

No. 20-

IN THE
Supreme Court of the United States

MARCELINO HERNANDEZ-MARTINEZ,

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

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”)—which affirmed the significant increase of the base offense level by the District Court with marijuana seizures which Mr. Hernandez-Martinez had no involvement—conflicts with the decisions of this Court on an important matter, and therefore the decision by the Fifth Circuit calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Marcelino Hernandez-Martinez: Petitioner (Defendant-Appellant in the lower Courts)

United States of America: Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, MARCELINO HERNANDEZ-MARTINEZ, requests that this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Mr. Hernandez-Martinez respectfully submits the District Court reversibly erred by including in the base offense level certain marijuana deliveries which were not part of the relevant conduct of Mr. Hernandez-Martinez. Furthermore, the Fifth Circuit did not apply the correct standard of review defined by this Court. Accordingly, the decision by the Fifth Circuit is in conflict with decisions of this Court and a compelling reason is presented in support of discretionary review.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Marcelino Hernandez-Martinez*, No. 19-40581 (5th Cir. September 8, 2020), appears at Appendix A to this Petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, McAllen Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. Hernandez-Martinez. This action is on a criminal prosecution initiated by the Government. Mr. Hernandez-Martinez pleaded guilty to possession of marijuana with intent

to distribute and conspiracy to harbor illegal aliens. A copy of the judgment appears at Appendix B. On appeal, the Fifth Circuit affirmed. A copy of the appellate decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. 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 witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview

Mr. Hernandez-Martinez pleaded guilty to one count of conspiracy to harbor illegal aliens and one count of conspiring to possess 100 kilograms of marijuana. ROA.25-28, ROA.103-44. He was sentenced to 135 months on the drug count and 108 months on the harboring count. ROA.167-73. The two sentences were run concurrently. ROA.173.

The Guilty Plea Hearing

The District Court accepted Mr. Hernandez-Martinez's guilty plea on November 28, 2018. ROA.110. Relevant to this petition was Mr. Hernandez-Martinez's admission that "[o]n [April 30, 2018], border patrol agents were conducting surveillance on a suspected stash house, location on Ba[y]lor Avenue in McAllen, Texas." ROA.131. The agents were given consent to search the house. ROA.132. Mr. Hernandez-Martinez was at the residence when the agents initially arrived to conduct the search, but he fled before he could be apprehended. ROA.132.

The stipulation included the following specifics as to possession of marijuana:

From on or about July 21st, 2017 to on or about May 10, 2018, the Defendant, Marcelino Hernandez-Martinez, did knowingly and intentionally conspire and agree with other persons, known and unknown to the grand jurors, to possess with intent to distribute 100 kilograms or more of marijuana, a Schedule 1 controlled substance.

On about April 7th, 2018, Palmview, Texas police officers responded to the scene of a vehicle accident in Palmview. While at the scene, the officers learned that one of the vehicles involved in the accident was at ruck that contained bundles of marijuana in the cab and bed of the truck. Although some of the bundles were stolen from the scene by other individuals prior to the arrival of the officers, the officers did seize numerous bundles weighing approximately 222 kilograms. The driver of the truck fled on foot and was not apprehended.

The Defendant admits that he was the driver of the truck and fled from the scene after the accident. The Defendant further admits that he conspired and agreed with other persons to possess the marijuana by agreeing to pick it up near Mission, Texas, as well as other nearby cities, and then transport and deliver the controlled substance to other individuals. He further admits that he did so on multiple occasions from on or about July 21st, 2017, to on or about May 10, 2018.

ROA.135-36.

Mr. Hernandez-Martinez agreed to plead guilty. ROA.142-44. After accepting Mr. Hernandez-Martinez's guilty plea, the Court ordered that a Presentence Investigation Report be prepared. ROA.142-44.

Presentence Investigation Report

A United States Probation Officer prepared and filed the Presentence Investigation Report ("PSR" or "the report"). ROA.183-210. Specific portions of the PSR facts are set forth below and discussed when relevant in the arguments section of this petition.

