IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **18-15204-GG**

United States of America,

Appellee,

- versus -

Fredis Valencia Palacios,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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United States v. Fredis Valencia Palacios, Case No. 18-15204-GG
United States' Notice Concerning Certificate of Interested Persons and Corporate Disclosure Statement

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-4, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included on our CIP, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case.

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Caldwell, Leslie R.

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D.E.L.S.

Dobbins, Brian

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E.M.A.

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G.C.R.S.

Goodman, Hon. Jonathan

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Hunt, Hon. Patrick M.

Kane, Sara

L.S.C.

Martinez, Hon. Jose E.

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Mulvihill, Thomas J.

Noto, Kenneth

Otazo-Reyes, Hon. Alicia M.

Palacios, Carlos Emilio Ibarguen

Palacios, Fredis Valencia

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Rivero, Laura

Simonton, Hon. Andrea M.

Smachetti, Emily M.

Stuart, Taniesha

Tarre, Michael S.

Torres, Hon. Edwin G.

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Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Southern District of Florida in a criminal case. The district court entered judgment against Appellant Fredis Valencia Palacios on December 4, 2018 (DE122). The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. § 3231. Palacios filed a timely notice of appeal on December 13, 2018 (DE128); see Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Statement of the Issues

I. Whether the district court clearly erred in assessing specific offense characteristic enhancements for brandishing a firearm or dangerous weapon (U.S.S.G. § 2L1.1(b)(5)), intentionally or recklessly creating a substantial risk of death or serious bodily injury (U.S.S.G. § 2L1.1(b)(6)), and resulting death (U.S.S.G. § 2L1.1(b)(7)); and assessing an adjustment for restraint of victim (U.S.S.G. § 3A1.3), by finding that violence committed by the co-defendants in an alien smuggling conspiracy constituted reasonably foreseeable conduct in connection with jointly undertaken criminal activity, pursuant to U.S.S.G. § 1B1.3(a)(1).

II. Whether the district court clearly erred in denying a minor role adjustment, pursuant to U.S.S.G. § 3B1.2.

III. Whether the district court abused its discretion by granting an upward variance after calculating the Guidelines range and considering the 18 U.S.C. § 3553(a) factors.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

On January 6, 2017, a Southern District of Florida grand jury returned a seven-count indictment charging Appellant Fredis Valencia Palacios ("Palacios") with: conspiracy to encourage and induce aliens to come to and reside in the United States, which resulted in two deaths and the placement of a third person's life in jeopardy,[1] in violation of 8 U.S.C. § 1324(a)(1)(A)(iv), (B)(iii) and (B)(iv), and 8 U.S.C. § 1324(a)(1)(A)(v)(I); and three substantive counts of knowingly encouraging an alien to enter and reside in the United States in reckless disregard of the law, which resulted in two deaths and the placement of a third's life in jeopardy, in violation of 8.U.S.C. § 1324(a)(1)(A)(iv), (B)(iii) and (B)(iv), and 18 U.S.C. § 2 (DE8). Palacios was indicted jointly with co-defendants Jorge Fernando Rivera Weir ("Weir"), Carlos Emilio Ibarguen ("Ibarguen") and Jhoan Stiven Carreazo Asprilla ("Carreazo"). Weir remains a fugitive (DE110:2).

Palacios was arrested in Colombia on May 17, 2017 pursuant to an extradition request and arrest warrant issued in the United States (DE117:7). The co-defendants were charged in Colombia for this incident at the time of Palacios's arrest; Palacios

[1] The initials of the decedents are E.M.A. and D.E.L.S.; the initials of the individual whose life was placed in jeopardy are L.S.C.

was not (id.). On May 9, 2018, Palacios was extradited to the United States, placed under arrest (id.) and arraigned in the Magistrate Court of the Southern District of Florida the following day (DE49).

On September 25, 2018, Palacios pleaded guilty to all four counts in the Indictment and stipulated to a factual proffer (DE66; DE67). At sentencing, the district court imposed a four-level enhancement for the brandishing of a firearm or dangerous weapon (U.S.S.G. § 2L1.1(b)(5)); a two-level enhancement for intentionally or recklessly creating a substantial risk of death or serious bodily injury (U.S.S.G. § 2L1.1(b)(6)); a ten-level enhancement for the offense resulting in a death (U.S.S.G. § 2L1.1(b)(7)); and a two-level adjustment for restraint of victim (U.S.S.G. § 3A1.3) (DE135:15). The court granted a three-level reduction for acceptance of responsibility (id.).

The advisory guidelines range was 108 to 135 months, based on a base offense level of 31 and a criminal history of I (id.); however, the government requested an upward variance to 262 months based on the severity of the crime and application of the 18 U.S.C. § 3553(a) factors (id. at 119-126). The district court sentenced Palacios above the guidelines range to 180 months on each of the four counts to run concurrently (id. at 36).[2]

[2] The district court stated it would have sentenced Palacios above the guidelines range irrespective of the government's motion (DE135:35-36). Co-defendant

2. Statement of the Facts

a) The Alien Smuggling Conspiracy

Homeland Security Investigations investigated the activities of a transnational organization involved in smuggling aliens from Cuba to the United States along a route that involved Cuba, Guyana, Brazil, Colombia, Panama and other countries (DE125:4). Palacios conspired with Weir, Ibarguen and Carreazo to induce aliens to enter and remain in the United States, knowing that such entry was illegal (DE67:1). Specifically, the group transported aliens across Colombia towards the Panamanian border en route to the United States (id.). Palacios's role in the conspiracy was to find boat operators for Weir, such as Ibarguen, who would ferry the aliens from Colombia to Panama (DE125:4).

b) Offense Conduct

Around July 2016, with the hopes of establishing residency in Miami, Florida (DE67:4), Cuban nationals E.M.A. and L.S.C. flew from Cuba to Guyana, where they crossed illegally into Colombia through Brazil and Venezuela (DE110:4). Weir approached them at a hotel in Cucuta, Colombia, told them he previously smuggled many aliens into the United States, and offered to take them to Panama (DE67:2).

Ibarguen was sentenced to a term of 540 months on each count to run concurrently (DE155), and Carreazo was sentenced to 600 months on each count to run concurrently (DE156).

Weir showed them Facebook photographs of people he claimed to have smuggled, some of whom were recognized by E.M.A. and L.S.C. (id.). A family member of E.M.A's in Miami, Florida paid Weir $500 as a down payment, and an additional payment to someone associated with Weir once E.M.A. and L.S.C. were delivered to a hotel in Turbo, Colombia[3] (DE67:2; DE134:36).

Weir introduced Palacios and Ibarguen to E.M.A. and L.S.C. as the boat drivers Weir used to transport people to the Panamanian border (DE67:3). During the meeting, Weir, Palacios, and Ibarguen discussed the route that would be used to transport the illegal aliens (id.). A third Cuban national, D.E.L.S., also paid Weir to transport her to the United States, and subsequently met E.M.A. and L.S.C. at the hotel in Turbo (DE67:2-3).

On September 6, 2016, Weir took E.M.A., L.S.C. and D.E.L.S. (together, "the victims"), to meet with Palacios; after the meeting, Palacios took them to a boat captained by Ibarguen to begin the journey to Panama (DE67:3). When the boat started taking on water, Ibarguen turned the boat around and took the victims to his residence in Turbo (DE125:6). The next day, they boarded a second boat with Carreazo (id.) (DE67:3; DE117-1 (Ex. 1, photograph of boat)).

[3] It is unclear whether the total amount paid to Weir was $1,000 or $1,400, nor what percentage of that amount was paid by L.S.C. (DE67:2; DE134:36-37).

