APPENDIX

TAB A - *UNITED STATES V. PALACIOS*, 844 F.3D 527 (5TH CIR., DEC. 27, 2016) (SLIP OP.)

FIFTH CIRCUIT ROA.234-244

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-40279

United States Court of Appeals
Fifth Circuit
FILED
December 27, 2016
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOSE PALACIOS, JR.,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before STEWART, Chief Judge, and SMITH and DENNIS, Circuit Judges.

CARL E. STEWART, Chief Judge:

Jose Palacios, Jr. ("Palacios") appeals his 144-month sentence for possession with the intent to distribute 100 kilograms or more of marijuana. He asserts that the district court committed reversible error by denying him the right of allocution before pronouncing his sentence. We agree. Accordingly, we VACATE and REMAND for resentencing.

I. BACKGROUND

Palacios, a licensed attorney, became involved in a drug trafficking conspiracy wherein he oversaw the organization's drug transportation activities, was involved in the collection of narcotics proceeds, and represented members of the organization in state legal proceedings to gain access to

privileged information regarding law enforcement activity. Palacios was arrested on July 23, 2013. On August 20, 2013, he and his coconspirators were named in a twenty-one count superseding indictment alleging that they had, *inter alia*, engaged in a conspiracy to traffic narcotics. Palacios pleaded guilty to Count Fifteen, possession with the intent to distribute 100 kilograms or more of marijuana.

The district court sentenced Palacios and his codefendants on March 6, 2014. Palacios's pre-sentence report ("PSR") placed him at an offense level of 38 with a category I criminal history. Based on this information, the advisory range pursuant to the U.S. Sentencing Guidelines was five to forty years' imprisonment, with a term of at least four years of supervised release. The PSR recommended that the district court reduce Palacios's offense level if he clearly accepted responsibility for his crime but also recommended that the court depart upwardly in sentencing him because he had abused his position as an attorney.

During sentencing, the district court reiterated Palacios's right to raise any issues he had with the PSR. The court explained to Palacios that to receive a reduction in his offense level for acceptance of responsibility, he would have to "generally" describe his wrongful conduct that constituted the instant offense. The court asked Palacios, "Do you want to tell me what it is that you did in this conspiracy?" Palacios spoke in detail about his role in the conspiracy, explaining that he arranged for the transportation and delivery of marijuana to at least three different locations.

Following Palacios's statement, the district court reduced his offense level by two points. The following exchange ensued:

> THE COURT: All right. So I'm going to give him his two points off for acceptance. I assume the Government will move for the third?

> THE GOVERNMENT: The Government so moves, your Honor.
>
> THE COURT: All right, which I grant. Okay. Anything else you want to add? I did review the letter from the church.
>
> MR. GARCIA [Palacios's counsel]: Yes, your Honor, also the classes that he's been taking while incarcerated in Willacy County. We also ask the Court to consider the age of his young son, your Honor.
>
> THE COURT: Right.

Palacios's counsel then offered as an additional mitigating factor that Palacios had no criminal history. Following counsel's statement, the district court directly addressed Palacios:

> THE COURT: Mr. Palacios, as I'm sure you know, your ex-wife was well-thought of and a very competent prosecutor here in this court. So I feel like [I] know your family a little bit already. And as I was telling your father, you know, it's a shame when I see this family drug connection . . . . I hope you are able to help yourself in the future so that you don't have to serve all of this lengthy sentence.

The district court then calculated Palacios's offense level as 33. The resulting applicable Guidelines range was 135–168 months. The court sentenced him to 144 months' imprisonment and five years' supervised release. The district court explained to Palacios that he had the right to appeal but did not ask him any further questions.

Palacios appeals his sentence, arguing that the district court plainly erred when it failed to allow him the right to allocute at his sentencing hearing. In his appellate brief, Palacios includes a lengthy statement he claims he would have made at sentencing if given the opportunity to allocute. In this statement, he apologizes to society, the victims of his crimes, and his family—particularly his young son. He explains the financial difficulties that drove

him to his "horrible decision" and asserts that he takes responsibility for his actions. He additionally describes the efforts he has made to rehabilitate himself while incarcerated and details his past charitable and volunteer work.

