

No. \_\_\_\_\_

---

---

**IN THE SUPREME COURT OF THE UNITED STATES**

\_\_\_\_\_ **Term,** \_\_\_\_\_

---

---

**ADRIAN PINEDA-OROZCO**

*Petitioner,*

-v-

**UNITED STATES OF AMERICA,**

*Respondent.*

---

---

**ON PETITION FOR WRIT OF *CERTIORARI*  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

---

**PETITION FOR WRIT OF *CERTIORARI***

**GERALD C. MOTON**  
***CJA Counsel of Record***  
***for Defendant-Petitioner***  
**11765 West Avenue, PMB 248**  
**San Antonio, Texas 78216**  
***motongerald32@gmail.com***  
**Telephone (210) 410-8153**  
**Fax: (210) 568-4389**

## **QUESTIONS PRESENTED**

1. Whether the Fifth Circuit Court of Appeals opinion permitting Pineda-Orasco's conviction to stand resulted in a miscarriage of justice given the longstanding presence of the the family member element of the duress defense in the Fifth Circuit?

2. Whether a defendant who raises a duress affirmative defense is precluded as a matter of law from receiving an acceptance of responsibility adjustment?

## TABLE OF CONTENTS

	<u>PAGE</u>
Questions Presented.....	ii
Table of Contents.....	iii
Index to Appendices.....	iv
List of Parties.....	v
Table of Authorities.....	vi
Opinion Below.....	2
Jurisdiction.....	2
Constitutional and Statutory Provisions.....	2
Statement of the Case.....	3
Reasons the Court Should Grant Review.....	7
<b>I. PERMITTING PINEDA-ORASCO'S CONVICTION TO STAND WOULD RESULT IN A MISCARRIAGE OF JUSTICE AS THE DURESS JURY INSTRUCTION GIVEN IGNORED LONGSTANDING PRESENCE OF THE THE FAMILY MEMBER ELEMENT OF THE DURESS DEFENSE IN THE FIFTH CIRCUIT AND WAS CLEAR ERROR.....</b>	<b>7</b>
<b>II. DEFENDANT'S DURESS AFFIRMATIVE DEFENSE WAS IMPROPERLY USED TO DENY AN AWARD OF REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY UNDER USSG §3E1.1.....</b>	<b>9</b>

<b>CONCLUSION AND PRAYER FOR RELIEF.....</b>	<b>17</b>
--	-----------

## **INDEX TO APPENDICES**

APPENDIX A	Fifth Circuit Court of Appeals Opinion
APPENDIX B	United States District Court, Western District of Texas Judgment In a Criminal Case
APPENDIX C	Sixth Amendment to the United States Constitution

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

## TABLE OF AUTHORITIES

### CASES

<i>United States v. Adrian Pineda-Orozco</i> , No. 17-5086, (5th Cir. October 11, 2018).....	<i>passim</i>
<i>United States v. Phea</i> , 755 F.3d 255, 266 (5th Cir. 2014).....	7,8
<i>United States v. Simkanin</i> , 420 F.3d 397, 406 (5th Cir. 2005).....	8
<i>United States v. Posada-Rios</i> , 158 F.3d 832, 873 (5th Cir. 1998).....	8
<i>United States v. Liu</i> , 960 F.2d 449, 454 (5th Cir. 1992).....	8
<i>United States v. De La Cruz</i> , No. 12-50113, p.2 (5th Cir., 2013).....	8
<i>United States v. Burt</i> , 143 F.3d 1215, 1218-19 (9th Cir. 1998).....	8
<i>United States v. Fuchs</i> 218 F.3d 957 (9th Cir. 2000).....	8
<i>United States v. Olano</i> , 507 U.S. 725, 736 (1993).....	9
<i>United States v. Santos</i> , 932 F.2d. 244, 251-53 (3d Cir.1991).....	9
<i>United States v. Bakhtiari</i> , 913 F.2d 105,31057 (2d Cir.1990) .....	9

