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' REPLY BRIEF

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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:

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I. SPECIFIC OFFENSE CHARACTERISTIC ENHANCMENTS

The Government still fails to demonstrate how the Co-defendants' side agreement to rob, rape and murder the aliens, is within the scope of the alien smuggling conspiracy or in furtherance of it.

In his opening brief Appellant maintained the District Court erred in calculation of the Sentencing Guidelines when assessing points for specific offense characteristics as the Trial Court did not conduct the required relevant conduct analysis and there were no facts to support a finding under relevant conduct.

The Government agrees that these specific offense characteristics must be analyzed pursuant to U.S.S.G. § 1B1.3(a), however argues that the specific offense characteristic points were properly applied as relevant conduct.

The Government points out at page 23 of its Response Brief that, 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 Palacios' case, the Trial Court made one finding of foreseeability and failed to conduct an analysis as to the scope of the conspiracy and furtherance of the conspiracy and there were no facts in the record to support any such findings. The Government similarly ignores these two elements in its Reply Brief and points to no facts whatsoever that support the specific offense characteristic conduct being either within the scope of the alien smuggling conspiracy or in furtherance of that conspiracy.

The Government's position is anything and everything that happened on that alien smuggling voyage - no matter how or why - is imputed to Palacios. This argument must fail because if that were the legal standard then there would be no need to conduct the three-step relevant conduct analysis. The standard would then be strict liability. This simply is not the law.

This alien smuggling case is unique in that the enhancements at issue were not the result of the smuggling venture itself but occurred because of specific, intentional, separate and intervening actions of the Co-defendants. Said another way, the side agreement between the Co-defendants to rob, rape and murder and aliens, was a separate conspiracy that Palacios had no knowledge of and did not jointly undertake.

Two of the cases cited by the Government are clearly distinguishable [United States v. Mothersill, 87 F.3d 1214 (11th Cir. 1996) and United States v. Aduwo, 64 F.3d 626 (11th Cir. 1995)], as they involved large quantities of drugs. In such drug cases violence, guns, injury and death have repeatedly been recognized as inherent in the violence of a drug trafficking organization and known to participants. Specifically in the Mothersill case, this Court found, "that deadly force and violence were more than peripheral possibilities; rather, they were routine practices and central to the goals and implementation of the conspiracy." Mothersill at 1219. The same has never been recognized with alien smuggling cases in general and there was no such routine practice in this specific alien smuggling conspiracy.

In the alien smuggling cases cited by the Government [United States v. Rodriguez-Lopez, 363 F.3d 1134 (11th Cir. 2004) and United States v. Zaldivar, 615 F.3d 1346 (11th Cir. 2010)], fleeing or evading law enforcement was the conduct at issue. Such evasion has been specifically recognized in caselaw as within the scope of and in furtherance of the alien smuggling conspiracy. However, the Government has failed to show how a secret, separate plan to rob, rape and murder the aliens was within the scope of the alien smuggling conspiracy or in furtherance of it. The Government seeks a ruling from this Court that, like drug trafficking, alien smuggling is so inherently violent that guns and murder should

automatically be deemed within the scope of and in furtherance of any alien smuggling conspiracy. No court has made this ruling because unlike drug trafficking where guns and murder logically further the object of the conspiracy, neither guns, violence nor murder normally further an alien smuggling conspiracy.

The Trial Court even conceded in this case that the Co-defendants' acts were not in furtherance of the conspiracy:

> THE COURT: Clearly if you murder them before you take them into the States, you cannot smuggle them in. I understand that.
> MR. HERNANDEZ: That is right.
> THE COURT: But it does have some logical sequence that, you know, it is not in furtherance of the conspiracy, that is obvious. (DE-134:16-17)

A. Brandishing Firearm and Victim Restraint

As to the firearm and victim restraint specific offense characteristics, the Government again makes only a foreseeability argument. The Government does not address how the firearm or victim restraint (which were used to rob, rape and murder) were within the scope of the jointly undertaken criminal activity or in furtherance of the conspiracy.