II. DISCUSSION

Palacios did not object in the district court that he was denied his right to allocute, and so we review for plain error. *See United States v. Reyna*, 358 F.3d 344, 350 (5th Cir. 2004) (en banc). To apply Rule 52(b)'s plain error rule in the allocution context, we first ask whether the district court (1) committed an error, (2) that is clear and obvious, and (3) that affected the defendant's substantial rights. *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)); *see also United States v. Perez*, 460 F. App'x 294, 299 (5th Cir. 2012) (per curiam). We "will 'ordinarily remand for resentencing' if a district court commits plain error that affects a defendant's substantial rights by denying the right of allocution." *United States v. Avila-Cortez*, 582 F.3d 602, 606 (5th Cir. 2009) (quoting *Reyna*, 358 F.3d at 353). However, reversal is "not automatic." *Id.* at 604. "In a limited class of cases, a review of the record may reveal, despite the presence of disputed sentencing issues, that the violation of a defendant's right to allocution does not [seriously affect the fairness, integrity, or public reputation of judicial proceedings]." *Id.* (quoting *Reyna*, 358 F.3d at 352).

A. Right to Allocution

Palacios argues that although the district court allowed him the opportunity to speak with regard to acceptance of responsibility, the court did not allow him "the right to speak on any subject of his choosing prior to imposition of sentence." We agree. "In order to satisfy Rule 32, the district court must communicate 'unequivocally' that the defendant has a right to allocute." *United States v. Magwood*, 445 F.3d 826, 829 (5th Cir. 2006) (quoting *United States v. Echegollen-Barrueta*, 195 F.3d 786, 790 (5th Cir. 1999)). The

district court must make a direct, personal inquiry to the defendant, applying the rule "quite literally." *Id.* (citation omitted); *see also United States v. Legg*, 439 F. App'x 312, 313 (5th Cir. 2011) (per curiam) (determining that extensive discussion between district court and defendant did not constitute a "specific and unequivocal" allocution opportunity). "[T]he court, the prosecutor, and the defendant must at the very least interact in a manner that shows clearly and convincingly that the defendant knew he had a right to speak on any subject of his choosing prior to the imposition of sentence." *Magwood*, 445 F.3d at 829 (quoting *Echegollen-Barrueta*, 195 F.3d at 789) (alteration in original) (internal quotation omitted).

Although Palacios and the district court engaged in discussion prior to the imposition of his sentence, the record does not show that Palacios was given a specific and unequivocal opportunity to speak in mitigation of his sentence. After Palacios described his role in the conspiracy and the district court granted him a reduction for acceptance of responsibility, the district court then stated, "Okay. Anything else you want to add? I did review the letter from the church." Palacios's counsel responded to the court's question with the statement: "Yes, your Honor, also the classes that he's been taking while incarcerated in Willacy County. We also ask the Court to consider the age of his young son, your Honor." It is unclear from the record to whom the district court addressed its open-ended question. The fact that (1) the immediately preceding dialogue had been between the court and the prosecution and (2) the court never interrupted defense counsel to clarify that its question had been directed to Palacios, makes plausible the conclusion that the question was not directed at Palacios but rather to his attorney. That any such ambiguity exists demonstrates that Palacios was not given a specific and unequivocal opportunity to speak. *See Magwood*, 445 F.3d at 829. Thus, we conclude that the first two prongs of the plain error test have been met: the district court

erred in failing to provide Palacios with an allocution opportunity, and that error was clear and obvious. *See id*; *United States v. Perez*, 460 F. App'x 294, 299–300 (5th Cir. 2012) (per curiam); *Legg*, 439 F. App'x at 313.

B. Defendant's Substantial Rights

The third prong of the plain error analysis—harm to the defendant's substantial rights—is also satisfied. "Ordinarily, in order to establish that an error 'affects substantial rights' . . . , a defendant must establish that the error was 'prejudicial,' i.e.[,] that it 'affected the outcome of the district court proceedings.'" *Reyna*, 358 F.3d at 350. In cases involving the right to allocution, we presume that the defendant's substantial rights were affected if "the record reveals that the district court did not sentence at the bottom of the guideline range or if the court rejected arguments by the defendant that would have resulted in a lower sentence." *Id.* at 353. Because Palacios was sentenced to 144 months' imprisonment, a mid-range sentence in the advisory guidelines range of 135 to 168 months of imprisonment, we hold that the error affected his substantial rights. *See Magwood*, 445 F.3d at 829; *Reyna*, 358 F.3d at 353.