During the trip, Carreazo brandished a firearm and Ibarguen displayed a knife towards the victims (DE67:3). Ibarguen tied the wrists of L.S.C. and D.E.L.S. before throwing them overboard, then anchored them with a rope inside of the boat so that they were just above the water (id.). While tied up and in the water, L.S.C. heard Ibarguen and Carreazo sexually assault E.M.A. before murdering her by cutting her throat (id. at 3-4). L.S.C. then heard Ibarguen and Carreazo murder D.E.L.S. by cutting his throat (id.). L.S.C. was unable to see the sexual assault and murders while tied up beside the boat, but heard E.M.A. and L.S.C. pleading for their lives (DE67:4; DE125:6). During Carreazo's and Ibarguen's struggle with D.E.L.S., L.S.C. freed himself from the ropes, swam away from the boat and hid in the mangroves (DE64:4). Carreazo and Ibarguen searched for L.S.C. but were unable to find him (id.).

A local fisherman discovered L.S.C. the following day and the Colombian Navy subsequently rescued him (DE67:4). L.S.C. directed the Colombian authorities to the location of the murders where the bodies of E.M.A. and D.E.L.S. were retrieved (id.) They were tied together with their throats and bellies cut open (id.).

L.S.C. subsequently identified photographs of Weir, Ibarguen, Palacios and Carreazo as the men who agreed to smuggle him. He also identified Ibarguen and Carreazo as the individuals responsible for the sexual assault and murders of E.M.A. and D.E.L.S. (DE67:4). On September 10, 2016, Colombian law enforcement

arrested Ibarguen and Carreazo in a hotel in Turbo (id.; DE125:6). Their hotel room contained personal property of the three victims (DE125:6). Additional personal property of the victims, the boat used in the smuggling venture and the firearm brandished by Carreazo were recovered from Ibarguen's residence (id.).

c) Palacios's Post-*Miranda* Statement to U.S. Law Enforcement

Palacios was arrested on May 9, 2018 (DE125:2) and gave a statement after waiving his *Miranda* rights (id.) (DE117-2 (Ex. 2, transcript of statement)).

Palacios stated that his sister dated Ibarguen and introduced the two of them (DE117-2:35-37). Palacios referred to Ibarguen as his "brother-in-law" and would frequently see him socially and professionally while working in the lumber business (id. at 35, 82-83, 111, 114). Palacios knew that Ibarguen was formerly a member of the Colombian Armed Forces, that he was involved in illegal human trafficking, and that he had a history of robbing Cubans of their cell phones on the streets of Colombia (id. at 216-17).

Palacios stated that the first individual he trafficked to Panama by boat was a Cuban national named "Lazaro," who Palacios met during a lumber unloading job near Turbo (id. at 37-39). This initial transport was done as a favor without payment, as Lazaro was poor and had no means to travel (id. at 39-41). Lazaro subsequently sent approximately ten Cuban nationals, many of whom were relatives of his, to Palacios to transport to Panama by boat, all of whom Palacios transported for free to

"help him [Lazaro] out" (id. at 41-46). Afterwards, Lazaro asked Palacios to transport more people, and started paying Palacios $150 per person to take them from Riosucio, Colombia to Panama (id. at 27-28, 52-53).

Palacios was informed by paramilitary forces that his trafficking was illegal (id. at 60-62). Palacios claimed that he ceased trafficking for a number of months, but resumed in early 2017 after taking a total loss on a lumber load that was destroyed in a storm (id. at 62-63). He was approached by a man named El Viejo, who paid him $200 for each person Palacios boated from Bajita, Colombia to Cacarica, Colombia (id. at 66-69). Palacios conceded awareness that his work for El Viejo was illegal (id. at 70-71).

Palacios transported approximately fifteen people for El Viejo, but was able to make enough money as a logger that he no longer needed the extra income from trafficking (id. at 72, 81). Sometime after Palacios's relationship with El Viejo ended, Palacios got into an argument with his wife's children, resulting in him leaving the family to go to Turbo where he stayed at the Laucris Hotel (id. at 81-82, 251). During his stay at the hotel, he met a friend of his named Fidel Pino ("Fidel")[4] and began living at Fidel's house (id. at 82, 84, 96, 252). While living with Fidel,

[4] Palacios knew Fidel was a moto-taxi driver and human trafficker, and came to understand that Fidel and Weir worked together to traffic illegal immigrants from Turbo to Acandi to Panama (DE117-2:101, 253).

Palacios reconnected with Ibarguen (id. at 82-83). Fidel had a party one afternoon, which Palacios, Ibarguen and Weir attended (id. at 84-85). During the party, Weir introduced himself to Palacios (id. at 86-87). They drank and socialized throughout the evening but did not discuss each other's professions (id. at 87).

Palacios saw Weir again at Fidel's house some time later, at which time Weir asked Palacios if he knew "someone who has a transport that can do a job" for him (id. at 88, 97). Palacios asked what kind of job, to which Weir replied "cross over some people . . . from Turbo to the other side [to Acandi]" and offered to pay Palacios to either do it or find someone who would (id. at 88-89, 106-07, 256). Palacios told Weir that he no longer had his boat, but Ibarguen, who he called his "brother-in-law," could do it for him (id. at 89, 254).

Palacios introduced Weir to Ibarguen and the three of them met up several more times at the Casandra Hotel to discuss the operation (id. at 108-09, 183-84, 258). Weir brought the three victims to one of the meetings, and during that meeting informed Palacios that he was waiting for the aunt of one of the victims to transfer money to him from the United States before proceeding with the transport (id. at 90-93).

Sometime later, Palacios received a call from Weir indicating that money arrived and that Weir was ready to proceed with the transport the victims (id. at 116). Weir also expressed his desire for Palacios to be present when the victims were

handed over to Ibarguen, given his familiarity with Ibarguen and the port of departure (id. at 140, 259-60). Palacios met Weir and the victims at the Cassandra Hotel, where Weir got two moto-taxis to transport them to the port (id. at 138-141). Ibarguen was already at the port when the victims, Weir and Palacios arrived (id. at 140). Palacios passed the victims off to Ibarguen and watched the boat depart (id. at 118, 139) ("I saw with my own eyes, that the people were put on the boat by Carlos [Ibarguen], that was the day the boat retur[-] . . . that the boat was sinking, and he had to come back").

The next day, Ibarguen showed up at Palacios's place of work and told him that the boat started sinking because it was too small, which required them to turn around and come back, but that he was going to get a bigger boat and leave the following day (id. at 119, 260-62). Palacios told Ibarguen to talk to Weir and stated that he had no further involvement in the operation (id. at 261).

Palacios stated that he did not receive any money for his involvement in the arrangement and claimed he only knew about the murders through his friend Fidel (id. at 122). Later, Palacios admitted that he was supposed to get 100,000 Colombian pesos per person, but did not receive any money because the victims were killed (id. at 186-87).

With respect to Carreazo, Palacios said that he was not friends with him but he knew him from Riosucio, Colombia as a fish salesman (id. at 130-31). Palacios

stated that he saw Carreazo with Ibarguen having a beer in Turbo three or four days before the murders, but did not interact with them (id. at 131-32). Palacios stated that he was unaware Carreazo was involved in the conspiracy, nor that there was a plan to rob or kill any of the victims (id. at 270-71). Palacios stated that Carreazo used drugs and was mentally unstable from his time in the military (id. at 229) ("When Playboy [Carreazo] overdoes it with the drug, he does not have anything to do with anyone . . . Playboy was in . . . the paramilitary forces. Playboy was already messed up in the head. Do you understand what I'm saying? He had his bad ideology in his head").

d) Palacios's Plea And Sentencing

On January 22, 2018, Palacios pleaded guilty to all four counts contained in the Indictment (DE138). Palacios, his attorney and the government entered a factual proffer detailing Palacios's role in the alien smuggling conspiracy, how Weir introduced him to the victims, his personal relationship with Ibarguen, the discussions between himself, Weir and Ibarguen regarding the route to be used by the boat drivers to transport the victims, his knowledge of the unlawfulness of the smuggling operation, and the sexual assault and murders that took place on September 7, 2016 (DE67).