<i>United States v. Lopez</i> , 885 F.2d 1428, 1434-36, 1438-39 (9th Cir.1989).....	9
<i>Schmuck v. United States</i> , 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed2d 734 (1989).....	9
<i>United States v. Contento-Pachon</i> , 723 F.2d 691, 693-94 (9th Cir.1984).....	9
<i>Dixon v. United States</i> , 548 U.S. 1,19 (2006) (Alito, J., concurring).....	9
<i>United States Of America v. Benitez-Reynoso</i> , No. 16-51425, p.12 (5th Cir., 2018).....	9,10
<i>United States v. Rudzavice</i> , 586 F.3d 310, 316-17 (5th Cir. 2009).....	10
<i>United States v. Spires</i> , 79 F.3d 464, 467 (5th Cir. 1996).....	10,11
<i>United States v. Fells</i> , 78 F.3d 168 (5th Cir.1996).....	12 15
<i>United States v. Broussard</i> , 987 F.2d 215 (5th Cir.1993).....	12
<i>United States v. Fleener</i> , 900 F.2d 914, 917-918 (6th Cir.1990).....	12,16
<i>United States v. Barris</i> , 46 F.3d 33, 35-36 (8th Cir.1995) .....	12,14
<i>United States v. Patino-Cardenas</i> , 85 F.3d 1133, 1136 (5th Cir. 1996).....	12
<i>United States v. Gamboa-Cardenas</i> , 508 F.3d 491, 505 (9th Cir. 2007).....	12,13

<i>United States v. Ing</i> , 70 F.3d 553,556 (9th Cir. 1995).....	13,14 16
<i>United States v. Gamboa-Cardenas</i> , 508 F.3d 491, 505-06 (9th Cir. 2007).....	13
<i>United States v. Martinez-Martinez</i> , 369 F.3d 1076,1089-90 (9th Cir. 2004).....	13
<i>United States v. Cisneros</i> , 846 F.3d 972, 975 (7 <sup>th</sup> Cir. 2017).....	15
<i>United States v. Barraza</i> , 655 F.3d 375, 384 (5th Cir.2011).....	15
<i>United States v. Hawkins</i> , 69 F.3d 11, 14 (5th Cir.1995).....	15
<i>United States v. Bailey</i> , 444 U.S. 394, 409-410 (1980). ....	15
<i>United States v. Garcia</i> , 182 F.3d 1165 (10th Cir.1999).....	16
<i>Joiner v. United States</i> , 103 F.3d 961 (11th Cir.1997).....	16
<i>United States v. Chevre</i> , 146 F.3d 622 (8th Cir. 1998) .....	16
<i>United States v. Brace</i> , 145 F.3d 247 (5th Cir.1998).....	16
<i>United States v. Kirkland</i> , 104 F.3d 1403 (D.C.Cir.1997).....	16
<i>United States v. Demes</i> , 941 F.2d 220 (3d Cir.1991) .....	16



## CONSTITUTIONAL PROVISIONS

<i>U.S. Const, Sixth Amendment</i> .....	3,10 12
--	------------

## STATUTES

21 U.S.C. § 841(a)(1).....	3
21 U.S.C. § 841 (b)(1)(A).....	3
21 U.S.C. § 846.....	2,3
21 U.S.C. § §952(a).....	3
21 U.S.C. §960(a)(1).....	3
21 U.S.C. § §960 (b)(1).....	3
21 U.S.C. § § 963.....	2
28 U.S.C. § 1254(1).....	2

## OTHER AUTHORITIES

USSG. §2D1.1(b)(5).....	4,5
USSG. §2D1.1, note 27(B).....	5
USSG§ 3B1.1(c).....	4,6 7
USSG § 3C1.1.....	14
USSG §3C1.1, Application Note 5 .....	14
USSG § 3C1.2.....	3,6 7,14

USSG § 3C1.2 Application Notes. 1.....	16
USSG § 3E.1.....	14
USSG § 3E.1.....	3,4,6
USSG § 3E.1.1 comment.(n.2) .....	10,14
USSG § 3E.1.1 comment.(n.2) .....	10,11
USSG § 3E.1.1 comment.(n.2) .....	13
USSG § 3E1.1(a).....	4,7
USSG § 3E1.1(a).....	10
USSG § 4A1.3(b).....	5

No. \_\_\_\_\_

---

---

**IN THE SUPREME COURT OF THE UNITED STATES**

\_\_\_\_\_Term, \_\_\_\_\_

---

---

**ADRIAN PINEDA-OROZCO**

*Petitioner,*

-v-

**UNITED STATES OF AMERICA,**

*Respondent.*

---

---

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

---

***PETITION FOR WRIT OF CERTIORARI***

Petitioner **ADRIAN PINEDA-OROZCO** respectfully asks this Court to grant a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction and rejecting his assertion that the jury instruction on his affirmative defense on duress that failed to expressly

encompass threats against his family members serious affected the fairness, integrity or public reputation of the judicial proceeding. Pineda-Orozco also respectfully asks this Court to grant a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction and rejecting his challenges to the calculation of his offense level.

