18-15204-BB
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FREDIS PALACIOS,
Defendant / Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff / Appellee.

Appeal from the United States District Court,
Southern District of Florida, Miami Division 1: 17-cr-20013-JEM-4

APPELLANT PALACIOS' INITIAL BRIEF

Arturo V. Hernandez
Counsel for Appellant
ARTURO V. HERNANDEZ, P.A.
40 N.W. 3rd Street, Suite 200
Miami, Florida 33128
Telephone: (305) 579-4850
Facsimile: (305) 381-6869
E-Mail: avhlawpa@gmail.com
Fla. Bar No. 0324078

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Fredis Palacios
Case No. 18-15204-BB

Pursuant to Federal Rule of Appellate Procedure and Eleventh Circuit Rule 26.1-1, counsel for Fredis Palacios, defendant/appellant, certifies that the following persons and entities have or may have an interest in the outcome of this appeal:

Arteaga-Gomez, Manuel A.

Asprilla, Jhoan Stiven Carreazo

Caldwell, Leslie R.

Caruso, Michael

D.E.L.S.

Dobbins, Brian

Dunham, Christian Scott

E.M.A.

Fajardo Orshan, Ariana

Ferrer, Wifredo A.

Garber, Hon. Barry L.

Gayles, Hon. Darrin P.

G.C.R.S.

Goodman, Hon. Jonathan

Greenberg, Benjamin G.

Harris, Ayana N.

Hernandez, Arturo V.

Hickman, Danielle L.

L.S.C.

Martinez, Hon. Jose E.

M.Z.

Noto, Kenneth

Otazo-Reyes, Hon. Alicia M.

Palacios, Carlos Emilio Ibarguen

Palacios, Fredis Valencia

Simonton, Hon. Andrea M.

Smachetti, Emily M.

Tarre, Michael S.

Turnoff, Hon. William C.

Weir, Jorge Fernando Rivera

REQUEST FOR ORAL ARGUMENT

Defendant-Appellant Fredis Palacios respectfully requests oral argument in this case, as he believes it would assist the Court in analyzing the legal issues raised herein. See Fed. R. App. P. 34(a).

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STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction over this cause pursuant to 18 U.S.C. § 3231 because Appellant Fredis Palacios was charged with an offense against the laws of the United States of America, as alleged by Indictment. [DE-8][1]. Palacios entered a guilty plea on September 25, 2018. [DE-66]. Sentence was imposed on December 4, 2018, by the Honorable Jose E. Martinez, United States District Judge for the Southern District of Florida. [DE-122]. Pursuant to the Federal Rule of Appellate Procedure 4(b)(1), Palacios filed his timely notice of appeal on December 13, 2018. [DE-128].

This Honorable Court has appellate jurisdiction over this cause pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give a United States Court of Appeal jurisdiction over all final decision and sentences of the district courts of the United States of America.

[1] [DE-_] refers to the docket entry number on the district court's docket, United States of America v. Fredis Valencia Palacios, 17CR20013-JEM (S.D. Fla.).

STATEMENT OF THE ISSUES

I. Whether the district court erred in calculation of the Sentencing Guidelines when assessing points for specific offense characteristics: brandishing a firearm or weapon [§2L1.1(b)(5)]; intentionally or reckless creating a substantial risk of death or serious bodily injury [§2L1.1(b)(6)]; resulting death [§2L1.1(b)(7)]; and for assessing an adjustment for victim restraint (§3A1.3);

II. Whether the district court erred in denying a minor role adjustment;

III. Whether the district court erred in imposing a sentence above the guideline range.

STATEMENT OF THE CASE

(i.) Course of Proceedings and Disposition in the District Court:

Fredis Valencia Palacios ("Palacios"), the Defendant-Appellant, appeals his judgment and sentence. On January 6, 2017, Palacios was charged in a four-count Indictment charging encouraging or inducing an alien to come to the United States knowing such entry would be in violation of law where two deaths resulted and the life of another was placed in jeopardy (conspiracy to alien smuggle) in violation of 8 U.S.C. §1324(a)(1(A)(iv) and (B)(iii) and 8 U.S.C. §1324(a)(I)(A)(v)(I); two substantive counts of alien smuggling conspiracy where death resulted; one substantive count of alien smuggling where the life of another was placed in jeopardy in violation of 8 U.S.C. §1324(a)(1)(A)(iv), (B)(iv), (B)(iii) and 18 U.S.C. § 2. [DE-8] Palacio was arrested in the country of Colombia; extradited to the United States and appeared in the Southern District of Florida on May, 5, 2018. [DE-49]

On September 25, 2018, Palacios entered a guilty plea to the Indictment before District Judge Jose E. Martinez [DE-66]. A Presentence Investigation report ("PSI") was prepared by United States Probation. [DE-110, 116] Palacios filed written objections to the PSI [DE-112] and a Sentencing Memorandum with a Motion for Downward Departure and Variance and letters in support of Palacios.

[DE-113, 114] The Government filed Objections to the PSI and a Sentencing Memorandum. [DE-115, 117]

On December 3 and 4, 2018, the District Court conducted a sentencing hearing, where it received evidence from the Government and Palacios and took testimony from five Government witnesses. [DE-134, 135] The District Court sentenced Palacios to 180 months incarceration followed by 3 years supervised release. [DE-123] Appellant Palacio is currently incarcerated. This appeal follows.