The Government tries to argue that the Trial Court made a finding that "violence" was a known risk to this conspiracy ("violence to which they subjected the victims was reasonably foreseeable **and a knowing risk of the conspiracy**." Gov. Resp. Br. at 28). The Trial Court made no such finding that violence was a

known risk of this alien smuggling conspiracy. The Court made a finding that the Co-defendants had violent tendencies and robbed in their past (DE-135:133) which goes to foreseeability. However, the Trial Court never made a finding that this alien smuggling conspiracy had any known element of violence. There is a marked difference. The Government attempts to muddle the Trial Court's finding about foreseeability into a finding about scope and furtherance of the conspiracy by broadening the Trial Court's actual ruling as to the violent tendencies of the Co-Defendants outside this conspiracy onto the entire conspiratorial agreement itself. The Government attempts to imply that Palacios had agreed to an alien smuggling venture that involved violence. But the record shows, it was undisputed that this alien smuggling venture was supposed to be non-violent and the object was to deliver the aliens safely to Panama, as to Palacios' knowledge.

Further, there was no evidence or findings made about a firearm ever being used by either of the Co-defendants in the past that would make it foreseeable that either ever owned or possessed such a weapon. Similarly, there was no evidence presented or findings made that either of the Co-Defendants had restrained any victim before. The prior fact relied upon by the Government and the Trial Court was the Ibarguen had taken cell phones out of the hands of people on the street and run away.

The Government cites United States v. Aduwo, 64 F.3d 626 (11th Cir. 1995), as a case where the use of a firearm during a drug "rip off" was imputed to a co-defendant who had no specific knowledge or agreement to the use of the weapon during the robbery. This case is not even remotely similar to Palacios' case where Aduwo was the girlfriend of the co-defendant, was a participant in the robbery and had even purchased the gun for the co-defendant and then claimed there was no plan to bring a firearm to the robbery. Therefore, in Abuwo the use of the firearm was not only foreseeable but was in facilitation of the drug robbery.

B. Risk of Death or Serious Bodily Injury

With the risk of death or serious bodily specific offense characteristic, the Government advances two different arguments – one based upon the robbery, rape and murders and another based upon an argument that the boat was unsafe and therefore put the aliens at risk of death or serious bodily injury.

As to the risk of death or serious bodily injury because of the murders committed by the Co-defendants, the same relevant conduct analysis is lacking and again the Government only concentrates on foreseeability of violence not the scope and furtherance elements.

As to the risk based upon seaworthiness of the boat, there was not sufficient evidence present, elicited or in the record to support a finding. The standard is

"intentionally or recklessly creating a substantial risk of death or serious bodily injury".

The facts presented at sentencing showed that the boat trip was from Turbo to Acandi (Gov. Res. Br. at 9, citing Palacios' post Miranda Statement). Geography shows that this is a three-hour boat trip of approximately 47 miles across the gulf of Uraba – not open ocean. This is not the same as Cuban migrants crossing the Florida Straits which is 90 miles, across open ocean with the complications of the Gulf Stream. The Gulf of Uraba is a completely protected body of water more like a cove and the crossing is half the distance.

There were no facts elicited as to the condition of the second boat to show that is was not sound for this short voyage.[1] There were no facts in the record such as overcrowding, dangerous sea conditions, or lack of life preservers. Lastly, this case involved only three aliens on a boat, not 22 like United States v. Sanchez 303 Fed.App'x 851 (11th Cir. 2008). None of the factors mentioned in the Guidelines, "carrying substantially more passengers than the rated capacity of a . . . vessel;

[1] As to the first boat that went out with the aliens the day before, there was not even a sufficient description of that boat to make any finding as to this specific offense characteristic. The Government's witness who was on the boat testified at sentencing as to the first boat, "Well, the boat wasn't any good and we had to turn around because of waves." (DE-134: 46). This does not support the smugglers intentionally or reckless created a serious risk or death or serious bodily injury. In fact, it shows the opposite - the precaution that was taken by the smugglers recognizing rough sea conditions and turning around for safety.

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, are present here.

Therefore, the record simply does not support this enhancement based upon a lack of safety of the boat or sea conditions either.

C. Enhancement for Resulting Death

In his opening brief, the Appellant argued that the 10-point enhancement for resulting death was erroneously imposed by the Trial Court. The Government argues that this error was invited and even if it were preserved, despite the Trial Court's ruling that the murders were not foreseeable, the death was really reasonably foreseeable because it was a "potential unintended consequence of putting the victims into a knowingly dangerous situation with knowingly violent people." Gov. Res. Br. at 38-39.

First, the death was either foreseeable or not and the Trial Court ruled it was not so any re-phrased argument about violent tendencies of the Co-defendants is simply a disagreement with the Trial Court's foreseeable ruling which the Government did not appeal.