The United States Probation Office ("Probation") prepared a Presentence Investigation Report ("PSI") in advance of Palacios's sentencing (DE110).

Probation determined that the base offense level was 38, pursuant to U.S.S.G. § 2A1.2(a) (second degree murder). The offense level was reduced by 3 due to Palacios's acceptance of responsibility for the offense and the filing of a motion by the government stating that Palacios assisted authorities in the investigation of his own misconduct and timely notified authorities of his intention to plead guilty (id. at 11). Accordingly, the total offense level was 35 (id.).

Palacios had zero criminal history points, resulting in a criminal history category of I (id.).

With a total offense level of 35 and a criminal history category of I, Palacios's advisory guideline imprisonment range was 168 to 210 months (DE110:16).

Palacios filed written objections to the PSI including, as relevant here, that Probation erred in not assessing a minor role reduction. Palacios argued that his role in the conspiracy was to locate a boat captain to transport the aliens—he was not the captain of the boat, nor a passenger that smuggled the aliens, and therefore existed only as a middle man; that he had a "limited knowledge of the overall scheme"; that he did not recruit the aliens or set the fees; and that he did not determine what path would be taken (DE112:4-6).

Palacios also objected to the application of U.S.S.G. § 2A1.2 (setting the base level at 38 for second degree murder) and the calculation of the guidelines based upon the homicide guideline cross-reference, on the basis that (1) he lacked the

requisite mens rea for any of the four types of murder to apply, and (2) the murders were not reasonably foreseeable or within the scope of the conspiracy (id. at 9-10). Accordingly, Palacios believed that the appropriate base level was 12 based upon the alien smuggling guidelines under U.S.S.G. § 2L1.1, and that neither specific offense characteristic enhancement for brandishing a firearm/dangerous weapon or the intentional or reckless creation of a substantial risk of death or serious bodily injury was applicable (id. at 14-15). Notably, Palacios conceded that the 10-level enhancement for a resulting death under U.S.S.G. § 2L1.1(b)(7)(D) was appropriate (id. at 15).

Thus, with a base offense level of 12, plus a 10-level enhancement for resulting death and a 3-level reduction for acceptance of responsibility, Palacios calculated the total offense level to be 19 (id. at 16). Palacios also filed a sentencing memorandum and motion for a variance below the guideline range based on the 18 U.S.C. § 3553(a) sentencing factors (DE113).

The government filed a written objection to the PSI for the failure to assess points for victim-related enhancements, and argued that a 2-level increase for physical restraint of victims pursuant to U.S.S.G. § 3A1.3 was appropriate, as Carreazo and Ibarguen tied the wrists of victims L.S.C. and D.E.L.S. after pulling a firearm and knife on them (DE115:1). Accordingly, the government argued that the adjusted offense level should have been 40 instead of 38 (id. at 2).

In an Addendum to the PSI, Probation concurred with the government's request for the 2-level adjustment for victim restraint. The Addendum acknowledged—but did not recommend—applying Palacios's requests for a 2-level minor role reduction, the alien smuggling base offense level guideline rather than the second degree murder guideline, or a 3553(a) downward variance (DE116-1:1-7).

The district court held a sentencing hearing on December 3, 2018 (DE134) that continued into December 4, 2018 (DE135). Palacios renewed his arguments for application of the alien smuggling base offense level guideline under section 2L1.1(a)(3), rather than the second degree murder guideline; against the imposition of specific offense characteristic enhancements for brandishing a firearm or other dangerous weapon; and the intentional or reckless creation of substantial risk of death or serious bodily harm (arguing that the murders and sexual assault committed by Carreazo and Ibarguen were not within the scope of the conspiracy and not reasonably foreseeable to Palacios), and in favor of a minor role reduction (id. at 1-31).

In an effort to establish that the second degree murder base offense level guideline under U.S.S.G. § 2A1.2(a), rather than the alien smuggling guideline under U.S.S.G. §2L1.1, should apply, the government presented testimony from two witnesses—L.S.C. and Colombia National Police Officer Jose Leandro Ocampo

Camacho (id. at 33-62). The district court denied the government's request to call the Colombian National Police Officer assigned to investigate the murders (id. at 64-74).[5]

L.S.C. testified that E.M.A.'s brother connected him and Weir over the telephone before L.S.C. and E.M.A. met Weir in person in Cucuta, Colombia (id. at 35). At that first meeting, L.S.C. stated that Weir showed them Facebook photographs of other Cubans he claimed to have successfully smuggled, some of whom L.S.C. recognized (id. at 35-36). L.S.C. paid Fernando $1,000 in total to get him and E.M.A. from Cucuta to Turbo to Panama (id. at 36). He testified that the money was wired to E.M.A. and had to be given to Weir before each leg of the journey (id. at 36-37). L.S.C. stayed in a hotel while in Turbo and was present for two meetings at the hotel involving himself, E.M.A., Palacios and Weir where details of the transport were discussed (id. at 38-40). He said that Palacios informed him at one of the meetings that they would be traveling by boat and it would be safe (id. at 40). On two occasions, L.S.C. stated he saw Palacios with another man named

[5] The district court did not believe that testimony regarding Palacios's association with Carreazo or Ibarguen prior to the murder would impact the court's decision as to whether the second degree murder guideline should apply (DE134:73) ("I have not heard anything that this guy was a well known serial murderer or rapist or anything else. This other guy that is being sentenced in a couple of days or whenever it is, he is being sentenced. I don't think the fact he knew him or associated with him, moves the ball enough . . . ").

Carlos, i.e., Ibarguen (id. at 41-42). He testified that Palacios separately asked him and Weir whether the money had arrived (id. at 43). Palacios stated he was present with Ibargeun when L.S.C., E.M.A. and a third unknown individual boarded the boat for their first attempt to travel to Panama (id. at 44-46). Due to problems with the boat, Ibarguen turned it around and had the three victims stay at his house (id. at 45-46). The following day, Palacios and Ibarguen got a second boat and Carreazo was there (id. at 46-47). He further testified that Palacios conversed with Ibarguen and Carreazo before he boarded the second boat and that Palacios was present when the boat departed (id. at 47).

Officer Camacho, a member of the specialized Interpol unit of the Colombia National Police, was primarily responsible for investigating alien smuggling cases and testified to Colombia's illegal immigration statistics (id. at 49-50). He described a correlation between crimes such as robberies, homicides, personal injuries, sexual crimes and conspiracies and the illegal smuggling of aliens (id. at 53). Within the previous four years, he testified that there were 72 arrests for personal injuries, 10 arrests for homicides, 33 for robberies and 19 for threats, all associated with the alien trafficking in Turbo, Colombia (id. at 55), and that $1,900,000 based on alien smuggling activities in Turbo was forfeited within the same time frame (id. at 56).

After consideration of argument from both parties, the district court applied the U.S.S.G. § 2L1.1 (alien smuggling) base offense level of 12, rather than the

second degree murder base offense level of 38, as well as three specific offense characteristic enhancements: 4 levels because a firearm/dangerous weapon was brandished or used (U.S.S.G. § 2B1.1(b)(5)(B))[6]; 2 levels because the offense involved intentionally or recklessly creating a substantial risk of injury or death to another person (U.S.S.G. § 2L1.1(b)(6)); and 10 levels because someone died during the commission of the offense (U.S.S.G. § 2L1.1(b)(7)(D)) (DE116:10-11). The court also imposed a 2-level adjustment because a victim was physically restrained in the course of the offense (U.S.S.G. § 3A1.3) (DE135:112). Additionally, a 3-level acceptance of responsibility reduction was granted by the court at the request of the government, which brought the total offense level to 31 (id.).

E.M.A.'s aunt, one of E.M.A.'s cousins and L.S.C.'s brother gave victim impact statements to the court at the sentencing hearing (id. at 113-19).