(ii.) Standard of Review:

This Court reviews the sentencing court's application and interpretation of a provision of the United States Sentencing Guidelines ("U.S.S.G.") de novo and its factual findings for clear error. United States v. Dougherty, 754 F.3d 1353, 1358 (11th Cir. 2014).

The Court reviews an upward variance for substantive reasonableness of the sentence imposed under an abuse of discretion standard. United States v. Pugh, 515 F.3d 1179, 1190 (11th Cir. 2008).

STATEMENT OF THE FACTS

The Alien Smuggling Conspiracy

Beginning in August 2016, Appellant Fredis Valencia Palacios worked for a group led by fugitive Co-Defendant Jorge Fernando Rivera Weir that was transporting aliens across Colombia, north towards the Panamanian border, en route to the United States. [DE-67] Appellant's role in this conspiracy was to assist in smuggling the aliens by procuring Co-Defendant Carlos Ibarguen Palacios to pilot the boat to ferry the aliens from Turbo, Colombia, to the area near the Colombian border with Panama. Id. Ibarguen recruited Co-Defendant Jhoan Stiven Carreazo Aprilla to help him with the smuggling voyage. [DE-110].

In July 2016, two Cuban nationals EMA and LSC flew from Cuba to Guyana, where they crossed illegally into Brazil, then Venezuela, and then into Colombia seeking to arrange transportation to smuggle them into Panama, Mexico, and ultimately, the United States, where they planned to establish residency. [DE-67]. EMA, LSC and DELS, a third Cuban national who joined the group, arranged with Weir and paid his group to transport them from Colombia to Panama. Id. These Cuban nationals had no status in the United States and did not have a legal basis to enter the country. Id. Weir, the Appellant and Ibarguen met with the Cuban nationals to discuss the route that the boat drivers would use to transport them. Id.

On September 6, 2016, Weir and the Appellant took the Cuban nationals to Ibarguen who had the boat to begin their journey. Id. However, the boat starting taking on water and Ibarguen turned the boat around and took the Cuban nationals to his home. Id. The next day, the Appellant came to Ibarguen's home and saw the Cuban nationals and the second boat. LSC testified that the Appellant, Ibarguen and Carreazo were there together that day talking. [DE-134:46-48]. Carreazo and Ibarguen then left with the Cuban nationals on the second boat. [DE-67] During the trip, Carreazo and Ibarguen pulled a firearm and a knife on the Cuban nationals. Id. Carreazo and Ibarguez had made a plan to rob the Cuban nationals. [DE-110] Ibarguen tied the wrists of LSC and DELS, threw them overboard but pulled them just above the water and anchored them with a rope. [DE-67] Carreazo and Ibarguen sexually assaulted EMA before cutting her throat murdering her. Id. Then Carreazo and Ibarguen cut DELS' throat killing him. Id. LSC was able to free himself from the ropes, swam away and hid in the mangroves. He was ultimately found by a local fisherman and rescued by the Colombian Navy. Id.

Ibarguen and Carreazo were apprehended in a hotel in Turbo, Colombia on September 10, 2016, and charged in Colombia with murder, rape and aggravated robbery. [DE-110]. They plead guilty in Colombia and were sentenced to 43 years and 6 months in prison. Id. The Appellant was never charged with any crime in Colombia. However, he was arrested upon this Indictment in Colombia on May 13,

2017, awaited extradition in La Picota prison in Colombia for approximately a year, along with Ibarguen and Carreazo, until he was ultimately extradited to the United States to stand prosecution. [DE 110]

The Appellant knew Ibarguen previously as the boyfriend of his younger sister. [DE-117-2:33] He knew that in the past Ibarguen had robbed immigrants of their cell phones on the street in Colombia, "If he went out on the street, and he would go—and, well, he would rob them. Like, for example, you are walking there on the street. Do you understand what I'm saying? …And you would have a phone in your hand, and he would take it from you. And he would take off running, and he would take it … Yes, he would take it from them, the phones, from the Cubans, every now and then." [DE-117-2:216-217] The Appellant further stated that he learned from Ibarguen ***after his arrest*** while he was in jail at La Picota, that Carreazo was a member of the paramilitary forces, and described him as being "messed up" in the head and that he had a "bad" ideology. [DE-117-2:228-229]. The PSI and the Government stated and argued erroneously that the Appellant knew this information about Ibarguen ***before*** the smuggling incident [DE-110 ¶19 and DE-117], however he did not. The Appellant objected in writing and at the sentencing to this error in the PSI [DE-112 and DE-134:10-13].

Presentence Investigation Reports

After entering a guilty plea on September 25, 2018, a draft Presentence Investigation Report was prepared for the District Court by United States Probation [DE-110] and then an amended PSI was filed [DE-116]. Using the 2018 edition of the Sentencing Guidelines Manual, the probation officer initially determined the Offense Level under U.S.S.G. § 2A.1.2, the Homicide Guideline section, because this Alien Smuggling Offense involved a death. [DE- 110 ¶ 29] The PSI recommended a base offense level of 38, as a second-degree homicide. Id. After the Government's Objection [DE-115], the probation officer in her amended PSI included a two-level upward adjustment for restraint of victim, pursuant to §3A1.1. The PSI applied a three-level reduction for acceptance of responsibility under U.S.S.G. § § 3E1.1(a) and (b), making the total offense level 37. [DE-116-1]

Palacios' Objections to the PSI, Motion for Departures and Variance

The Appellant objected in writing [DE-112] and again at sentencing [DE-134:4-23] to the determination of the Offense Level under the 2A1.2, the Second Degree Homicide Guidelines, and argued his guidelines should be calculated under section 2L1.1, the Alien Smuggling Guideline section.