In addition, the Appellant did not invite error as to the foreseeability of the resulting death. The Trial Court made its findings and ruling that the deaths were

not foreseeable at the end of the first day of sentencing (DE-134:83). At that point, the same factual ruling applicable to this enhancement was necessarily made as it is the same element, foreseeability of the deaths. This ruling must and can only logically also be applied across the board and any discussion or argument by the parties after this ruling were moot and irrelevant.

Furthermore, this 10-point resulting death enhancement was never included in the PSIR as Probation only calculated the guidelines under section 2A1.1, the homicide guideline section. So, the Appellant had no duty or opportunity to file a specific objection to this specific offense characteristic through the PSIR. Also, throughout the sentencing the Appellant argued that the deaths were not foreseeable and the Trial Court agreed therefore that ruling was made and automatically applied to the 10-point resulting death specific offense characteristic.

Even if the error was initially invited, it was corrected by the Government during the sentencing when the Government pointed out, "It is logically inconsistent, I don't understand Mr. Hernandez' argument. He gets up here and says it is 10 points for death, but none of this is reasonably foreseeable." (DE-135:112) After the Government's statement, the Appellant attempted to respond, but the Trial Court cut off the Appellant and issued his rulings. So, this very issue was pointed out and corrected by the Government before the Trial Court made its final Guideline calculation.

Lastly, if the error were invited by the Appellant it should still be review by this Court as plain error under exceptional circumstances that substantially effected Palacios' rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings in this sentencing context where a miscalculation of 10 points in the Guideline range equates to at least 6-7 years of incarceration. As recognized by Judge Barkett in her concurring opinion in Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002),

> a fair reading of our Circuit precedent holds that if error is invited, we may not review the error even if it is harmful. See, e.g., United States v. Fulford, 267 F.3d 1241, 1247 (11th Cir. 2001); Unites States v. Ross, 131 F.3d 970, 988 (11th Cir. 1997). However, I believe we should reconsider that precedent and agree with the Sixth and Ninth Circuits, which have held that invited error may result in reversal in certain "exceptional situations." See, e.g., United States v. Sharpe, 996 F.2d 125, 129 (6th Cir. 1993); United States v. Ahmad, 974 F.2d 1163, 1165 (9th Cir. 1992) ("An invited error is only cause for reversal in the 'exceptional situation' in which it is 'necessary to preserve the integrity of the judicial process or prevent a miscarriage of justice.'") (internal citations omitted); United States v. Schaff, 948 F.2d 501, 506 (9th Cir. 1991).

II. DENIAL OF THE MINOR ROLE ADJUSTMENT

In his opening brief, the Appellant maintained that the Trial Court erred by denying a minor role adjustment. The Government argues that Palacios' role was major; he was "essential" because he procured Ibarguen as the boat captain who ultimately committed the murders; and that all alien smuggling cases involve a

large network of co-conspirators so everyone would qualify for a minor role adjustment therefore Palacios does not merit one.

The Government's arguments and the Trial Court's basis for denying the minor role are misplaced. The Government pointed out in its Response the Trial Court's statement relevant to the role, 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]" (DE-135:10-11), 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 . . . ". Other than this comment earlier in the sentencing, the Trial Court denied the request for minor role without any further elaboration (DE-135:132) after the Appellant enumerated 13 factors as to why he was deserving of a minor role.

This Court has stated, "[w]hen evaluating a defendant's role in an offense, the district court must consider the totality of the circumstances, U.S.S.G. § 3B1.2, comment n.3(c), assessing 'first, the defendant's role in the relevant conduct for which [he] has been held accountable at sentencing, and, second, [his] role as compared to that of other participants in [his] relevant conduct.'" United States v. Colorado, 716 Fed.Appx. 922, 924 (2017). In addition, "The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative." Id. at 925. Moreover, a District Court cannot hinge its denial of a

minor role on a single factor and do so would constitute error. Id; see also United States v. Cruickshank, 837 F.3d 1182 (11th Cir. 2016).

Therefore, it appears that the Trial Court impermissibly relied upon only one factor, that Palacios put the ill-fated boat voyage together, in denial of the minor role reduction and this sentence must be reversed.

CONCLUSION

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

Respectfully submitted
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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(A) because it is less than 15 pages. 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
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that seven copies of the foregoing Reply Brief for the Appellant were mailed to the Court of Appeals via US Mail on this 29th day of May, 2019, and that, on the same day, the foregoing brief was filed using CM/ECF and served via CM/ECF on AUSA Shane Butland, Counsel for Appellee.

BY: /s/ Arturo V. Hernandez
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