### **OPINIONS BELOW**

The Fifth Circuit's opinion, *United States v. Adrian Pineda-Orozco*, No. 17-50867 (hereinafter referred to as Pineda-Orozco or Petitioner) is attached as Appendix A. The district court's judgments below is attached as Appendix B.

### **JURISDICTION**

The Fifth Circuit entered judgment on October 11, 2018. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Pineda-Orozco challenges his conviction by a jury of both conspiracy to possess, with intent to distribute, and conspiracy to import, 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 846, 963, and his sentence to concurrent 600-month terms of imprisonment. Pineda-Orozco challenges the failure to properly instruct the jury that his duress affirmative defense included threats to his family members and the

rejection of his challenges to the application of under USSG § 3E.1 and the trial court's improper imposition of a two-level adjustment for reckless endangerment during flight under USSG § 3C1.2.

This case raises serves as the perfect vehicle to resolve a circuit split regarding whether a defendant who raises a duress affirmative defense is precluded as a matter of law from receiving an acceptance of responsibility adjustment and to clarify the law raised by this important Sixth Amendment issue. The Sixth Amendment is set forth in as Appendix C.

### **STATEMENT OF THE CASE**

On January 13, 2016, Pineda-Orozco was named in two counts of a four-count indictment filed in the Del Rio Division of the Western District of Texas. (ROA. 18 *et. seq.*). Count One charged Pineda-Orozco with Conspiracy to Possess With Intent to Distribute Methamphetamine, in violation fo 21 U.S.C. § 841(a)(1) & (b)(1)(A) & 846, occurring on or about December 18, 2015. (ROA. 18 ). Count Three charged Pineda-Orozco with Conspiracy to Import Methamphetamine, in violation of 21 U.S.C. § §952(a),960(a)(1) & (b)(1) and 963, occurring on or about December 18, 2015. (ROA. 19 ). On January 19, 2017, Pineda-Orozco underwent a jury trial which concluded on January 20, 2017.

*See* (ROA. 188 *et. seq.*). The jury found Pineda-Orozco guilty of Counts One and Three. (ROA. 155 ).

On April 3, 2017, the United States Probation Office prepared a presentence report, which was disclosed to both the Government and Defense on April 20, 2017 (“PSR”). *See* (ROA. 155 ). Thereafter Pineda-Orozco filed three objections to the PSR. Defendant objected to page 13, paragraph 58, of the PSR wherein it states that the total offense level is 43 and the guideline imprisonment range is life. (ROA. 747). Defendant asserted that this calculation contradicted the PSR on page 7, paragraph 28, which stated that the total offense] level is level 42. (ROA.747). Therefore, this would put Pineda-Orasco's guideline range of Criminal History Category IV, Level 42, with a range of punishment from 360 months to life. Pineda-Orozco further objected to page 6, paragraph 16, and page 7, paragraph 27, of the PSR wherein the Defendant is being denied any reduction for acceptance of responsibility under USSG§ 3E1.1(a) of the USSG. (ROA. 747). Defendant further objected to page 7, paragraph 23, of the PSR wherein 2 levels were added against the Defendant for being a leader, manager, or organizer under §3B1.1 (c) of the USSG. (ROA. 748).

The Government filed objections contending that Defendant should be assessed two additional special offense characteristic points pursuant to USSG

§2D1.1(b)(5) in this matter, which was not included in the initial presentence report. (ROA. 460-461). The Government contended that Defendant's total offense level for purposes of the presentence report should be 44, criminal history category IV, with an advisory range of imprisonment of Life. (ROA. 460-461).

Both Pineda-Orozco and the Government sought departures. (ROA. 460-461, 462). Defendant requested that the trial court grant a downward depart from the calculated guideline range of punishment under USSG§ 4A1.3(b) asserting that his criminal history substantially over represents the seriousness of his criminal history and the likelihood that he will commit other crimes. (ROA. 451). The Government sought an upward departure and take into account additional aggravating factors pursuant to U.S.S.G. §2D1.1, note 27(B). (ROA. 461-462).

On September 25, 2017, a sentencing hearing was held before Judge Alia Moses. *See* (ROA. 438 *et. seq.*). Pineda-Orozco was sentenced to 600 months on each count to run concurrent with credit for time served since December 18, 2015, 5 years of supervised release to run concurrent on each count; Fine waived; \$100 Special Assessment as to count 1 and 3 and denial of Federal Benefits for 20 years. (ROA. 173). The Judgement was signed by Judge Alia Moses on October

13 2017. (ROA. 172). Prior to this date, on October 2, 2017 a Notice of Appeal from the sentence was filed on Pineda-Orozco's behalf. (ROA. 165).