The Appellant also objected in writing [DE-112] and again at sentencing [DE-134:23-29] to not receiving a two-level reduction for a Minor Role adjustment pursuant to U.S.S.G. § 3B1.2.

In addition, the Appellant made factual objections in writing [DE-112] to correct the following erroneous and misleading factual statement that: "he (the Appellant) knew that Carreazo was a member of the paramilitary forces, and described him as being 'messed up' in the head and had 'bad' ideology,'" which was argued by the Government at sentencing and a fact relied upon by the Court.

U.S. Probation did not conduct a calculation of the Offense Level, including the application of specific offense characteristics, under section 2L1.1, the Alien Smuggling Guidelines, prior to the sentencing. It was only after sentencing on December 4, 2018, and the Court made its final rulings was another, amended PSI filed now calculating the Offense Level under section 21.1 for the first time. [DE-125]

Lastly, Palacios requested a departure pursuant to §5K2.0, for mitigating circumstances not adequately taken into consideration by the Guidelines and a variance pursuant to 18 U.S.C. § 3553(a). [DE-113]

District Court's Rulings at Sentencing

At sentencing the District Court ruled that section 2L1.1, the Alien Smuggling Guidelines, applied and the Base Offense Level was 12. [DE-135:112] The Court applied the following specific offense characteristics under section 2L1.1: increase to a level 20 for brandishing of a firearm; two-level increase for intentionally causing a substantial risk of death; 10 level increase for resulting

death. Id. The Court applied a chapter Three Adjustment of three levels for restraint of the victims. Id. At sentencing, the Appellant objected to numerous enhancements arguing that the Government had not proven they qualified under the relevant conduct standard. [DE-135:105-113] The specific offense characteristics under section 2L1.1 were not included in PSI's that were prepared in advance of sentencing. [DE-110 and DE-116]

The District Court overruled Palacios' objection to not receiving the minor role adjustment. [DE-135:132]

The District Court determined a Total Offense Level 31 with a range of 108 to 135 months incarceration. [DE-135:132-133]. The Court then sua sponte varied upward 45 months to a 180 month sentence. [DE-135:133] The Court's findings for this upward variance were as follows,

> I believe that this is a crime of horrible nature. I believe that while the rape and murder may not have been foreseeable. And I do not find that there was evidence that it was foreseeable. The violence and robbery was definitely foreseeable. He knew that these people had tendencies that they had -- robbery, that they had robbed people. That they were violent people. And I think delivering these people into their hands is inexcusable and just terrible. [DE-135]

The Government did not file a motion for upward departure or variance. The Defense objected to the sentence which was based upon an upward variance or departure. [DE-135:103-105 and 135]

SUMMARY OF THE ARGUMENT

The Government did not sufficiently prove the specific offense characteristics or the adjustment for victim restraint which was based solely upon the conduct of the Co-Defendants.

The Appellant proved his conduct warranted the minor role reduction.

Ultimately, the Trial Court sua sponte varied upward substantially from an incorrect guideline calculation based upon factual error and without sufficient justification, therefore this case must be reversed for resentencing.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. THE LOWER COURT ERRONEOUSLY CALCULATED THE SENTENCING GUIDELINES

A sentencing court after United States v. Booker, 543 U.S. 220 (2005), must still calculate the Guidelines range accurately and consider them although they are not mandatory. "A misinterpretation of the Guidelines by a district court effectively means that [the district court] has not properly consulted the Guidelines." United States v. Crawford, 407 F.3d 1174 (11th Cir. 2005).

In addition, United States v. Washington, 714 F.3d 1358, 1361 (11th Cir. 2013), states, "[w]hen the government seeks to apply an enhancement under the Sentencing Guidelines over a defendant's factual objection, it has the burden of introducing sufficient and reliable evidence to prove the necessary facts by a preponderance of the evidence."

A. RELEVANT CONDUCT ELEMENTS WERE NOT ANALYZED NOR PROVED AT SENTENCING

The nature of the Trial Court's errors in the guideline calculation are primarily related to assessing specific offense characteristics and an adjustment based upon a misapprehension of the law that the only factor in the relevant conduct analysis was foreseeability. All the points assessed related to actions of the Co-Defendants, not the conduct of the Appellant. Since there was absolutely no evidence in the record to support applying these characteristics under relevant conduct, the points must be vacated from the sentence.

U.S.S.G. § 1B1.3(a) instructs,

> Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) ***specific offense characteristics*** and (iii) cross references in Chapter Two, and (iv) ***adjustments in Chapter Three***, **shall** be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a ***jointly undertaken criminal activity*** (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
>
> (i) ***within the scope*** of the jointly undertaken criminal activity,
>
> (ii) ***in furtherance*** of that criminal activity, ***and***

> (iii) ***reasonably foreseeable*** in connection with that criminal activity;
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. (Emphasis added).

Therefore, Trial Court must conduct a complete relevant conduct analysis when determining the specific offense characteristics or any adjustments under Chapter Three. The relevant conduct section of the Guidelines was amended in 2015 and Amendment 790, "restructure[d] the guideline and its commentary to set out more clearly the three-step analysis the court applies in determining whether a defendant is accountable for the conduct of others in a jointly undertaken criminal activity under § 1B1.3(a)(1)(B)." U.S.S.G. Suppl. to App. C, Amend. 790, Reason for Amendment. The Trial Court did not follow this three-step analysis.

