant *knowingly or intentionally* bring drugs into the United States). Even if, under normal circumstances, a person who drives to the international border with narcotics in his car can be presumed to know that he possesses those narcotics and to intend to bring them into the United States, these were not normal circumstances. From Grenier's approach to the port of entry, where drivers in front of and behind Grenier noted his erratic behavior, to his incoherent presentation and irrational answers in response to Customs and Border Patrol questioning, everything about the incident on April 23, 2012, indicated that Grenier was not in his right mind.

Likewise, that Grenier filled out a customs declaration stating that he was going to New York, told agents he was headed for California, and that the purpose of his travel was "to save the world," all pointed to the inescapable conclusion that Grenier was not "conscious and aware of his action," nor did he *know* within the commonly accepted meaning of the word, that "certain consequences were substantially certain to result from his acts." *See Tison*, 481 U.S. at 150; 1A Fed. Jury Prac. & Instr. §§ 17:04 and 17:07 (6th ed.) (a person's statements and "all other facts and circumstances" are relevant to establishing knowledge). *See also United States v. Tran*, 519 F.3d 98, 102 (2d Cir. 2008) (upholding conviction under § 952 where judge instructed jury that a "wise and intelligent consideration of all the facts and circumstances . . . may enable you to infer what the Defendant's state of mind was. . . .").

Without a hearing, the evidence before the district court at sentencing was that Grenier was suffering from delusions caused by his mental illness both during his drive to the border and during questioning by the Customs and Border Patrol officers, that he possessed no rational intent nor conscious knowledge of the likely and probable consequences of his actions, and that he should not have been held criminally responsible for his actions.[3] *See United States v Freeman*, 357 F2d 606,

[3] In fact, Clinton County Correctional Facility records from April 24, 2012 (the day after Grenier's arrest) demonstrate that he told a doctor that he had "not expect[ed] to cross the border but his 'schizophrenia made him make a bad decision.'"). The

615 (2d Cir. 1966) (footnote omitted) ("[S]ociety has recognized over the years that none of the three asserted purposes of the criminal law -- rehabilitation, deterrence and retribution -- is satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished.").

Moreover, in this Circuit, the mere fact that the narcotics were brought onto United States territory is insufficient to establish every element of the offense. *See United States v. Acosta*, 973 F.2d 551, 558 (2d Cir. 1992) (Van Graafeiland, J., dissenting) (internal citations omitted) ("Acosta's violation of section 952(a) was complete when he brought the cocaine into the country. . . . The entry of controlled substances onto American soil causes the harm and furnishes the jurisdictional basis for punishment of the offender.").

Therefore, because the evidence was insufficient to prove Grenier's knowing or intentional action on April 23, 2012, his conduct did not satisfy every element of the charged offense. Reversal and an order dismissing the charges against him is required. *See United States v. Javino*, 960 F.2d 1137, 1141 (2d Cir. 1992) (referencing *Burks v. United States*, 437 U.S. 1 (1978) ("If the evidence at trial was insufficient to prove that element, we must reverse and order dismissal of that count.").

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record contains no indication that the district court considered these records, which are consequently not included in the Joint Appendix. However, they are available for the Court's review on request.

II. The District Court Clearly Erred in Sentencing Grenier Without Application of U.S.S.G. § 5K2.13.

A. Standard of Review

A district court's factual conclusions concerning the applicability of United States Sentencing Guideline 5K2.13 are reviewed for clear error. *United States v. Silleg*, 311 F.3d 557, 564 (2d Cir. 2002) (citing *United States v. Piervinanzi*, 23 F.3d 670, 685 (2d Cir. 1994)).

B. Applicable Law

Under U.S.S.G. § 5K2.13, "A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. . . ." In this Circuit, "to establish diminished capacity a defendant must establish both 'reduced mental capacity and a causal link between that reduced capacity and the commission of the charged offense.'" *Silleg*, 311 F.3d at 564 (quoting *United States v. Prescott*, 920 F.2d 139, 146 (2d Cir. 1990) (drug conspiracy); referencing *United States v. Ventrilla*, 233 F.3d 166, 169 (2d Cir. 2000) (mailing a threatening communication with intent to extort money); *Piervinanzi*, 23 F.3d at 684 (wire and bank fraud and money laundering). *See also United States v. Speight*, 726 F. Supp. 861, 868 (D.D.C. 1989) (internal citations omitted) (U.S.S.G. § 5K2.13 "does not require

that the reduced mental capacity be demonstrated to be the sole, or 'but for,' cause of the commission of the offense. . . . Consequently, that defendant's mental illness and drug addiction may both have contributed to the commission of the offense does not bar application of 5K2.13 to reduce defendant's sentence to the extent that defendant's mental illness contributed to the commission of the offenses.").

C. Discussion

By its plain wording, application of U.S.S.G. § 5K2.13 would have been appropriate in this case, because Grenier was suffering from delusions that directed his action and "contributed substantially to the commission of the offense" on April 23, 2012. Grenier's conduct on April 23, 2012 could reasonably be explained by understanding that "the defendant was a mentally ill drug addict who was hearing voices that instructed him to come to the U.S." based on his "delusional thoughts . . . that people were telling him to go to New York to 'save the world.'" A-50. *See also* A-49 (stressing Grenier's long history of schizophrenia and symptoms including "extreme paranoia and outlandish delusional thoughts."). Likewise, the PSR reported that Grenier believed, "[T]hey" were speaking to him over a website and convinced him to travel to a meeting in New York City because "they" need him to "help save the world." PSR ¶ 18. This is notably similar to what Grenier told Customs and Border Patrol on the date of the incident. *See* PSR ¶ 8.

The district court considered the PSR and adopted its factual findings and calculations. A-56. The district court stated that it had "considered all the pertinent information submitted to the Court, presentence investigation report, its addendum, plea agreement, counsel's memorandum. I consulted the Sentencing Guidelines and various factors under Title 18 Section 3553(a)." *Id*. Yet, even though Grenier's mental health was discussed extensively in the PSR and in the parties' sentencing submissions, the district court did not mention it other than to recommend mental health and substance abuse treatment during the term of incarceration. A-59. Failure to discuss Genier's mental state or to consider application of U.S.S.G.§ 5K2.13, under these circumstances, was clear error.

CONCLUSION

Wherefore, for the reasons set forth above, Grenier's conviction should be overturned.

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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 this brief contains 5,901 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Times New Roman font.

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