With respect to the ultimate sentence, the government requested 262 months based on a number of factors: (1) Palacios coordinated and arranged the boat operators for the operation (id. at 120-21); (2) the violence (specifically, the robbery) was foreseeable, even if the murders were not, as Palacios put the victims in the hands of individuals he knew to be violent (id. at 122); (3) Palacios admitted to prior

[6] Because this 4-level enhancement, when added to the base level of 12, resulted in an offense level that was less than 20, the offense level increased to 20 pursuant to U.S.S.G. § 2L1.1(b)(5)(B).

involvement in illegal smuggling (id. at 122-23); (4) the poor quality of the vessel used to transport the victims (id. at 123); (5) the seriousness of the crime (id. at 123-24); and (6) the need to adequately deter similar future conduct (id. at 124-25).

Palacios requested 30-37 months, arguing that the government did not prove by a preponderance of the evidence that Palacios knew any murders would take place due to his role as the "middle man" whose only involvement was to procure the boat captain—Ibarguen—in furtherance of a limited conspiracy to smuggle aliens (id. at 127-28).

The district court, after considering "the statements of all the parties, the presentence report, [and the] statutory factors set forth in 18 U.S.C. section 3553(a)," imposed a sentence of 180 months (id. at 133). In so sentencing, the court found that the violence and robbery of the victims was foreseeable to Palacios, and that a sentence above the guideline range was "necessary to provide sufficient punishment and deterrence" (id.) ("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 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").

3. Standards of Review

This Court reviews the district court's application of the sentencing guidelines de novo and its findings of fact for clear error. United States v. Grant, 397 F.3d 1330, 1332 (11th Cir. 2005). Clear error will not be found "unless review of the record leaves [the Court] with the definite and firm conviction that a mistake has been committed." United States v. White, 335 F.3d 1314, 1319 (11th Cir. 2003) (internal marks omitted). A district court's determination may be affirmed for any reason supported by the record, even if not relied upon by the district court. United States v. Hall, 714 F.3d 1270, 1271 (11th Cir. 2013) (citing United States v. Chitwood, 676 F.3d 971, 975 (11th Cir. 2012)). Because Palacios expressly assented to the assessment of a 10-level enhancement for resulting death under U.S.S.G. § 2L1.1(b)(7)(D), however, he invited any error and forfeited review of that claim. United States v. Brannan, 562 F.3d 1300, 1306 (11th Cir. 2009).

Arguments not raised in the district court are reviewed for plain error, under which the Court asks whether there is: "(1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." United States v. Cotton, 535 U.S. 625, 631-32 (2002) (citations and internal quotation marks omitted).

Sentences are reviewed for "unreasonableness." United States v. Booker, 543 U.S. 220, 261 (2005). All sentences—"whether inside, just outside, or significantly outside the Guidelines range"—must be reviewed under a deferential abuse-of-discretion standard. Gall v. United States, 552 U.S. 38, 41 (2007). "The appellate court must . . . first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." Id. at 51. Assuming no procedural error, the substantive reasonableness of the sentence will be then considered. Id. The reviewing court "may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." Id. A district court need not discuss or state each of the § 3553(a) factors explicitly; "[a]n acknowledgement the district court considered the defendant's arguments and the § 3553(a) factors will suffice." United States v. Gonzalez, 550 F.3d 1319, 1324 (11th Cir. 2008). That an appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal. Id.

Summary of the Argument

The district court did not clearly err in finding, for purposes of the specific offense characteristic enhancements assessed, that the violence perpetrated on the victims by co-defendants Carreazo and Ibarguen was reasonably foreseeable and in furtherance of the jointly undertaken alien smuggling conspiracy. To paraphrase the district court, without Palacios, the victims would not have had contact with their killers. Palacios, despite knowing of Ibarguen's history of robbing Cuban nationals and Carreazo's mental instability, suggested and arranged for Ibarguen to captain the transporting "vessel" after discussions with Weir, and stood idly by when the vessel departed for Turbo, Colombia with Carreazo, Ibarguen and the victims.

The evidence adduced at the sentencing hearing established the inherent dangerousness of alien smuggling under ordinary circumstances, which was exacerbated by Palacios's enthusiasm in arranging the transport of three victims in a shoddy boat with two individuals who had known violent dispositions.

The reasoning for the variance above the Guidelines range was clearly stated by the court, and determined after review of all written submissions and consideration of argument from both parties, two fact witnesses, three victim impact statements and the § 3553(a) factors. Any suggestion that the district court failed to carefully considered the evidence—and was unduly influenced by the heinousness of the crime alone—is belied by the court's imposition of the alien smuggling

guidelines (as requested by Palacios), rather than the second degree homicide guidelines (as requested by the government), when determining the base offense level. Moreover, Palacios expressly agreed in his written objections to the PSI and at the sentencing hearing that the 10-level enhancement for resulting death was appropriate; accordingly, he has waived review of that claim on appeal.

The court did not err, clearly or otherwise, in its determination of the facts or the application of an appropriate guidelines calculation, and, after consideration of the § 3553(a) factors, imposed a variance that was reasonable and within its discretion. Accordingly, the district court's sentencing determination should be affirmed in all respects.

Argument

I. The District Court Did Not Clearly Err In Assessing Specific Offense Characteristic Enhancements Or Adjustments To Palacios, As The Co-Defendants' Violence Against The Victims Was Reasonably Foreseeable And In Furtherance Of The Jointly Undertaken Criminal Conspiracy.

Palacios attacks the various specific offense characteristic enhancements imposed and the court's denial of a minor role reduction under the theory that "[a]ll the points assessed related to actions of the Co-Defendants, not the conduct of the Appellant" and that "there was absolutely no evidence in the record to support applying these characteristics under relevant conduct" (Br. at 12).

A. The Relevant Conduct Standard

Preliminarily, it is of no legal consequence that Palacios did not personally murder E.M.A. or D.E.L.S. or sexually assault E.M.A. U.S.S.G. § 1B1.3(a)(1) specifically provides for co-conspirator liability if the acts committed by a co-conspirator were within the scope of the conspiracy, in furtherance of the conspiracy, and reasonably foreseeable in connection with that conspiracy. "If a defendant is aware of the scope of a conspiracy outside of his individual actions, he may be held accountable for the actions by co-conspirators even though he was not personally involved." United States v. De La Cruz Suarez, 601 F.3d 1202, 1221 (11th Cir. 2010). "The focus [of subsection a(1)] is on the specific acts . . . for which the defendant is to be held accountable . . . *rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator*." U.S.S.G. § 1B1.3(a)(1), cmt. n.1 (emphasis added).

To determine such accountability, a sentencing court "must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake and then consider the conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant." United States v. Baldwin, 774 F.3d 711, 730 (11th Cir. 2014) (citing United States v. Petrie, 302 F.3d 1280, 1290 (11th Cir. 2002)). "A sentencing court's failure to make individualized findings regarding the scope of the

defendant's activity is not grounds for vacating a sentence [, however,] if the record supports the court's determination with respect to the offense conduct, including the imputation of other's unlawful acts to the defendants." Petrie, 302 F.3d at 1290. In determining the scope of criminal activity a particular defendant agreed to undertake (i.e., a defendant's "relevant conduct" for purposes of imputing liability for the acts of others), "the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." U.S.S.G. § 1B1.3, cmt. n.3(B).

B. The Scope Of The Conspiracy

The gravamen of Palacios's argument regarding the impropriety of assessing enhancements for the conduct of his co-conspirators is that their actions were outside the scope of the conspiracy to which he agreed (Br. 18) ("It was undisputed that the 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 Carreaso [sic] alone."). By limiting the scope of the conspiracy to "safely deliver[ing] the aliens to their destination" (Br. at 18), and claiming immunity from any reasonably foreseeable but unintended crimes that were committed during the smuggling operation, Palacios restricts the legal inquiry in a manner that this Court has expressly rejected.