During the course of the sentencing, the Trial Court found that the murders of the aliens committed by the Co-Defendants was not foreseeable to the Appellant and therefore determined that the homicide guidelines did not apply. However, then the Trial Court erroneously and incongruously found the same or similar actions of the Co-Defendants were foreseeable when assessing specific offense characteristics and the adjustment for victim restraint. The Trial Court's analysis and findings stopped there, short of what is required. For this reason, the guidelines were not accurately calculated and the sentence based thereupon must be reversed.

1. SCOPE OF THE JOINTLY UNDERTAKEN CRIMINAL ACTIVITY AND IN FURTHERANCE OF THAT CRIMINAL ACTIVITY

The Trial Court and the Government failed to address, analyze or provide any factual support in the record to show that the Co-Defendants commission of murder, brandishing a firearm or restraining the victim was within the scope or in furtherance of the jointly untaken criminal activity. In this case the criminal activity was alien smuggling - not murder or robbery.

"Actions of coconspirators that a particular defendant does not assist or agree to promote are generally not within the scope of that defendant's jointly undertaken activity." United States v. Soto-Piedra, 525 F.3d 527, 533 (7th Cir. 2008). U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(B), states, "the scope of the 'jointly undertaken criminal activity' is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." See also, United States v. Montano-Garcia, No. 18-11773, 2019 U.S. App. LEXIS 3543 (11th Cir. Feb. 5, 2019). The Guideline further explains, "[i]n order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement)." United States v. Presendieu, 880 F.3d 1228, 1245 (11th Cir. 2018). Lastly the Guideline

instruct, "[i]n doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others."

This is an analysis the Trial Court must conduct in order to make specific findings to support the application of relevant conduct as to each enhancement. "Only after the district court makes individualized findings concerning the scope of criminal activity the defendant undertook is the court to determine reasonable foreseeability." United States v. Hunter, 323 F.3d 1314 (11th Cir. 2003). For example, in Hunter, the sentence was reversed and remanded because the "district court erred in not making particularized findings as to the scope of each Appellants' agreement in the larger counterfeit check cashing operation." Id. This Court in Hunter further stated, "[a]lthough the district court made findings regarding reasonable foreseeability, it did not 'first determine the scope of the criminal activity [Hunter, Summerset, and Seymore] agreed to jointly undertake.' U.S.S.G. § 1B1.3, cmt. (n.2). Rather, the court held simply that because each Defendant knew that he or she was part of a ring, he or she should be held accountable for all of the acts of all of the members. Yet the Guidelines establish that the fact that the defendant knows about the larger operation, and has agreed to perform a particular act, does not amount to acquiescence in the acts of the criminal enterprise as a whole." Id. at 1320; see also United States v. Anor, No. 17-15608, 2019 U.S. App. LEXIS 5679 (11th Cir. Feb. 26, 2019)(Unpublished);

United States v. Willis, 476 F.3d 1121, 1124, 1130 (10th Cir. 2007)(remanded for further factual findings regarding scope of criminal activity defendant agreed to jointly undertake, where defendant was convicted of aiding and abetting the accessing of a protected computer and district court did not make particularized findings regarding an agreement by defendant to aid and abet identity theft); United States v. Melton, 131 F.3d 1400, 1405-1407 (10th Cir. 1997)(the relevant conduct enhancement was vacated because the criminal conduct was not within scope of agreement and not reasonably foreseeable, where defendant was convicted of counterfeiting conspiracy but had no involvement in the subsequent "reverse sting" operation).

Not only was this analysis not conducted by the Trial Court at the Appellant's sentencing, but there were no facts in the record to support these two elements of relevant conduct. Below each enhancement will be analyzed separately to demonstrate the insufficiency of the evidence.

2. FORESEEABILITY

The Trial Court did specifically address the issue as to whether the conduct of the Co-Defendants was reasonably foreseeable to the Appellant. However, the Trial Court's factual findings as to the specific offense characteristics were contradictory and clearly erroneous. Even if the conduct was somehow foreseeable, the enhancements must still fail because the previous two elements of

scope and furtherance were not met. U.S.S.G § 1B1.3(a)(1)(B), clearly states, "the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, ***even if those acts were known or reasonably foreseeable to the defendant***, are not relevant conduct under subsection (a)(1)(B)." (Emphasis added). See also United States v. Barona-Bravo, 685 F. App'x 761 (11th Cir. 2017)(Unpublished)(reversing and remanding sentence because trial court "confined its relevant-conduct analysis to the question of reasonable foreseeability" and "did not make individualized findings on the record concerning the scope of criminal activity each particular defendant agreed to jointly undertake, as it is now required to do under § 1B1.3(a)(1)(B)").

B. THE LOWER COURT ERRONEOUSLY IMPOSED POINTS FOR SPECIFIC OFFENSE CHARACTERISTIC FOR BRANDISHING A FIREARM OR WEAPON UNDER U.S.S.G. § 2L1.1(b)(5)

U.S.S.G § 2L1.1(b)(5), provides for a specific offense characteristic enhancement up to a level 20 for the different levels of possession and use of a firearm or a weapon in an alien smuggling case. In this case, the PSI details the brandishing of a firearm by Co-Defendant Carreazo during the course of his robbery and murder of the victims. [DE-110:5] As it undisputed the Appellant never possessed a firearm or any weapon and, this enhancement can only be

applied to him if it is determined under § 3B1.1 that the Co-Defendants' brandishing of the firearm qualified under the relevant conduct analysis.