PSR: Offense Conduct

With regard to offense conduct, the PSR states that, on July 21, 2017, Border Patrol agents followed a GMC Yukon which was reported to be possibly involved with narcotics traveling north from the Rio Grande River. ROA.186. As the agents approached the Yukon, the driver engaged in a u-turn and returned to the river, where the two individuals in the vehicle exited the Yukon and absconded into Mexico on a raft. ROA.186. Agents discovered 535.90 pounds of marijuana and Mr. Hernandez-Martinez's fingerprints on the abandoned vehicle. ROA.186. The location of the fingerprint was not provided and these two individuals were not identified.

On August 2, 2017, a similar event took place near the river in Granjeno, Texas. ROA.186-87. Specifically, agents observed individuals drop bundles of marijuana, weighing 255.37 kilograms, and abscond into Mexico. ROA.186-87. A search of a vehicle found near the area produced a cell phone with photographs of Mr. Hernandez-Martinez, "a photograph of the license plate found on the Yukon seized on July 21, 2017, and a photograph of an SUV

containing several bundles of narcotics in the cargo area.” ROA.186-87. Mr. Hernandez-Martinez was never identified by witnesses or fingerprints as being near the truck.

On September 19, 2017, agents followed another vehicle in the border area. ROA.187. The individuals in the vehicle absconded across the river and a search of the vehicle yielded negative findings with respect to any drugs. ROA.187. However, latent fingerprints from the vehicle yielded positive results for Mr. Hernandez-Martinez. ROA.187. Again, it was never established where the fingerprints were located and no witness testified that Mr. Hernandez-Martinez was there that day.

On September 27, 2017, agents returned to the border area and the PSR provides the following took place:

an agent observed a GMC Sierra travel toward the Rio Grande river at a high rate of speed. Upon reaching the river, several individuals walked toward the vehicle and loaded it with bundles. The driver, later identified as **Marcelino Hernandez**, departed the area at a high rate of speed. Shortly thereafter, **Marcelino Hernandez** observed agents travel toward the truck and proceed to return to the river, where he and the passenger absconded to Mexico. The truck was submerged in the river. A search of the vehicle resulted in the discovery of an unknown number of bundles containing approximately 222.5 kilograms of marijuana. On September 28, 2017, agents were deployed to the Rio Grande River to retrieve the GMC Sierra that was submerged in the river. Agents recovered the vehicle and discovered an additional seven bundles of marijuana weighing, with water, approximately 306 kilograms.

ROA.187 (emphasis in original).

On March 18, 2018, another truck was seen at the river on the American side of the border and individuals attempted to load it with “what appeared to be marijuana.” ROA.187. The individuals absconded into Mexico with all but one of the bundles. ROA.187-88. The remaining bundles, which were recovered by agents, were determined to be marijuana

which weighed 10.88 kilograms. ROA.188. Mr. Hernandez-Martinez's fingerprints were found on the vehicle. ROA.188. Again, it was unclear where the fingerprints were found.

On April 7, 2018, officers responded to a motor vehicle accident. ROA.188. The driver of a GMC Sierra fled, although law enforcement officers found bags of marijuana in the vehicle and on the side of the road that weighed 222.62 kilograms. ROA.188. The Probation Officer claimed "it was later determined that Marcelino Hernandez was the driver of the GMC Sierra." ROA.188. It was unclear how this was determined.

On May 10, 2018, according to the PSR, law enforcement officers found Mr. Hernandez-Martinez in a trailer park in Alamo, Texas. ROA.193. He was arrested and transported to a Border Patrol station in Weslaco, Texas. ROA.193. At the station, Mr. Hernandez-Martinez was interviewed by Agent Alkhatib. ROA.193. Before he was questioned, Mr. Hernandez-Martinez waived his constitutional rights. ROA.193.

Later that summer, a telephone conference took place between Agent Alkhatib and Mr. Hernandez-Martinez. ROA.193. The relevant portions of the PSR provide:

On July 25, 2018, a telephone contact was established with Agent Alkhatib who confirmed that **Marcelino Hernandez** admitted he was the driver of the 1995 GMC Sierra truck that struck two vehicles on April 7, 2018.

* * * * *

Agent Alkhatib disclosed that although Luiz Hernandez' fingerprints were discovered in the 2001 GMC Yukon, wherein one bundle of marijuana and a jar containing marijuana were discovered on March 21, 2018, there is not enough evidence to link Luis Hernandez to the marijuana seized on said date.

ROA.194 (emphasis in original).