In United States v. Mothersill, a Florida Highway Patrol Trooper was killed when he opened a gift-wrapped package found in the trunk of a vehicle after a routine traffic stop. 87 F.3d 1214, 1216 (11th Cir. 1996). The package, disguised as a microwave oven, contained a homemade pipe-bomb that was intended to kill a potential witness whom the defendants feared would report their crack-cocaine distribution operation. Id. at 1217-19. In finding the defendants liable for the death of the state trooper, this Court recognized that the goal of the conspiracy (their "principal objective") was "to engage in the sale and distribution of illegal drugs." Id. at 1218. However, employing the Pinkerton doctrine,[7] the death of the trooper was a reasonably foreseeable consequence of the conspiracy, despite being an originally unintended outcome—the amount of money and drugs involved permitted an inference by the jury that the conspirators were "aware of the likelihood" that deadly force would be used to protect the conspirators' interests. Id. at 1218-19.

Similarly, this Court has found liability for defendants who were unaware of their co-defendants' conduct. In United States v. Aduwo, 64 F.3d 626 (11th Cir. 1995), this Court upheld the imputation of firearms possession to Aduwo, a member of a two-person "drug rip-off" crew that intended to rob buyers of cocaine with

[7] Pinkerton co-conspirator liability applies in two situations: where the substantive crime is also a goal of the conspiracy, or where the substantive offense differs from the precise nature of the ongoing conspiracy, but facilitates the implementation of its goals. Mothersill, 87 F.3d at 1218.

whom they negotiated a sale. Id. at 627. The buyers turned out to be undercover agents, and unbeknownst to Aduwo, her co-defendant was in possession of a 9mm Glock upon arrest. Id. Though Adowu claimed no actual knowledge of her co-defendant's possession, this Court stated that "[w]hether Adowu had actual knowledge of Brown's [co-defendant's] possession of the Glock is irrelevant to our inquiry. Aduwo's alleged lack of knowledge notwithstanding, she is liable for Brown's possession of the Glock if such possession was foreseeable and in furtherance of the conspiracy." Id. at 627 n.4. In finding Aduwo culpable for the gun possession, this Court held that the quantity of drugs involved indicated that the buyers were also dealers, and thus it was reasonably foreseeable that one of the conspirators might carry a weapon in case the "rip-off" was detected. Id. at 629 (notably, though the scheme was, in fact, detected, the court imputed liability due to the reasonable likelihood of a *potential* occurrence).

In the context of illegal immigration, this Court has imputed specific offense enhancements to alien smugglers whose co-conspirators, not themselves, created the substantial risk of serious bodily injury or death by attempting to evade law enforcement. See United States v. Rodriguez-Lopez, 363 F.3d 1134 (11th Cir. 2004) (enhancement proper when co-defendant operated vessel that engaged Coast Guard in high speed chase when defendant was standing next to him); United States v. Zaldivar, 615 F.3d 1346 (11th Cir. 2010) (resulting death enhancement proper for

defendant who was not operating vessel that fled from Coast Guard and requested the driver to stop fleeing).

The common thread in each of these decisions is whether conduct of a co-conspirator, even if originally unintended, was reasonably foreseeable as a likely consequence or known risk of the conspiracy. See United States v. Williams, 51 F.3d 1004, 1012 (11th Cir. 1995) (finding a resulting death enhancement appropriate because Williams "'put into motion' a chain of events that contained an 'inevitable tragic result'" when, during an attempted armed carjacking, the passenger in the target vehicle accidentally killed the driver when shooting at Williams).

Here, a preponderance of the evidence established that the actions of Ibarguen and Carreazo, though originally unintended, were reasonably foreseeable to Palacios in light of what Palacios knew about them, his observations of the quality of the vessel, and the known, inherent risks in Colombian alien smuggling operations.

C. The District Court Did Not Clearly Err In Assessing The Brandishing Of A Firearm/Other Dangerous Weapon Enhancement And Victim Restraint Adjustment[8]

Palacios argues that in order to find that the brandishing of a firearm enhancement and victim restraint adjustment were properly assessed, a preponderance of the evidence must establish that Palacios, having not been present, either agreed to, or was aware of, his co-defendants' plan (Br. at 17-19, 22-23). However, this Court has never required such specific knowledge or agreement when finding liability for the acts of co-conspirators. Given Palacios's knowledge of Ibarguen's and Carreazo's past, the district court properly found that the violence to which they subjected the victims was reasonably foreseeable and a knowing risk of the conspiracy.

The record evidence established that Palacios was intimately familiar with Ibarguen—the two had met through Palacios's sister, who was romantically involved with Ibarguen (DE117-2:35-37); Palacios referred to him as "brother-in-law" (id. at 35); they "partied" and drank frequently together (id. at 82-83, 95, 111); and they occasionally worked together (id. at 114). Beyond their social relationship,

[8] Palacios argued the brandishing of a firearm enhancement and victim restraint adjustment in separate sections of his brief (Br. at 17, 22). Because he uses the same argument for each—that it was improperly assessed because neither was within the scope of the conspiracy or reasonably foreseeable—both are addressed in the same section here for simplicity.

Palacios knew of Ibarguen's criminal history, which included his involvement in illegal human trafficking (id. at 216-17) and robbing Cuban nationals of their cell phones on the street (id. at 217).

Palacios's relationship with Carreazo differed. They did not appear to have a friendly relationship, and in fact, when Palacios saw him with Ibarguen a few days before the murders, Palacios stated to law enforcement that he did not interact with either of them (id. at 130-32). Notwithstanding Palacios's characterization of their relationship as essentially non-existent, Palacios was aware of Carreazo's drug use and the effect that Carreazo's paramilitary service had on him mentally (id. at 229). As Palacios said to law enforcement, "Playboy [Carreazo] was already messed up in the head . . . [h]e had his bad ideology in his head" (id.).

Though Palacios claimed in his objections to the PSI and his initial brief that he did not learn of Carreazo's mental instability until after the murders took place, that claim finds no support in his recorded statement to law enforcement. Moreover, one would assume, based on their close personal relationship and socializing history, that Palacios would have addressed Ibarguen when seeing him days before the murders; the fact that Palacios saw Ibarguen having a beer with Carreazo but avoided them both entirely—and informed law enforcement of that decision—is consistent with Palacios knowing of Carreazo's disposition and acting in conformity with that knowledge.

But despite knowing of Ibarguen's checkered past—including his proclivity for robbing Cuban nationals when they were in unfamiliar surroundings—and Carreazo's psychological issues, Palacios not only suggested to Weir that Ibarguen was the person Weir should hire to captain the boat, but represented to the victims that their journey would be "safe" and conversed with Ibarguen and Carreazo immediately prior to watching them depart on the boat with the victims. Once the transport that Palacios arranged and monitored was underway, Ibarguen and Carreazo brandished weapons and tied the hands of L.S.C. and D.E.L.S. before robbing them, raping E.M.A., and murdering D.E.L.S. and E.M.A.

The district court made clear that it did not find the rape and murder of the victims foreseeable; however, it found that the violence and robbery was. In so finding, the court stated that Palacios "knew these people had tendencies that they had—robbery, that they had robbed people. That they were violent people. And I think delivering these people [the victims] into their hands is inexcusable and just terrible" (DE135:36). The district court's reasoning is analogous to that of this Court in Williams, supra—Palacios put into effect a chain of events that was likely to, and did, end in tragedy. Accordingly, the brandishing of a firearm/dangerous weapon enhancement and victim restraint adjustment were properly assessed as a reasonably foreseeable, though unintended, outcome of Palacios's engagement in, and

coordination of, a dangerous conspiracy with knowingly risky, violent and unstable individuals.