It was undisputed that the only jointly undertaken criminal activity the Appellant agreed to was to smuggle the aliens. The separate plan to rob and murder the aliens, which the Appellant had no knowledge of, was made between Co-Defendants Ibarguen and Carreazo alone. Not to mention, this separate plan ran in direct contradiction to the alien smuggling conspiracy whose object was to safely deliver the aliens to their destination. There was never any argument, dispute or allegation that the Appellant had anything to do with this plan. The Government's argument throughout the sentencing was that the Appellant knew or should have known that the Co-Defendants he was dealing with were bad people and therefore their actions and murders should have been foreseeable. This argument is deficient because it wholly ignores the rest of the relevant conduct analysis.

Like the murders, attempted robbery and rape, the act of brandishing the firearm was neither in the scope of the alien smuggling conspiracy, in furtherance of the alien smuggling or foreseeable to the Appellant and therefore, this enhancement should not have been applied. The Government failed to prove that this act by Co-Defendant Carreazo met any of these three elements.

The Trial Court found that this conduct was foreseeable based upon an erroneous factual finding that the Appellant knew that both of these Co-Defendants

were "violent" and had "tendencies to commit robbery". This finding was clearly erroneous as to Co-Defendant Carreazo as the facts proven at sentencing showed only that the Appellant learned about Carreazo's character after his arrest, not before the smuggling and Carreazo was the one who brandished the gun relevant to this offense characteristic. Second, this finding was also erroneous as to Co-Defendant Ibarguen, who the Appellant had prior knowledge that in the past he took cell phones from migrants on the street. There were never any facts to support the finding that the Appellant knew about any violence and certainly there was no knowledge or reason to believe a firearm or weapon would be present. Therefore, the Trial Court's basis for this factual finding as to foreseeability was also incorrect.

Although the Trial Court focused solely on the element of foreseeability during the course of the sentencing hearing and in his findings, there are two additional elements that must be met, before reaching foreseeability. The Trial Court conducted no such analysis, made no findings and there were no facts elicited or admitted at sentencing as to elements of scope of the jointly undertaken criminal activity or furtherance of the criminal activity.

C. THE LOWER COURT ERRONEOUSLY IMPOSED POINTS FOR SPECIFIC OFFENSE CHARACTERISTIC FOR INTENTIONALLY OR RECKLESSLY CREATING A SUBSTANTIAL RISK OF DEATH OR SERIOUS BODILY INJURY U.S.S.G. §2L1.1(b)(6)

There is a two-level enhancement under section 2L1.1(b)(6) for "intentionally or recklessly creating substantial risk of death or serious bodily injury". This enhancement cannot be determined based upon the outcome, i.e. whether death or injury actually occurred. See United States v. Cardena-Garcia, 362 F.3d 663 (10th Cir. 2004)(Specifically, § 2L1.1(b)(5) allows for an enhancement based upon "the defendant's intentional or reckless conduct, with no consideration of the outcome"). In United States v. Aranda-Flores, 450 F.3d 1141 (10th Cir. 2006), the court discussed the level of culpability necessary to warrant this enhancement in a case where an alien smuggler feel asleep while driving and death occurred. The court determined that mere negligent conduct is not sufficient and remanded the case for resentencing without the enhancement.

As to this specific offense characteristic of intentionally or recklessly creating a substantial risk of death or serious bodily injury, the Trial Court made no findings as to any of the relevant conduct elements. The most the Trial Court stated about characteristic is, "I think under the circumstances of this case, where in fact, he put them in a situation where they were in fact murdered, raped, and tied and left for dead in the water, I think that is a lot more significant than, you know, yeah they were in danger because they were going with two morons that were driving

them in a boat that was going to sink." [DE-135:109] This appears to arguably be a foreseeability finding, but does not speak to the scope or furtherance of the criminal activity. In fact, murdering, raping or injuring the aliens was not in the scope or in furtherance of the activity of alien smuggling venture. Therefore, because it was the Co-Defendants' actions (which were unknown to the Appellant) of committing rape and murder that put these aliens at risk of death or serious bodily injury, under a relevant conduct analysis the Appellant cannot be assessed two points for this specific offense characteristic.

D. THE LOWER COURT ERRONEOUSLY IMPOSED POINTS FOR SPECIFIC OFFENSE CHARACTERISTIC FOR RESULTING DEATH UNDER U.S.S.G. § 2L1.1(b)(7)

After making the finding that the homicide guidelines did not apply because the murders and resulting deaths were not "foreseeable" to the Appellant, the Trial Court conducted no further analysis and assessed ten points under the specific offense characteristic for resulting death under section 2L1.1(b)(7). The Trial Court's specific factual findings made during the sentencing do not support and moreover contradict the imposition of these points. The Lower Court repeatedly indicated and then ultimately ruled that it was absolutely not foreseeable to the Appellant that his Co-Defendants were going to commit murder of the aliens.

Therefore, after this factual finding as to the lack foreseeability of the murders it is impossible to enhance for the same deaths pursuant to section

2L1.1(b)(7). Under the 11th Circuit caselaw[2] that preceded the 2015 amendment to relevant conduct, still requires the same foreseeability analysis. See United States v. Zaldivar, 615 F.3d 1346, 1350-51 (11th Cir. 2010).