On appeal Pineda-Orasco asserted the trial court's duress instruction was insufficient and that the instructional error was prejudicial. Pineda-Orasco further asserted that the trial court improperly declined to award him a reduction for acceptance of responsibility under USSG § 3E.1, improperly imposed an aggravating role adjustment under USSG § 3B1.1(c) and improperly imposed a two-level adjustment for reckless endangerment during flight under USSG § 3C1.2.

A panel of the Fifth Circuit rejected his arguments and affirmed his conviction in *United States v. Adrian Pineda-Orozco*, No. 17-50867 (5th Cir. October 11, 2018). The panel without deciding whether the phrasing of the instruction was clear or obvious error concluded Pineda-Orasco had not shown an effect on his substantial rights: “in the light of the jury’s rejection of his testimony that he was personally threatened, he has not shown a reasonable probability a broader instruction encompassing the similar-claimed threats against his family would have resulted in a different verdict.”



Regarding Pineda-Orasco's sentencing challenges the Fifth Circuit found a denial of an offense-level reduction for acceptance of responsibility pursuant to Guideline § 3E1.1(a) was “not with foundation” because of Pineda’s reckless flight from arrest and his trial testimony denying knowledge that methamphetamine was being transported.

The Fifth Circuit found that the application of the two-level Guideline § 3B1.1(c) offense-level adjustment (leader or organizer of criminal activity enhancement) was plausible concluding Pineda-Orasco supervised the driver before, and during, the smuggling trips.

The Fifth Circuit also held that the application of the two-level Guideline § 3C1.2 offense-level adjustment (reckless endangerment) was plausible in the light of testimony that Pineda narrowly avoided hitting law-enforcement officers while fleeing during a high-speed chase.

## **REASONS THE COURT SHOULD GRANT REVIEW**

- I. PERMITTING PINEDA-ORASCO'S CONVICTION TO STAND WOULD RESULT IN A MISCARRIAGE OF JUSTICE AS THE DURESS JURY INSTRUCTION GIVEN IGNORED LONGSTANDING PRESENCE OF THE THE FAMILY MEMBER ELEMENT OF THE DURESS DEFENSE IN THE FIFTH CIRCUIT AND WAS CLEAR ERROR.**

A jury instruction must: (1) correctly state the law, (2) clearly instruct the jurors, and be factually supportable. *United States v. Phea*, 755 F.3d 255, 266 (5th Cir. 2014). “[S]pecific jury instructions are to be judged not in isolation, ‘but must be considered in the context of the instructions as a whole and the trial record.’” *United States v. Phea*, 755 F.3d at 266 (quoting *United States v. Simkanin*, 420 F.3d 397, 406 (5th Cir. 2005)). To raise an issue of duress for consideration by the jury, a defendant must present proof of the following four elements: (1) that the defendant or a member of her family "was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious body injury"; (2) that she "had not recklessly or negligently placed [herself] in a situation in which it was probable that [s]he would be forced to choose the criminal conduct"; (3) that she "had no reasonable legal alternative to violating the law," that is, no chance "to refuse to do the criminal act and . . . to avoid the threatened harm"; and (4) that there was "a direct causal relationship . . . between the criminal action taken and the avoidance of the threatened harm." *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998) (internal quotation marks, modifications, and citations omitted); *United States v. Liu*, 960 F.2d 449, 454 (5th Cir. 1992) (noting that the defense extends to threats involving family members). *United States v. De La Cruz*, No. 12-50113, p.2 (5th Cir., 2013). Error is plain when it is "clear

and obvious." *See United States v. Burt*, 143 F.3d 1215, 1218-19 (9th Cir. 1998) (reversing conviction for clear error on basis of erroneous entrapment instruction) *United States v. Fuchs*, 218 F.3d 957 (9th Cir., 2000). Permitting Pineda-Orasco's convictions to stand would result in a miscarriage of justice. This is particularly so given the longstanding presence of the family member element of the duress defense in the Fifth circuit and other circuits. *See United States v. Olano*, 507 U.S. 725, 736 (1993).<sup>1</sup>

## **II. DEFENDANT'S DURESS AFFIRMATIVE DEFENSE WAS IMPROPERLY USED TO DENY AN AWARD OF REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY UNDER USSG §3E1.1.**