D. The District Court Did Not Clearly Err In Assessing The Intentional Or Reckless Creation Of A Substantial Risk Of Death Or Serious Bodily Injury Enhancement Pursuant To U.S.S.G. § 2L1.1(b)(6)

Palacios attacks the imposition of a two-level enhancement for intentionally or recklessly creating a substantial risk of death or serious bodily injury under the theory that "murdering, raping or injuring the aliens was not in the scope or in furtherance of the activity of the alien smuggling venture," and because the district court purportedly did not make any findings as to the relevant conduct elements (Br. at 20-21).

Again, Palacios conflates the relevant conduct inquiry with specific knowledge of the ultimate conduct. Neither the defendants who killed the trooper with a pipe bomb in Mothersill, nor the alien smuggler who affirmatively told the vessel operator to stop fleeing law enforcement in Zaldivar, nor the carjacker whose victim shot and killed a fellow passenger in Williams, knew that—or intended for—the resulting deaths to occur. Regardless, this Court found each of those defendants liable, as the ultimate outcome was a reasonably foreseeable result of their inherently risky activity. "The applicable commentary to § 2L1.1(b)(5) of the sentencing guidelines emphasizes that this provision applies to an array of factual scenarios and should be applied flexibly." Rodriguez-Lopez, 363 F.3d at 1138 (citing to the

commentary examples of transporting persons in the trunk or engine of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in crowded, dangerous or inhumane conditions). Moreover, because the record amply supports the district court's findings, any failing by the court to have made individualized findings as to the scope of the jointly undertaken activity is not a grounds for vacatur of the sentence. Petrie, 302 F.3d at 1290.

Here, the district court's determination that Palacios "put [the victims] in a situation where they were in fact murdered, raped and left for dead in the water" is a sufficient basis to impute the actions of the co-defendants to Palacios and finds substantial support in the record. It is undisputed that but for Palacios's recommendation of Ibarguen to Weir, neither Ibarguen nor Carreazo would have been included in the smuggling operation, and therefore would have been unable to murder and rape the victims. But even if this court does not find that the violence on the boat was reasonably foreseeable, the record evidence established that the utilization of a vessel with such poor quality created a risk of death or serious bodily injury in and of itself.

While the government was unable to identify a published case with an analogous fact pattern, persuasive authority exists from two unpublished opinions in this Circuit that may provide guidance to this Court.

In United States v. Sanchez, 303 Fed.App'x 851 (11th Cir. 2008), this Court found that the mere organization of an alien smuggling operation was sufficient to impute the risk of death or serious bodily injury enhancement. In that case, twelve defendants were charged with various alien smuggling conspiracies after the United States Coast Guard, after a brief pursuit, stopped a boat that contained 22 Cuban migrants. Id. at 852. Though Sanchez was not aboard the boat when it was stopped, and though the passengers did not suffer any actual harm, the district court assessed an enhancement for intentionally creating a substantial likelihood of injury or death due to the overcrowding of the vessel. Id. at 852-53. Sanchez claimed err for the same reasons Palacios does here—it was her *co-conspirators'* actions that caused the substantial risk of death or bodily harm, and therefore their conduct was not reasonably foreseeable to her. Id. at 853. In rejecting Sanchez's argument and finding the conduct of her co-defendants attributable to her, this Court detailed the actions that she took in furtherance of the conspiracy. Id. at 854. Notably, the court relied upon the fact that "Sanchez agreed to be involved in a conspiracy to smuggle twenty-two Cuban aliens into the United States. The 30-foot vessel was purchased in Sanchez's name. She attended a meeting about the smuggling operation . . . [a]t that meeting, there was a list of the Cuban aliens to be picked up and a handheld Global Positioning System with the coordinate route entered." Id.

In this case, Palacios had a higher level of involvement in the alien smuggling conspiracy than did Sanchez. Like Sanchez, he agreed to be involved; he knew of—and met—the aliens to be transported; and he attended multiple meetings where logistics and routes were discussed. Unlike Sanchez, however, Palacios also coordinated the boat captain, assured the aliens that their journey would be safe, and was present when the aliens boarded the boat that departed for Panama. Moreover, the unsafe nature of the transport (due to overcrowding) was only indirectly known to Sanchez—though she purchased the vessel and was provided with a list of aliens who were to be transported, she was not present when the aliens boarded the boat. In this case, Palacios knew of the vessel's dubious quality first-hand: he was told by Ibarguen that the first transport attempt was unsuccessful because the boat began sinking and had to turn around, and he watched the victims board the boat used for the second transport during which the murders took place.

The commentary to the risk of death or serious bodily injury enhancement specifically includes "carrying substantially more passengers than the rated capacity of a . . . vessel; harboring persons in a crowded [or] dangerous condition; or guiding persons through . . . a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements." U.S.S.G. § 2L1.1, cmt. n.3.

A photograph of the boat was included as an attachment to the government's sentencing memorandum (DE117:Exhibit 1). The boat's dangerousness is

immediately evident—it has no place for even one occupant to sit, contains no life jackets, and has the construction quality of a middle school woodshop project. And this was the second, "bigger" boat used to transport three Cuban nationals and two adult men—at night—from Colombia to Panama. Additionally, the passengers had no protection from the elements, and there is no suggestion that food, water or clothing were available to the victims.

In Zaldivar, the pertinent question was whether the conspirators' attempt to evade capture with 32 Cuban aliens and two smugglers on a 25-foot vessel "*could* create the sort of dangerous circumstances that would be *likely* to result in serious injury or death. 615 F.3d at 1350-51 (emphasis added) (noting that the boat was overcrowded and did not contain enough life preservers for all its passengers). Similarly, a two-level increase was also upheld in Rodriguez-Lopez, which involved a small boat transporting 22 passengers at high speeds with an insufficient number of life jackets, 363 F.3d at 1137-38, and in United States v. Caraballo, when the defendant's boat carried 11 people from the Bahamas to Florida with only three life jackets, as there was a likelihood of death or serious injury if the boat capsized. 595 F.3d 1214, 1230-31 (11th Cir. 2010). As in Aduwo, the Carabello Court was concerned with the likely potential consequence as the boat did not, in fact, capsize. More analogous to this case, this Court also found that a motorboat traveling without lights and beginning to take on water indicated that "the risk of death or serious

bodily injury was far from hypothetical." United States v. Bowleg, 567 Fed.App'x 784, 799 (11th Cir. 2014).

In this case, Palacios tacitly consented to the victims' transport in a woefully inadequate boat with men he knew had criminal histories and mental issues. Palacios organized the transport, discussed its details with the participants, assisted with loading the victims into the boats and persuaded Weir to use Ibarguen as the boat captain. Given the amount of record evidence supporting the district court's assessment of a risk of death or bodily injury enhancement, the district court's findings should not be disturbed.

E. The District Court Did Not Clearly Err In Assessing Points For Resulting Death Under U.S.S.G. § 2L1.1(b)(7)

For the first time on appeal, Palacios claims that the court's decision to impose a 10-level enhancement under U.S.S.G. § 2L1.1(b)(7)(D) should not apply (Br. at 21). His argument is as follows: because the court denied application of the second degree murder base offense level of 38 under U.S.S.G. § 2A1.2(a) on the grounds that the murders were not "foreseeable," and instead imposed the alien smuggling base offense level of 12, the imposition of a 10-level specific offense characteristic enhancement for a resulting death is contradictory and legally "impossible" (id.).