In addition after 2015, not only must the deaths be foreseeable, but also be in the scope and in furtherance of the criminal activity. Again, under the relevant conduct analysis, the commission of an intentional homicide is in no way in the scope of the activity that the Appellant agreed to and is not in furtherance of this alien smuggling conspiracy whose goal was to deliver the aliens safety to their destination.

E. THE LOWER COURT ERRONEOUSLY IMPOSED AN UPWARD ADJUSTMENT FOR VICTIM RESTRAINT UNDER U.S.S.G. §3A1.3

U.S.S.G §3A1.3 allows a two-level increase, "if a victim was physically restrained in the course of the offense". Similarly, Chapter Three Adjustments are also subject to the relevant conduct analysis. Again, the Trial Court conducted no analysis and made no findings to determine whether the action of the Co-Defendants of tying the victims was within the scope or in furtherance. Arguably,

[2] There is currently a split in the Circuits as to causal connection, if any, that is necessary to trigger an enhancement under section 2L1.1(b). The Tenth Circuit "contains no causation requirement". United States v. Cardena-Garcia, 362 F.3d 663, 666 (10th Cir. 2004); the Fifth Circuit has concluded that section 2L1.1(b)(7)(D) requires at least but-for causation; the Eighth Circuit focuses on whether the death was "causally connected to the dangerous conditions created by [the defendant's] unlawful conduct." United States v. Flores-Flores, 356 F.3d 861, 863 (8th Cir. 2004).

the Trial Court found that this restraint was foreseeable based upon the same erroneous factual assumption that the Appellant knew the Co-Defendants were violent and committed robberies.

The same arguments made above also apply to this Adjustment. The scope of what the Appellant undisputedly agreed to was to illegally transport these aliens who were coming to the United States. There was no agreement or knowledge of the Co-Defendants' plan to rob and murder. It was entirely outside the scope and in no way could have been in furtherance. The tying up or restraining of the victims was for the purposes of robbing and then killing them - not for the purpose of completing the smuggling venture.

II. PALACIOS SHOULD HAVE RECEIVED A MINOR ROLE ADJUSTMENT

The Trial Court erroneously denied the Appellant's request for a minor role adjustment and the Appellant met the burden by a preponderance of the evidence demonstrating the minor role was applicable in this case. He therefore, should have received a two-point minor role adjustment pursuant to U.S.S.G § 3B1.2.

In 2015, Sentencing Commission made specific amendments with reference to the minor role assessment. The purpose of the 2015 Amendment to the role reduction is clearly spelled out by the Commission, "[t]his amendment provides additional guidance to sentencing courts in determining whether a mitigating role adjustment applies. Specifically, it addresses a circuit conflict and other case law

that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances. It also provides a non-exhaustive list of factors for the court to consider in determining whether an adjustment applies and, if so, the amount of the adjustment." See Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary of November 1, 2015 Amendments. The explanation of the Amendment goes on to state, "[t]his amendment is a result of the Commission's study of § 3B1.2 (Mitigating Role). The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony. Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended." Federal Register Volume 80, Number 86 (Tuesday, May 5, 2015).

Section 3B1.2 of the United States Sentencing Guidelines now sets out factors to be considered by the Court when determining a role adjustment. Application Note 3(C) also lists new factors to consider,

> (i) the degree to which the defendant understood the scope and structure of the criminal activity;
> (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
> (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
> (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

> (v) the degree to which the defendant stood to benefit from the criminal activity.

The note further states, "For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline."

It was undisputed that the Appellant's role in this conspiracy was to locate a boat captain to transport the aliens for this short part of their trip (one short leg from Turbo by boat to the next leg of their overall journey from Cuba to the United States) on behalf of the head of the organization, Co-Defendant Weir.

The Appellant was not the captain of the boat and was not even a passenger on the boat that was smuggling the aliens. He was merely a middle man who set up the organizer with the boat captain. His role was very limited to one small piece in a much larger conspiracy. In addition, the Appellant had limited knowledge of the overall scheme which began with the organizer Weir, outside of Colombia long before the Appellant entered the organization, and the trip which would continue for many days and months with numerous unindicted coconspirators and unnamed coyotes/smugglers who would guide the aliens through countries up to the U.S. border. The PSI describes the scope of the overall conspiracy as a "transnational criminal organization involved in alien smuggling activities from Cuba to the

United States using a smuggling route involving Cuba, Guyana, Brazil, Colombia, Panama, and other countries." [DE-110:4]

In this case, a microscope has been put on this very small part of the overall journey in this alien smuggling conspiracy, which seems to inflate the Appellant's role because the concentration is on just this short part of the journey. But, legally the court must consider all "participants" in the entire scheme, not just the small group involved in the Turbo leg of the voyage. The Guidelines define a, "'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. §3B1.1. Therefore, not only the parties named in the indictment, but also unindicted co-conspirators are participants and the Appellant's role should have been compared to everyone, which include a wide network of smugglers from Cuba to Colombia up through Central America and Mexico.

In addition, the surviving victim, LSC, testified at sentencing that the Appellant and Co-Defendant Weir had two meetings with him where only the boat voyage was discussed [DE-134:39-40]. This witness testified that it was Weir who discussed the money and to whom they made payment and the Appellant never discussed payment with him the both times that he saw the Appellant at his hotel while he was waiting to be smuggled. [DE-134:40-43] Therefore, it was shown that the Appellant had no part in recruiting the aliens or setting the fees the aliens

would pay. He had no role in determining when the aliens would come or leave and worked at the direction of Weir.