C. Discretion to Correct the Error

While we will ordinarily remand for resentencing if a district court commits plain error that affects a defendant's substantial rights by denying the right of allocution, we have "decline[d] to adopt a blanket rule that once prejudice is found under the rule stated above, the error invariably requires correction." *Reyna*, 358 F.3d at 352. Instead, we "conduct a thorough review of the record to determine . . . whether the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings,'" compelling our exercise of discretion to correct it. *Id.* at 353. In most allocution appeals, "to prevail, defendants will have to show some objective basis that would have moved the trial court to grant a lower sentence; otherwise, it can hardly be said that a miscarriage of justice has occurred." *Id.* at 356 (Jones, J., concurring); *see also*

Magwood, 445 F.3d at 830 (determining that the defendant, who simply challenged a facial violation of the denial of the right to allocute and who did not challenge his sentence, failed to establish that a miscarriage of justice occurred).

Whether this court will exercise its discretion to correct the error is a "highly fact-specific" inquiry involving a range of factors. *See Avila-Cortez*, 582 F.3d at 605. "[I]f the defendant had a prior opportunity to allocute, or if the defendant fails to explain what exactly he or she would have said during allocution that might mitigate the sentence, then the case is one of those 'limited class of cases' in which we will decline to exercise our discretion to correct the error." *Id.* at 606 (quoting *Reyna*, 358 F.3d at 352). We have also considered whether defense counsel offered mitigating arguments on behalf of the defendant. *See Magwood*, 445 F.3d at 830 (declining to correct the error where defense counsel argued mitigating information, the district court weighed that information, and the defendant failed to state what his mitigating statement would have been). Although the presence of such arguments may support affirming the sentence, such statements do not preclude this court from exercising its discretion to correct the error. *See id.*

Here, Palacios was not given a prior opportunity to allocute. He was, however, given an opportunity to speak before the district court imposed his sentence. During the sentencing hearing, the district court reiterated to Palacios his right to raise any issues he had with the PSR and gave him the opportunity to describe "what wrongful conduct [he] did that constituted [the] offense." In response, Palacios provided a detailed answer describing his unlawful actions. However, although the district court went beyond "barely address[ing the defendant] at all," *see Avila-Cortez*, 582 F.3d at 604, 607 (finding reversible error where the only time the defendant spoke was when he twice said "Yes, sir" in response to whether he had received and reviewed the

PSR), it never gave Palacios an explicit opportunity to speak freely, *see Magwood*, 445 F.3d at 829. Palacios was effectively limited to talking about any issues he had with the PSR; telling the district court generally "what wrongful conduct [he] did that constituted [the] offense"; and discussing his role in the conspiracy. Thus, this consideration does not weigh definitively in either direction.

However, other factors weigh strongly in favor of correcting the district court's error. Palacios provided in his appellate brief a statement of what he would have said had he been given the opportunity to allocute. This statement is specific, thorough, and gives "detail, expression, [and] expansion" to the statements provided by defense counsel.[1] *See Avila-Cortez*, 582 F.3d at 606. It provides specific facts about Palacios's professional accomplishments, charitable activities and family life, and efforts to better himself while incarcerated—any of which might have convinced the district court to impose a lesser sentence. *See id.* (correcting the error where the defendant "specifie[d] precisely" what he would have told the district court to mitigate his sentence); *United States v. Lister*, 229 F. App'x 334, 338–39 (5th Cir. 2007) (per curiam) (correcting the error where the defendant specified in his brief what he would

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[1] For example, during sentencing, defense counsel asked the district court "to consider the age of [Palacios's] young son." By contrast, in his appellate brief, Palacios states that he would have said:

> I would like to apologize to my own family . . . . Most importantly, my son Joey, for leaving him without a father. Not a day goes by that I don't regret all the things that I have done that has [sic] led me to standing before you today. These actions have taken me away from the most important responsibility to be bestowed upon me—fatherhood. I have failed miserably in setting a good example for him. And although I have tried to raise a little boy with a strong moral code, my actions will nonetheless affect the way he looks at me. I only hope that one day he will find it in his heart to forgive me for abandoning him when he needs me the most. Being taken into custody in his presence is something that will always tear at my heart and my conscience.

have included in his allocution statement); *cf. United States v. Neal*, 212 F. App'x 328, 332 (5th Cir. 2007) (per curiam) (declining to correct the error where the defendant "assert[ed] only conclusionally [that] he was not given an opportunity to discuss his 'family, background, his conduct in prison, his activities during his months of successful supervised release, or other areas'" but failed "to allege any specific facts which, given the entirety of the transcript, . . . likely would've convinced the district court to levy a more lenient sentence").

Moreover, although Palacios's defense counsel made a few, somewhat cursory, mitigating statements on Palacios's behalf,[2] these brief points were not sufficient to supplant Palacios's right to plead his own case at allocution. In *Avila-Cortez*, we exercised our discretion to correct the error where the defendant explained in his brief that he would have told the district court that he had a specific strategy to address his problem with alcohol and that he was making plans to return permanently to Mexico with his wife. 582 F.3d at 606. The defendant's counsel, by contrast, had only "summarily referred to this mitigating evidence in his argument." *See id.* Similarly, here, defense counsel "did not present to the court the same quantity or quality of mitigating evidence that [the defendant] would have given had he been able to allocute." *See id.* At the sentencing hearing, defense counsel only summarily referred to the fact that Palacios was taking classes while incarcerated, has a young son, and had no prior criminal history. In his appellate brief, however, Palacios adds detail and description to these assertions, presents additional mitigating evidence, and does all of this in his own voice. *See Green v. United States,* 365

[2] Specifically, defense counsel stated: "Yes, your Honor, also the classes that he's been taking while incarcerated in Willacy County. We also ask the Court to consider the age of his young son, your Honor." Counsel then added: "The fact that Mr. Palacios, you know, has no criminal history, your Honor."

U.S. 301, 304 (1961) (As Justice Frankfurter explained, "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."). Further, as in *Avila-Cortez*, the record in this case does not indicate that the district court contemplated, or subsequently rejected, defense counsel's mitigating statements. *See Avila-Cortez*, 582 F.3d at 604, 606; *cf. Magwood*, 445 F.3d at 830.

These considerations weigh in favor of correcting the district court's error, and, consistent with this court's precedent, Palacios has "show[n] some objective basis that would have moved the trial court to grant a lower sentence." *See Magwood*, 445 F.3d at 830 (internal quotation marks omitted); *cf. Legg*, 439 F. App'x at 313 (finding the defendant failed to show such an objective basis where the facts and assertions he contended he would have presented to mitigate his sentence were either considered by the district court and deemed unpersuasive or did not undermine the court's reasons for imposing the sentence); *United States v. Coleman*, 280 F. App'x 388, 392 (5th Cir. 2008) (per curiam) (finding no miscarriage of justice where the defendant did not point to anything "that arguably would have impacted the district court's thinking").

The Government urges us to consider, *inter alia*, (1) that the district court had a "comprehensive" view of Palacios through the substantial PSR, the experience of sentencing Palacios's coconspirators, and its knowledge of Palacios's ex-wife and family,[3] and (2) that Palacios, a former prosecutor and defense lawyer, "would have been his own best advocate if there had been anything else to say." We do not find these factors sufficient to outweigh the previous considerations. The existence of a voluminous PSR and the presence

[3] Palacios's ex-wife is a prosecutor who had previously appeared in the district court, and Palacios's brother and father were codefendants who had been sentenced by the court.

of other codefendants at sentencing do not per se negate the occurrence of a miscarriage of justice, and the Government cites no authority that would suggest otherwise. Additionally, even assuming that Palacios had been aware of his right to allocute based on his professional experience, mere awareness of that right is not the proper inquiry under Rule 32. Moreover, during sentencing, Palacios was not appearing as a defense attorney but rather as a criminal defendant facing severe penalties and likely under significant stress. Thus, while these considerations could perceivably carry slight weight, we do not find them dispositive.