“When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to [the defense of

---

<sup>1</sup>The federal case law has repeatedly extended the duress defense to threats against third parties. *See, e.g., United States v. Liu*, 960 F.2d at 454 ("It is clear that the jury should be informed that the [duress] defense is available if the defendant proves that he, or a member of his family, was under a present, imminent, or impending threat of death or serious bodily injury."); *United States v. Santos*, 932 F.2d 244, 251-53 (3d Cir.1991) (stating that, "[i]f [the defendant] had made [a] specific objection[...], it is reasonable to assume that the district court would have ... instructed the jury that [the defendant] could utilize the alleged threats to her children to establish duress" and further noting that "the district court gave [the defendant] wide latitude to introduce evidence concerning her fears about threats ... against her children"); *United States v. Bakhtiari*, 913 F.2d 1053, 1057 (2d Cir.1990) ("[W]e believe ... that a claim that a defendant's family has been threatened might help establish the defense of duress or coercion."); *United States v. Lopez*, 885 F.2d 1429, 1434-36, 1438-39 (9th Cir.1989) (assuming that the duress defense applies to the defense of a girlfriend), *overruled on other grounds by Schmuck v. United States*, 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed2d 734 (1989); *United States v. Contento-Pachon* 723 F.2d 691, 693-94 (9th Cir.1984)

duress].” *Dixon v. United States*, 548 U.S. 1,19 (2006) (Alito, J., concurring); *see also Dixon v. United States*, 548 U.S. at 12 (majority opinion). But in *United States Of America v. Benitez-Reynoso*, No. 16-51425, p.12 (5th Cir., 2018) a Fifth Circuit panel held “a defendant who goes to trial to preserve an issue unrelated to factual guilt is not entitled to the adjustment if the defendant also disputes factual guilt, *see United States v. Rudzavice*, 586 F.3d 310, 316-17 (5th Cir. 2009), *or tries to prove an affirmative defense, see United States v. Spires*, 79 F.3d 464, 467 (5th Cir. 1996).” (Emphasis added). This interpretation of *United States v. Spires*, respectfully is simply wrong and conflicts with the law in other circuits and a defendant's Sixth Amendment fundamental right to trial.

USSG §3E1.1 of the guidelines directs the sentencing court to reduce a defendant's offense level if he “clearly demonstrates acceptance of responsibility for his offense[.]” USSG § 3E1.1(a). The adjustment “is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt.” USSG § 3E1.1, comment. (n.2). Nevertheless in “rare situations,” a defendant convicted at trial may demonstrate acceptance of responsibility, “such as where he goes to trial to assert and preserve issues that do not relate to

factual guilt.” Application Note 2 of Section 3E1.1 of the U.S.S.G., states that conviction by trial does not automatically preclude a defendant from consideration of a reduction under this section. This case does not fall within the advisory prohibition on awarding acceptance of responsibility since Pineda-Orasco did not “put the government to its burden of proof at trial by denying the essential factual elements of guilt . . .”. U.S.S.G. § 3E1.1, cmt. 2. The defendant was entitled to adjustment because he asserted an duress affirmative defense at trial, in support of which he presented a story that was not “....very different from the one the government offered,” *See United States v. Spires*, 79 F.3d at 467 (defendant not entitled to acceptance reduction where he raised a duress defense that required proof of additional facts, the additional facts were disputed at trial, and defendant’s version of the facts was rejected by the jury).

Pineda-Orozco never denied being involved in this conspiracy. (ROA. 395). He simply asserted that he participated in the conspiracy out an extreme fear of threats of serious injury or bodily harm, and possibly death, particularly immediate threats against his family. (ROA. 427). Pineda-Orozco admitted the operative facts of the charge from the beginning in a post-arrest statement at the time of his arrest without

invoking his right to an attorney wherein he readily admitted to having committed the offense on the two other occasions that he was being held accountable for under the relevant conduct provisions of the U.S.S.G., in addition to the time in which he was caught. (ROA. 679). Pineda-Orozco rightfully sought to preserve his defense as permitted under the Guidelines to challenge to the applicability of a statute to his conduct). *United States v. Fells*, 78 F.3d 168 (5th Cir.1996) (defendant challenged legality of conviction in improper venue). The categorical denial of a request to consider a reduction in the context of a duress affirmative defense impermissibly penalizes Pineda-Orozco for asserting his constitutional right to trial. *See United States v. Broussard*, 987 F.2d 215 (5th Cir.1993); *United States v. Fleener*, 900 F.2d 914, 917-918 (6th Cir.1990) (assertion of entrapment offense at trial did not preclude application of reduction for acceptance of responsibility) and *United States v. Barris*, 46 F.3d 33, 35-36 (8th Cir.1995) (assertion of insanity defense at trial not an automatic bar to reduction for acceptance of responsibility). Pineda-Orozco duress affirmative was misconstrued as a factual challenge rather than as a permissible challenge to the legal significance of the admitted conduct, *see United States v. Patino-Cardenas*, 85 F.3d 1133, 1136 (5th Cir. 1996); *United States v. Fells*, 78 F.3d at 171-72. Importantly "the affirmative defense of duress does not dispute any of the .