Further, in this alien smuggling conspiracy case where death and physical injury resulted, the Appellant's role (or lack of role or knowledge) in the deaths and injury should be judged against the role the of Co-Defendants who actually planned and committed the robbery, rape and murder. By way of analogy, the comment to section 3B1.2 recognizes that some co-defendants may plead to a lesser offense in comparison to more major participants and in such a case a minor role would not be recommended,

> (B) Conviction of Significantly Less Serious Offense. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under § 2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

In this case, the opposite is true, the Appellant is being held responsible for the exact same criminal conduct as the two Co-Defendants who intentionally committed robbery, rape and murders. All three were charged with exactly the same violation, alien smuggling where death resulted. So, the Appellant was also a minor participant in comparison to the Co-Defendants who actually caused the death. This is another basis for finding the Appellant warrants a minor role when strictly comparing him to the indicted conspirators in this case in light of the numerous enhancements he received based solely upon the Co-Defendants' actions. It is abundantly clear that the Appellant was more than significantly less culpable than the Co-Defendants that committed the murders.

Therefore, Trial Court erred in not assessing two-level reduction for minor role as the record clearly demonstrated, unequivocally that the Appellant's role meets the criteria when compared to both the overall conspiracy and the Co-Defendants charged in this Indictment.

III. THE LOWER COURT IMPOSED AN ABOVE GUIDELINE SENTENCE WITHOUT SUFFICIENT LEGAL BASIS

The Trial Court varied 45 months above the top of the guideline range of 108-135 months, which is a 33 percent increase - assuming for argument sake that the guideline calculation was accurate. If, as argued above, the guideline range was incorrect and should have been only a level 10, then the variance is over a 90

percent increase from the top of the guideline range. Either way, the variance was legally unjustified and unreasonable.

A. THE LOWER COURT FAILED TO CONSIDER AND WEIGH THE 3553 FACTORS AND INSTEAD CONCENTRATED ONLY ON THE DEATHS COMMITTED AT THE HANDS OF THE CO-DEFENDANTS

Throughout the sentencing hearing and in its factual findings supporting the upward variance, the Trial Court concentrated on only one factor, the heinous murders that were committed by the Co-Defendants and whether it was foreseeable to the Appellant. It was undisputed that the Appellant played no part or had any knowledge that the intervening murders were going to happen during this alien smuggling voyage. Blinded by this one factor, the Trial Court erroneously failed to consider any other sentencing factors - neither the guidelines nor the factors set out in 18 U.S.C. § 3553(a).

"A sentence may be unreasonable if it is grounded solely on one factor, relies on impermissible factors, or ignores relevant factors." United States v. Pugh, 515 F.3d 1179, 1194 (11th Cir. 2008). A district court's unjustified reliance on any one Section 3553(a) factor may be a "symptom of an unreasonable sentence." See United States v. Crisp, 454 F.3d 1285, 1292 (11th Cir. 2006). In reversing a sentencing departure, this Court in Crisp recognized that although the district court indicated that it had "considered" several of the factors listed in § 3553(a) by mentioning "the seriousness of the offense, provides just punishment, affords

adequate deterrence and adequately protects the public." The court's primary focus was only one factor, restitution. Id. See also, United States v. Ward, 506 F.3d 468, 478 (6th Cir. 2007)("[a] sentence may be substantively unreasonable when the district court selects the sentence arbitrarily, bases the sentence on impermissible factors [or] fails to consider pertinent section 3553(a) factors."); United States v. Ausburn, 502 F.3d 313, 328 (3d Cir. 2007)(asking if the district court: "(1) exercised its discretion by giving meaningful consideration to the § 3553(a) factors; and (2) applied those factors reasonably by selecting a sentence grounded on reasons logical and consistent with the factors"); United States v. Boleware, 498 F.3d 859, 861 (8th Cir. 2007) ("A sentence within the guidelines range may be unreasonable if the sentencing court: (1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors, but in weighing those factors commits a clear error of judgment.")

The Trial Court at the Appellant's sentencing mentions, with no prior or further discussion, that it considered, "the statutory factors set forth in 18 U.S.C. Section 3553(c)" [DE-135:132] and states again without discussion, "Sentence will be imposed above the advisory guideline range which I think is necessary to provide sufficient punishment and deterrence." [DE-135:133] However, it is clear the "horrible nature" of the rape and murder [DE-135:133, 103 and DE-134:9,70]

and the foreseeability based upon the Appellant's knowledge of the character of the co-defendants for robbery and violence, is the only factor, concern or basis for this sentence. The Trial Court spent one paragraph explaining this at the conclusion of the sentencing as justification before imposition of the sentence [DE-135:133]. Not to mention that throughout the sentencing hearing which spanned the course of two separate days, the Trial Court mentioned the nature of the murders numerous times. So, the Trial Court considered one factor: the nature and circumstances of the offense - that is all.

Most significantly, the Trial Court failed to recognize the history and characteristics of the Appellant which was briefed and demonstrated by letters from those that know him in Colombia. In addition, the Trial Court failed to consider unwarranted sentencing disparities or sentences in similar alien smuggling cases with death. Lastly, although the Trial Court mentions deterrence, it is unclear how a sentence in the United States for a Colombian national who was extradited here would deter others in Colombia. Or, how a harsher sentence based upon an unknown and unintentional act would deter those from acting in the future.

By single-mindedly concentrating on the heinous nature of acts of two others without regard for the remaining sentencing factors related to this particular defendant before the court, the Trial Court erred in handing down this sentence significantly above the guideline range.