At the outset, we note that Palacios never raised this argument in the district court, and, in fact, affirmatively assented to the 10-level enhancement in his written

objections to the PSI (DE112:15) ("There is a 10 level enhancement for a resulting death under 2L1.1(b)(7)(D) which is applicable") and again at the sentencing hearing (DE135:8) ("We agree obviously that the base offense level is 12, and we also agree that there should be a ten level bump up, because there was a resulting death as set forth in the indictment"). Palacios therefore invited any error in the application of that enhancement and forfeited review of that claim. Brannan, 562 F.3d at 1306 (citing United States v. Harris, 443 F.3d 822, 824 (11th Cir. 2006) ("The fact remains that [defendant's] counsel waived the PSI and that waiver invited any error that may have arisen here. Accordingly, there is no reversible error."); United States v. Jernigan, 341 F.3d 1273, 1289-90 (11th Cir. 2003) (holding that defendant invited error by agreeing to allow tape-recorded statement into evidence; court cannot review the impropriety of jury hearing the tape); United States v. Love, 449 F.3d 1154, 1157 (11th Cir. 2006) (holding that defendant invited error by expressly acknowledging that the court could impose a sentence of supervised release; precluded from claiming resulting sentence was in error); United States v. Parikh, 858 F.2d 688, 695 (11th Cir. 1988) (holding defense counsel invited error when he asked government witness to relay hearsay); United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983) (holding defense counsel invited error when he told jury that the indictment was insufficient; cannot appeal impropriety of prosecutor's responding comment).

Alternatively, as this issue was not raised with the trial court, this Court's review is for plain error. See United States v. Cotton, 535 U.S. 625, 631-32 (2002) (citations and internal quotation marks omitted) (Arguments not raised in the district court are reviewed for plain error, under which standard the Court asks whether there is: "(1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."). Plain error will not lie "unless review of the record leaves [the Court] with the definite and firm conviction that a mistake has been committed." White, 335 F.3d at 1319.

Preliminarily, Palacios pleaded guilty to conspiracy to encourage or induce aliens to come to and reside in the United States that resulted in the death of a person, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv), (B)(iii) and (B)(iv), and 18 U.S.C. § 2. He was not charged with, or convicted of, murder, nor did the district court find that a preponderance of the evidence established his culpability for that offense.

As the court expressly stated, the murders and rape "may not have been foreseeable," though the court found that the robbery and violence "definitely" were (DE135:36). Accordingly, the 10-level enhancement for resulting death was not based upon the reasonable foreseeability of murder, as Palacios suggests, but was based upon the reasonable foreseeability that death was a potential unintended

consequence of putting the victims into a knowingly dangerous situation with knowingly violent people. As the court stated at sentencing, "[Palacios] knew these people [the co-defendants] had tendencies they had—robbery, that they had robbed people. That they were violent people. And I think delivering these people [the victims] into their hands is inexcusable and just terrible" (id.).

The district court's reasoning is similar to this Court's findings in Zaldivar. In that case, the defendant was convicted of the same criminal statute at issue here, and also received a 10-level sentencing enhancement for resulting death. 615 F.3d at 1350-51. In rejecting the defendant's suggestion that the enhancement requires the defendant's individual actions to be the proximate cause of the death or serious injury, this Court stated that the test is whether it was "reasonably foreseeable to a defendant that his actions or the actions of any other member of the smuggling operation *could* create the sort of dangerous circumstances *that would be likely* to result in serious injury or death." Id. (emphasis added).

The second degree murder base offense level was not applied in this case because the court did not believe that murder was foreseeable to Palacios; however, Palacios's deliverance of the victims to two individuals who were known to be violent and mentally unstable, combined with the inadequacy of the vessel in which Palacios saw the victims depart from Colombia, created the "sort of dangerous circumstances that would be likely to result in serious injury or death." As such, the

district court did not err, plainly or otherwise, in imposing the 10-level enhancement pursuant to U.S.S.G. § 2L1.1(b)(7)(D).

II. The District Court Did Not Clearly Err By Denying Palacios A Minor Role Adjustment

Under U.S.S.G. § 3B1.2(b), a defendant who was a "minor participant" in any criminal activity is afforded a 2-level reduction. The commentary notes that the determination as to whether the adjustment is applicable "is heavily dependent upon the facts of the particular case," and certain factors "should" be considered:

> 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 the 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.
>
> 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.

U.S.S.G. § 3B1.2(b), cmt. n.3(C).

Palacios argues that the district court erred in denying him a minor role adjustment on the grounds that: (1) his role was merely to find a boat captain, and

therefore "his role should have been compared to everyone [in the "transnational alien smuggling conspiracy"], which include a wide network of smugglers from Cuba to Colombia up through Central America and Mexico" (Br. at 25-26); (2) his role in this portion of the conspiracy was limited, and did not include setting the fees, recruiting the aliens or determining when the aliens arrived or departed (id. at 26-27); and (3) his role should be judged against the co-defendants' more severe acts of robbery, rape and murder (id. at 27-28).

The district court addressed the heart of Palacios's position at the sentencing hearing when stating that Palacios "is an essential part of the—putting the whole thing together. Without him the thing would not have—these people [the victims] would not have had contact with them [the co-defendants]" (DE135:10-11), and that Palacios "put them [the victims] in a situation where they were in fact murdered, raped, and tied and left for dead in the water . . . " (id. at 109).

Addressing Palacios's specific arguments, virtually all alien smuggling conspiracies, by nature, involve a chain of facilitators that work independently towards the same goal. Rarely is it the situation that one group of smugglers will transport a group of illegal immigrants from the immigrants' home countries all the way to their ultimate destination. If a minor role reduction was warranted in every situation in which an alien trafficker was simply one cog in the machine of illicit alien smuggling, every trafficker would be effectively be entitled to it, as each's

actions would be judged against the entirety of the smuggling organization. Neither the legislature, nor the courts, have carved out this minor role exception for alien smugglers.

But to address the issue, as well as the "limited role" argument advanced by Palacios, more directly, there would be no dispute that Palacios was a major participant in this conspiracy had the murders not occurred. While Palacios attempts to mitigate his own role in the operation, he glosses over the fact that he introduced Weir to Ibarguen; convinced Weir to hire Ibarguen as the boat captain; was to be paid 100,000 Colombian pesos per victim transported; attended multiple meetings with both Weir and Ibarguen where routes were discussed; relayed those plans to the victims and gave personal assurances of their safety; traveled with the victims and Weir to the location of departure; and was present on both occasions when the victims departed Turbo for Panama.

Palacios wants to have it both ways—he wants this Court to find minimal liability because the scope of the conspiracy was limited to successfully transporting aliens from Colombia to Panama, and also that leniency is warranted because his contribution to the conspiracy should be judged against conduct perpetrated by his co-defendants outside the scope of the conspiracy.

Given that this case involves a conspiracy to transport aliens, Palacios's role should be judged in that context, as it was by the district court based on the record evidence.

Additionally, Palacios references § 3B1.2, cmt. n.3(B), which discusses the propriety of denying a mitigating role reduction for a defendant who received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct. In such a case, the commentary notes that denial is generally warranted as "such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense" (id.). The commentary evinces a concern with defendants whose offense level is unrepresentative of their actual criminal conduct. In this case, Palacios was not only convicted of each and every count that he was charged with—which were identical to the charges to which co-defendants pleaded guilty—but he also received the benefit of the alien smuggling base offense level of 12 as opposed to the second degree murder base offense level of 38.

In light of these circumstances, the district court did not clearly err in denying Palacios a minor role adjustment.

III. The District Court Did Not Abuse Its Discretion In Imposing A Sentence Above The Guidelines Range

As stated above, sentences are reviewed for "unreasonableness" under a deferential abuse-of-discretion standard. Booker, 543 U.S. at 261; Gall, 552 U.S. at 41. Once it's determined that no procedural error exists, the substantive reasonableness of the sentence—including any justification for a 3553(a) variance—will be then considered. Gall, 552 U.S. at 51.

Palacios argues that the district court was so "blinded" by the heinousness of the murders that it unjustifiably relied upon that evidence when imposing a sentence above the guidelines (Br. at 29). In so doing, the court "erroneously failed to consider any other sentencing factors," including Palacios's history, characteristics and 3553(a) factors, and also relied upon facts that were purportedly at odds with the record; specifically, that Palacios was aware of his co-defendants' violent tendencies prior to the murders.