. . . essential elements of the crime charged." *United States v. Gamboa-Cardenas*, 508 F.3d 491, 505 (9th Cir. 2007).

The protection of the constitutional right to trial is of such importance that a defendant has been awarded acceptance credit even when he or she testifies in support of an affirmative defense. In *United States v. Ing*, 70 F.3d 553 (9th Cir. 1995), the defendant testified in support of an entrapment defense, and the district court denied credit for acceptance of responsibility because, in the words of the presentence report which the district court adopted, "he denie[d] his criminal intent." *United States v. Ing*, 70 F.3d at 556. The Ninth Circuit held that this was error, because "the defense of entrapment by its very nature entails an admission regarding the defendant's participation in criminal activity." *United States v. Ing*, 70 F.3d at 556. The Ninth Circuit has similarly indicated that there may be acceptance of responsibility when the affirmative defense of duress is raised in a defendant's testimony, see *United States v. Gamboa-Cardenas*, 508 F.3d 491, 505-06 (9th Cir. 2007), though it may need to be established by pre-trial admissions or conduct, see *id.* (discussing and distinguishing *United States v. Martinez-Martinez*, 369 F.3d 1076, 1089-90 (9th Cir. 2004)). Comment note 2 of U.S.S.G. § 3E1.1 specifically states that sentence decreases for acceptance of responsibility are available after trial if such decreases are "based primarily upon pre-trial statements

and conduct" (emphasis added). Pineda-Orozco's pre-trial statement and conduct supported the acceptance of responsibility reduction. Further the constitutional importance of the right to a fair trial should have outweighed the denial of acceptance of responsibility for his pre-arrest dangerous conduct during flight given his duress affirmative defense.

§3E1.1. Acceptance of Responsibility Application Note states:

“Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.” Importantly, Pineda-Orozco was given an enhancement under §3C1.2. §3E1.1 does not provide that §3C1.2 may apply when a defendant has been denied accepted responsibility for his criminal conduct as is the case when §3C1.1 is applicable. Secondly, Pineda-Orasco also was denied acceptance of responsibility related to the same conduct as his enhancement under §3C1.2. §3C1.2. Application Notes:1. provides “Do not apply this enhancement where the offense guideline in Chapter Two, or another adjustment in Chapter Three, results in an equivalent or



greater increase in offense level solely on the basis of the same conduct.”<sup>2</sup> Section 3C1.1, Application Note 5 is also instructive. It provides a non-exhaustive list of the types of conduct that “ordinarily” will not warrant a obstruction enhancement, and included in that list is “avoiding or fleeing from arrest.” *United States v. Cisneros*, 846 F.3d 972, 975 (7<sup>th</sup> Cir., 2017) “we have distinguished between “panicked, instinctive flight,” generally in the immediate aftermath of the crime, and “calculated evasion” constituting a deliberate attempt to frustrate or impede an ongoing criminal investigation.”

In *United States v. Barraza*, 655 F.3d at 384 (5<sup>th</sup> Cir.2011) (quoting *United States v. Hawkins*, 69 F.3d 11, 14 (5<sup>th</sup> Cir.1995) (alteration in original) held that “[d]ouble counting is prohibited only if the particular guidelines at issue specifically forbid it.” This is such a case. “Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law.” *United States v. Bailey*, 444 U.S. 394, 409-410 (1980). Like entrapment Pineda-Orasco's duress defense by its very nature entails an admission regarding the defendant's participation in criminal activity. *See*

---

<sup>2</sup> Assuming *arguendo* that the denial of acceptance for raising the duress defense is decided in the Petitioner's favor plainly the application of the §3C1.2 would be imposed solely for the same conduct.

*United States v. Ing*, 70 F.3d at 556.<sup>3</sup> Pineda-Orasco raising the duress defense should not provide a vehicle for either the denial of acceptance of responsibility or an enhancement under §3C1.2.