B. THE LOWER COURT'S UPWARD VARIANCE WAS UNREASONABLE AND WITHOUT SUFFICIENT JUSTIFICATION

Not only was sentence above the guideline range unjustified, but the amount of the variance was unreasonable. Again, the Trial Court's reasoning was based upon one factor and the record is wholly insufficient to support an upward departure of 45 months above the top of the guidelines, after every possible enhancement was assessed.

According to the United State Supreme Court in Rita v. United States, 551 U.S. 338 (2007), "a court of appeals may presume that a sentence within the guidelines range is reasonable." See United States v. Irey, 612 F.3d 1160, 1185 (11th Cir. 2010).

In reversing a variance this Court explained, "the district court did not provide a sufficiently compelling justification to support the degree of its variance, nor did it give any apparent weight to many other important statutory factors embodied by Congress in 18 U.S.C. § 3553(a) that must be considered at sentencing." United States v. Pugh, 515 F.3d 1179, 1183 (11th Cir. 2008). Although there is no rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range or "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence," "appellate courts may therefore take the degree of variance into account and consider the extent of a

deviation from the Guidelines." Pugh at 1190, citing Gall v. United States, 552 U.S. 38 (2007).

The Supreme Court explained that the justification for the deviation from the guidelines range must be "sufficiently compelling to support the degree of the variance." Gall at 50.

The reasoning, support and justification for the substantial upward variance in the Appellant's case was lacking. The only fact cited by the Trial Court was the Appellant's disregard of the Co-Defendants' past in robbery and violence[3] when delivering the aliens to them for the boat trip which ultimately resulted in their horrible murder. Upon analysis, it is shown that this fact was also a justification for the Trial Court's application of the specific offense characteristics already taken into consideration and not a basis for an additional upward variance. Other than this fact, the Trial Court cites no other basis for the beyond the guideline sentence. There is no discussion of the Appellant's past, his character or anything he specifically did that was so egregious to take this out of the heartland of cases to warrant a significant increase above a guideline sentence.

In United States v. Lopez, 343 F. App'x 484, 485-86 (11th Cir. 2009) (unpublished), this Court vacated a 60-month upward variance sentence for

[3] It will be shown in section III. C, below that this factual premise itself is partially erroneous.

smuggling unlawful aliens into the country where the guidelines range was 33 to 41 months. This Court stated,

> beyond Lopez's criminal history and the general need for more effective deterrence, the district court considered other § 3553(a) factors in imposing the upward variance, including the seriousness of the offense and the nature and circumstances of the conduct. By focusing only on Lopez's criminal history, without providing any other justification as to the need to deviate almost fifty percent above the high end of the guideline range, we believe the district court abused its discretion in concluding that this 60-month sentence was sufficient but not greater than necessary.

Similarly, the Trial Court in this alien smuggling case focused only on the Co-Defendants' murders and abused its discretion when determining that a 15 year sentence was not greater than necessary to meet the 3553 sentencing factors as they relate to this Appellant in these circumstances.

C. THE UPWARD VARIANCE WAS BASED UPON ERRONEOUS FACTUAL FINDINGS

Worse yet, the Trial Court based its variance upon some erroneous facts. The Court stated that the Appellant knew "these people" (the Co-Defendants) had "tendencies" and "they had robbed people" and "they were violent." First, the Trial Court incorrect combines Co-Defendant Carreazo and Co-Defendant Ibarguen together. There was no evidence submitted that Carreazo was violent or robbed anyone. The Government repeatedly and erroneously attempted to show that the Appellant had prior knowledge of Carreazo's character before the events in this

case. That is simply not correct and had been objected to and pointed out by the Appellant. What the Appellant said in his post-arrest interview with law enforcement was that after he was arrested and was in jail in Colombia with Ibarguen (who he did know and have a prior relationship with) told him about Carreazo's character and mentality. This all occurred after the murders and after the Appellant's arrest - not before the Appellant delivered the aliens for transport.

Moreover, nothing in the Appellant's statement about Carreazo mentioned robbery or violence. However, the Appellant did say that he knew in the past that Ibarguen had taken cell phone from aliens on the street. Based upon this one fact, the Trial Court exaggerated this finding as a basis for the departure that the Appellant knew both Co-Defendants committed robberies and had violent tendencies.

This is yet another grounds, a factual basis, to find the Trial Court's justification for the upward variance was erroneous.

CONCLUSION

For the foregoing reasons and arguments above, the judgment and sentence of Appellant Fredis Valencia Palacios should be reversed and this case should be remanded for a new sentencing.

Respectfully submitted,

BY: /s/Arturo V. Hernandez

Arturo V. Hernandez
Counsel for Appellant
ARTURO V. HERNANDEZ, P.A.
40 N.W. 3rd Street, Suite 200
Miami, Florida 33128
Telephone: (305) 579-4850
Facsimile: (305) 381-6869
E-Mail: avhlawpa@gmail.com
Fla. Bar No. 0324078

CERTIFICATES OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B)(i) because, excluding the parts of the document exempted by FRAP 32(f), it contains 7,830 words. I also certify that this brief complies with the typeface requirement of Fed. R. Ap. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using the WordPerfect program in 14-point Times New Roman font.

BY: /s/Arturo V. Hernandez
Arturo V. Hernandez

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was electronically filed with the Clerk of this Court and served on all counsel of record, including AUSA Emily Smachetti, on this 10th day of April, 2018.

BY: /s/ Arturo V. Hernandez
Arturo V. Hernandez