No procedural errors occurred at sentencing. After a two-day hearing, the guideline range was properly calculated; nothing in the record suggests the court treated the range as mandatory; the facts upon which the imposed incarceratory term was based were established through court filings and live testimony; and the district court explained the reasoning for the sentence ultimately imposed.

The court sentenced Palacios to a term of 180-months imprisonment, a variance of 45 months above the top of the 108-135 month guideline range. In so doing, the district court expressly stated that it considered "the statements of all the parties, the presentence report, statutory factors set forth in 18 U.S.C. Section 3553(a)" (DE135:35-36). 18 U.S.C. § 3553(a) directs the sentencing court to consider "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; and (C) to protect the public from further crimes of the defendant."

This Court has long rejected the notion that a sentencing court needs to list out each Section 3553(a) factor or "specifically mention the grounds for variance that [the defendant] argued." United States v. Scott, 426 F.3d 1324, 1329 (11th Cir. 2005); see also United States v. Amedeo, 487 F.3d 823, 833 (11th Cir. 2007) ("[A]lthough the district court's sentencing order made no mention of evidence that arguably mitigated in [the defendant's] favor under § 3553(a), we cannot say that the court's failure to discuss this 'mitigating' evidence means that the court erroneously 'ignored' or failed to consider this evidence in determining [the defendant's] sentence."). Sentencing courts can focus on a few factors in announcing their decision because a court "is permitted to attach 'great weight' to

one factor over others," United States v. Shaw, 560 F.3d 1230, 1237 (11th Cir. 2009) (quoting Gall, 552 U.S. at 57), and "[t]he decision about how much weight to assign a particular sentencing factor is committed to the sound discretion of the district court." United States v. Rosales-Bruno, 789 F.3d 1249, 1254 (11th Cir. 2015) (internal quotation marks omitted).

Though Palacios faults the district court for "mentioning the nature of the murders numerous times" (Br. at 31), the "nature and circumstances of the offense" and "seriousness of the offense" are specific § 3553(a) factors that the court is required to consider. Certainly, the fact that Palacios handed the victims off to the jointly charged co-defendants, who then slit the throats of two of them, is relevant information the court is obliged to consider when determining a proper sentence, as is the fact that the sole survivor, L.S.C., was forced to endure the horror of listening to the rape and murder of E.M.A., the murder of D.E.L.S., and evade capture by hiding from the pursuing murderers after freeing himself from his wrist ties.

With respect to the history and characteristics of Palacios, the presentence report contained damning information about him. It detailed Palacios's post-arrest statements, where he admitted to working with Weir and other smugglers in the past; to introducing Weir to Ibarguen; to the amount of money he was to be paid (100,000 Colombian pesos per person) for finding a boat captain (Ibarguen) for Weir; to knowing that Ibarguen had a history of robbing Cuban nationals who immigrated to

Colombia for their cellular phones; to his familiarity with Carreazo's membership in the paramilitary forces; that Carreazo was "messed up" in the head and had a "bad ideology"; and his numerous meetings with the victims prior to their transport (id. at 8).

Palacios asserts that the court failed to consider his history and characteristics at the time of sentencing, but the record reflects otherwise—the court considered his history and characteristics and determined after review found that they warranted incarceration above the guideline range, not leniency.

Palacios expresses confusion as to how the sentence imposed would deter future smuggling (Br. at 31) ("it is unclear how a sentence in the United States for a Colombian national who was extradited here would deter others in Colombia"). By the same flawed logic, heavy sentences imposed on cartel leaders extradited from other countries do nothing to deter future drug trafficking. On the contrary, the prospect of criminal prosecution in the United States is of significant interest to foreign nationals, as the government noted when citing a number of Colombian press clippings about the incident.[9] For example, an article entitled "They Capture The

[9] The following were cited by the government: "*See* "'Play Boy' y 'Carlos', señalados de robar y asesinar a dos migrantes cubanos," *Noticias Caracol*, September 12, 2016 (https://noticias.caracoltv.com/medellin/play-boy-y-carlos-senalados-de-violar-y-asesinar-migrantes-doscubanos);"Migrante fue abusada y asesinada por "coyotes" en Turbo," *El Colombiano*, September 12, 2016 (http://www.elcolombiano.com/antioquia/seguridad/supuestos-asesinos-de-

Leader Who Would Have Killed Two Cubans In Turbo," depicted Palacios holding an AK-7 (DE117:16, Exhibit 2). In arguing that a 262-month term of incarceration was appropriate, the government stated that it "would demonstrate to other human smugglers around the world that the United States government takes smuggling human beings illegally into this country very seriously" and that "individuals who attempt to violate United States' law by engaging in similar criminal conduct will face serious consequences by doing so" (DE117:15). The record establishes a compelling justification for an upward variance to promote deterrence of similar smuggling activity.

Palacios's repeated claim that he learned of Carreazo's character *after* his arrest (DE112:3; DE134:12; Br. at 19), and that the district court therefore erred in finding that he delivered the victims to two individuals he knew were dangerous, is

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migrantes-cubanos-no-aceptan-cargos-NE4969924); "Capturan a líder que habría asesinado a dos cubanos en Turbo (Antioquia)," *El Espectador*, May 28, 2017 (https://www.elespectador.com/noticias/judicial/capturan-lider-que-habria-asesinado -dos-cubanos-en-turboantioquia-articulo-695906); "La terrible historia de los traficantes de migrantes que asesinaron a 2 cubanos en Turbo," *Semana*, November 10, 2017 (https://www.semana.com/nacion/articulo/primeros-colombianos-extraditados-a-estadosunidos- por-trafico-de-migrantes/546662). *See also* "Tres colombianos se declaran culpables en Estados Unidos de tráfico de personas," *El Espectador*, October 26, 2018 (https://www.elespectador.com/noticias/judicial/trescolombianos-se-declaran-culpables-en-estados-unidos-de-trafico-de-personas-articulo-820328)" (DE117:15, fn. 9).

entirely without merit. A review of Palacios's video-recorded statement indicates that his knowledge of Carreazo's disposition emerges in the context of disbelieving Carreazo's post-arrest claim that Ibarguen raped E.M.A. (DE117-2:129). Palacios said "Carlos [Ibarguen] is not a bad guy. I do believe it about Playboy [Carreazo]," and then goes on to describe the effect of Carreazo's paramilitary service on his mental acuity and psychological disposition (id.).

Though it is true that Palacios stated he learned additional troubling details about Carreazo through Ibarguen while jailed at La Picota after his arrest (for example, that while on the boat, Carreazo threatened to kill Ibarguen if Ibarguen refused to tie up the victims (DE117-2:228) and that Carreazo was ordered to kill Ibarguen's father, who was a member of the Colombian paramilitary, after he was captured by the Colombian Armed Forces (id. at 133-34)), none of that information contradicts Palacios's pre-arrest knowledge of Carreazo's drug usage or mental issues. Moreover, as argued above, Palacios's decision not to interact with Ibarguen—a close and trusted friend—three days before the murder after seeing him with Carreazo is consistent with a finding of pre-existing tension between Palacios and Carreazo; under normal circumstances, it is reasonable to assume (and certainly not an abuse of discretion to do so) that Palacios would converse with someone he partied with, drank with, occasionally worked with, and recommended for hire in the smuggling operation. The only difference between Palacios's previous friendly

interactions with Ibarguen and his refusal to interact with him days before the murders was Carreazo's presence.

As correctly noted by Palacios, the sentencing hearing alone spanned two days. The court afforded both the government and Palacios substantial time to advocate for their positions. Based on the totality of the record evidence reviewed and heard by the court, a variance above the sentencing guidelines was reasonable and not an abuse of discretion.

Conclusion

For the foregoing reasons, the district court's decisions should be affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,651 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Certificate of Service

I hereby certify that seven copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 7th day of May, 2019, and that, on the same day, the foregoing brief was filed using CM/ECF and served via CM/ECF on Arturo V. Hernandez, Counsel for Appellant.

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