---

<sup>3</sup>The question of whether a defendant who raises an entrapment defense is precluded as a matter of law from receiving an acceptance of responsibility adjustment has been a source of circuit conflict. The resolution of the issue of the duress defense and receiving an acceptance of responsibility adjustment will resolve provide clarity to the controversy surrounding affirmative defenses and acceptance of responsibility generally. Compare *United States v. Garcia*, 182 F.3d 1165 (10th Cir.1999) (entrapment defense does not bar defendant from seeking acceptance of responsibility adjustment as matter of law); *Joiner v. United States*, 103 F.3d 961 (11th Cir.1997) (same); *United States v. Ing*, 70 F.3d 553 (9th Cir.1995) (same); *United States v. Fleener*, 900 F.2d 914 (6th Cir.1990) (same) with *United States v. Chevre*, 146 F.3d 622 (8th Cir. 1998) (entrapment defense per se incompatible with acceptance of responsibility adjustment); *United States v. Brace*, 145 F.3d 247 (5th Cir.1998) (en banc) (same); with *United States v. Kirkland*, 104 F.3d 1403 (D.C.Cir.1997) (indicating general incompatibility of entrapment defense with acceptance of responsibility adjustment); *United States v. Demes*, 941 F.2d 220 (3d Cir.1991) (same).

## **CONCLUSION AND PRAYER FOR RELIEF**

In summary, this Petition is important. Given the far reaching consequences of the Fifth Circuit's decision review should be granted.

Respectfully submitted,

/s/ Gerald C. Moton

---

GERALD C. MOTON  
*CJA Counsel of Record*  
*for Defendant-Petitioner*  
11765 West Avenue, PMB 248  
San Antonio, Texas 78216  
*motongerald32@gmail.com*  
Telephone (210) 410-8153  
Fax: (210) 568-4389

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

No. 17-50867  
Summary Calendar

---

United States Court of Appeals  
Fifth Circuit

**FILED**

October 11, 2018

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ADRIAN PINEDA-OROZCO,

Defendant - Appellant

---

Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 2:16-CR-47-3

---

Before BARKSDALE, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:\*

Adrian Pineda-Orozco was convicted by a jury of both conspiracy to possess, with intent to distribute, and conspiracy to import, 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 846, 963, and was sentenced below the Sentencing Guidelines advisory range to concurrent 600-month terms of imprisonment. He contests his convictions and sentence, claiming error for the jury instruction on the affirmative defense of duress for the former

---

\* 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.

No. 17-50867

and for rulings on three offense-level adjustments for the latter. (Pineda also asserts “[t]he evidence was insufficient to sustain his conviction” in the summary-of-the-argument section of his brief. This claim was not briefed beyond this single mention; therefore, it is waived. *E.g., United States v. Thames*, 214 F.3d 608, 611 n.3 (5th Cir. 2000).)

Regarding the challenge on appeal to his convictions, Pineda testified at trial. He contends the related jury instruction on the affirmative defense of duress was erroneous because it did not expressly encompass purported threats to his family members. *See United States v. Willis*, 38 F.3d 170, 179 (5th Cir. 1994). Because Pineda did not raise this issue in district court, review is only for plain error. *E.g., United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Pineda must show a forfeited plain (clear or obvious) error that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he does so, we have the discretion to correct the reversible plain error, but should do so only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings”. *Id.*

Without deciding whether the phrasing of the instruction was clear or obvious error, we conclude Pineda has not shown an effect on his substantial rights: in the light of the jury’s rejection of his testimony that he was personally threatened, he has not shown a reasonable probability a broader instruction encompassing the similar-claimed threats against his family would have resulted in a different verdict. *See id.* at 135; *United States v. McClatchy*, 249 F.3d 348, 357 (5th Cir. 2001).

As for his sentences, Pineda’s challenges to the calculation of his offense level fail under the standards of review applicable to each of the three offense-level adjustments at issue. Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as

No. 17-50867

improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 48–51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

An offense-level reduction for acceptance of responsibility, pursuant to Guideline § 3E1.1(a) was denied because of Pineda’s reckless flight from arrest and his trial testimony denying knowledge that methamphetamine was being transported. That denial was not without foundation. *See United States v. Rudzavice*, 586 F.3d 310, 315 (5th Cir. 2009).

The application of the two-level Guideline § 3B1.1(c) offense-level adjustment (leader or organizer of criminal activity enhancement) was plausible in the light of Pineda’s supervision of the driver before, and during, the smuggling trips. *See, e.g.*, *United States v. Cooper*, 274 F.3d 230, 247 (5th Cir. 2001).