III. CONCLUSION

In sum, we conclude that the district court's failure to provide Palacios the opportunity to allocute before sentencing amounted to plain error that affected his substantial rights, warranting this court's exercise of discretion to correct the error. *See Reyna*, 358 F.3d at 352–53. Accordingly, we VACATE and REMAND for resentencing.[4]

[4] We are aware that in Dkt. No. 16-40164, *United States v. Chavez-Perez*, also up on appeal, we held that the district court's failure to provide the defendant the right to allocute did not amount to reversible error. In contrast to the instant case, we determined that the final prong of the plain error test was not met because no miscarriage of justice had occurred. Because the defendant in *Chavez-Perez* failed to demonstrate an objective basis that would have moved the district court to grant a lower sentence, *see Reyna*, 358 F.3d at 356 (Jones, J., concurring), we declined to exercise our discretion to correct the error.

TAB B - MAY 17, 2017
AMENDED JUDGMENT

FIFTH CIRCUIT ROA.278-282

(NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT

Southern District of Texas

Holding Session in McAllen

UNITED STATES OF AMERICA
V.
JOSE PALACIOS, JR

AMENDED JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **7:13CR00994-S1-015**
USM NUMBER: 48380-379

☐ See Additional Aliases.

Date of Original Judgment: March 6, 2014
(or Date of Last Amended Judgment)

Jeremy B. Gordon
Defendant's Attorney

Reason for Amendment

☒ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
☐ Correction for Clerical Mistake (Fed. R. Crim. P. 36)
☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☒ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☒ pleaded guilty to count(s) 15 on October 1, 2013.
☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1), 841(b)(1)(B) and 18 U.S.C. § 2	Possession, with intent to distribute, 100 kilograms or more of marijuana.	03/06/2013	15

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 1 and the original Indictment, as to this defendant, ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 11, 2017
Date of Imposition of Judgment

Signature of Judge

RANDY CRANE
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

May 17, 2017
Date

DEFENDANT: **JOSE PALACIOS, JR**
CASE NUMBER: **7:13CR00994-S1-015**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of * 108 months.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be placed in an institution as close as possible to his family in San Antonio, Texas, and where he can receive drug and/or alcohol abuse treatment and/or counseling.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JOSE PALACIOS, JR**
CASE NUMBER: **7:13CR00994-S1-015**

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: * 4 years.

☐ See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
6. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☐ See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **JOSE PALACIOS, JR**
CASE NUMBER: **7:13CR00994-S1-015**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00		

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **JOSE PALACIOS, JR**
CASE NUMBER: **7:13CR00994-S1-015**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of _____ over a period of _____ , to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of _____ over a period of _____ , to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
Attn: Finance
P.O. Box 5059
McAllen, TX 78502

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

17-40560.282

TAB C - *UNITED STATES V. PALACIOS*, 721 FED. APPX. 405 (5TH CIR. MAY 10, 2018) (SLIP OP.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
May 10, 2018
Lyle W. Cayce
Clerk

No. 17-40560
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE PALACIOS, JR.,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:13-CR-994-15

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Jose Palacios, Jr. appeals the sentence imposed at resentencing on remand for his conviction for possession with intent to distribute 100 kilograms or more of marijuana. In his first appeal, this court held that the district court plainly erred by denying Palacios the right to allocution before pronouncing his sentence; the court vacated his sentence and remanded the case for resentencing. On remand, Palacios argued that (1) his base offense level

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

should be reduced by two levels to 32 under the retroactive Amendment 782 to the Sentencing Guidelines; (2) he should not receive a two-level enhancement under U.S.S.G. § 2D1.1 for possession of a firearm; and (3) he should receive a safety valve reduction under 18 U.S.C. § 3553(f). The district court reduced his offense level to 32 under Amendment 782, but ruled that he could not raise his other arguments challenging his sentence.

On appeal, Palacios has filed an unopposed motion for summary disposition of his appeal, conceding that his arguments challenging his sentence on remand were foreclosed by the mandate rule. *See United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008); *United States v. Lee*, 358 F.3d 315, 323 (5th Cir. 2004). Accordingly, because summary disposition is appropriate, Palacios's unopposed motion for summary disposition is GRANTED, and the district court's judgment is AFFIRMED. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).