And, the application of the two-level Guideline § 3C1.2 offense-level adjustment (reckless endangerment) was plausible in the light of testimony that Pineda narrowly avoided hitting law-enforcement officers while fleeing during a high-speed chase. *See United States v. Gillyard*, 261 F.3d 506, 510 (5th Cir. 2001).

AFFIRMED.

**United States District Court**  
**Western District of Texas**  
 DEL RIO DIVISION

**FILED**  
**OCT 18 2017**  
 CLERK, U.S. DISTRICT COURT  
 WESTERN DISTRICT OF TEXAS  
 BY *[Signature]* DEPUTY

UNITED STATES OF AMERICA

v.

Case Number: DR-16-CR-00047-AM(3)  
 USM Number: 43220-279

ADRIAN PINEDA-OROZCO

Defendant.

**JUDGMENT IN A CRIMINAL CASE**  
**(For Offenses Committed On or After November 1, 1987)**

The defendant, ADRIAN PINEDA-OROZCO, was represented by Jad Harper.

The defendant was found guilty on Count(s) One and Three by a jury verdict on January 20, 2017. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 846	Conspiracy to Possess More Than 50 Grams of Methamphetamine With Intent to Distribute	12/18/2015	One
21 U.S.C. § 963	Conspiracy to Import Methamphetamine	12/18/2015	Three

As pronounced on September 25, 2017, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall 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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 13th day of October, 2017



ALIA MOSES  
 United States District Judge

Arresting Agency: POE - Eagle Pass

DEFENDANT: ADRIAN PINEDA-OROZCO  
CASE NUMBER: DR-16-CR-00047-AM(3)

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 600 months as to count 1; 600 months as to count 3 Terms to run concurrent with credit for time served since December 18, 2015, pursuant to 18 U.S.C. § 3584(a).

The Court makes the following recommendation to the Bureau of Prisons:

That the defendant serve this sentence at F.C.I., Three Rivers, if possible.

That the defendant be incarcerated in a federal facility as close to Houston, Texas as possible.

The defendant shall remain in custody pending the service of sentence.

### 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

17-50867.173



DEFENDANT: ADRIAN PINEDA-OROZCO  
CASE NUMBER: DR-16-CR-00047-AM(3)

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years on each count, to run concurrent.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

DEFENDANT: ADRIAN PINEDA-OROZCO  
CASE NUMBER: DR-16-CR-00047-AM(3)

### CONDITIONS OF SUPERVISION

#### Mandatory Conditions:

- 1) The defendant shall not commit another federal, state, or local crime during the term of supervision.
- 2) The defendant shall not unlawfully possess a controlled substance.
- 3) The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court) but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
- 4) The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- 5) If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
- 6) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- 7) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.
- 8) The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
- 9) The defendant shall notify the court of any marital change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

#### Standard Conditions:

- 1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the Court or probation officer instructs the defendant to report to a different probation office or within a different time frame. The defendant shall not leave the judicial district without permission of the court or probation officer.
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court.
- 4) The defendant shall answer truthfully the questions asked by the probation officer.
- 5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.
- 7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless excused from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless excused from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

17-50867.175

DEFENDANT: ADRIAN PINEDA-OROZCO  
CASE NUMBER: DR-16-CR-00047-AM(3)

- 8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the Court.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
- 10) The defendant shall 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) The defendant shall 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 the defendant poses a risk to another person (including an organization), the Court may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- 13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
- 14) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pays such penalties in accordance with the Schedule of Payments sheet of the judgment.
- 15) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- 16) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the Court, unless the defendant is in compliance with the payment schedule.
- 17) If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally reenter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office, or as ordered by the Court.

DEFENDANT: ADRIAN PINEDA-OROZCO  
CASE NUMBER: DR-16-CR-00047-AM(3)

**CRIMINAL MONETARY PENALTIES/ SCHEDULE**

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 111 E. Broadway, Suite 100 Del Rio, Texas 78840.

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

	<b><u>Assessment</u></b>	<b><u>Fine</u></b>	<b><u>Restitution</u></b>
TOTAL:	\$200.00	\$ .00	\$ .00

**Special Assessment**

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00. The debt is incurred immediately.

**Fine**

The fine is waived because of the defendant's inability to pay.

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 above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

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

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.

17-50867.177

DEFENDANT: ADRIAN PINEDA-OROZCO  
CASE NUMBER: DR-16-CR-00047-AM(3)

**DENIAL OF FEDERAL BENEFITS**  
**(For Offenses Committed On or After November 18, 1988)**

**FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862a**

IT IS ORDERED that the defendant shall be ineligible for all federal benefits for a period of 20 years ending 9/25/2037

## *Amendment VI*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.