The PSR summarizes Mr. Hernandez-Martinez's role in the marijuana offense in the following fashion:

Marcelino Hernandez will be held accountable for the following drug seizures: 535.99 kilograms of marijuana seized on July 21, 2017; 255.37 kilograms of marijuana seized on August 2, 2017; 222.5 kilograms of marijuana seized on September 27, 2017; 306 kilograms of marijuana seized on September 28, 2017; 10.88 kilograms of marijuana seized on March 21, 2018; 222.62 kilograms of marijuana seized on April 7, 2018; and 5.35 kilograms of marijuana seized on May 10, 2018, for a total of 1,558.71 kilograms.

ROA.195 (emphasis in original).

PSR: Calculations

On the drug count, the Officer first set the Base Offense Level. ROA.198. The PSR provided:

Base Offense Level: The United States Sentencing Commission Guideline for a violation of 21 U.S.C. § 846, 841(a)(1) and 841(b)(1)(B) is found in U.S.S.G. § 2D1.1(a)(5). This guideline instructs that the base offense level is determined by the type and quantity of illicit controlled substance attributable to the relevant conduct findings for this defendant. As identified in the *Offense Conduct* section above, the defendant is held accountable for 1,558.71 kilograms of marijuana. A laboratory report is unavailable. As such, the net weight is unknown. Given a 5% reduction for wrapping material, the amount becomes 1,480.77 kilograms. Pursuant to U.S.S.G. § 2D1.1(c)(5), at least 1,000 kilograms but less than 3,000 kilograms of marijuana are assigned a base offense level of 30.

ROA.198 (emphasis in original). No further offense level adjustments were made and thus the adjusted Base Offense Level was 30. ROA.198.

The Officer then turned her attention to “multiple count adjustments.” ROA.198. She applied U.S.S.G. § 3D1.4 and determined the “two counts resulted in two units.” ROA.198-99.

This resulted in a 2-level increase to the higher offense level of 33, which brought the Combined Offense Level to 35. ROA.199.

The PSR next establishes the Criminal History points. ROA.199. One point was added for a juvenile possession of less than 2 ounces of marijuana, 2 points for a misdemeanor possession of less than 2 ounces of marijuana and 1 point for a 2016 illegal entry (misdemeanor) entry into the United States. ROA.199-200. Thus, Mr. Hernandez-Martinez's Criminal History score was 4, resulting in a Criminal History Category of III. ROA.201.

Finally, the Probation Officer determined the sentencing options. ROA.203. On the drug count, the Officer believed the punishment range was 210 to 262. ROA.203. On the harboring count, the Guidelines sentence was determined to be 120 months. ROA.203. Specifically, the Officer concluded "the guideline sentence, as to Count 1, becomes the statutorily required maximum term of 120 months imprisonment." ROA.203. The Probation Officer also noted some recommendations if there was acceptance of responsibility. ROA.204. However, due to various determinations at sentencing, those levels became moot.

Objections to the PSR by Mr. Hernandez-Martinez

Mr. Hernandez-Martinez filed objections to the PSR. ROA.179-82. Relevant to this appeal was the objection that the extraneous marijuana seizures should not be part of the relevant conduct. ROA.179. Mr. Hernandez-Martinez further maintained he should be granted acceptance of responsibility. ROA.180. The Probation Officer responded to the objections and her responses were addressed at sentencing.

The Sentencing Hearing

Sentencing was held on June 19, 2019. ROA.145. Mr. Hernandez-Martinez's attorney argued his objections to the PSR. ROA.152. Relevant to this petition, he argued that Mr. Martinez-Martinez could not be held accountable for over 1,000 kilograms of marijuana. ROA.152-53.

The Court then sentenced Mr. Hernandez-Martinez on both counts to which he pleaded guilty. ROA.173. At this stage, Mr. Hernandez-Martinez was at a Level 29 with a Criminal History Category of III. ROA.167. Under the Guidelines, the drug count had a sentencing range of 108 months to 135 months imprisonment. ROA.167, 170. On the harboring count, the range was 108 to 120 months in the custody of the Bureau of Prisons "because its maxed at 10 years." ROA.170-71.

On the drug count, the Court sentenced Mr. Hernandez-Martinez on the high-end of the Guidelines, which was a sentence of 135 months imprisonment. On the harboring count, the Court sentenced Mr. Hernandez-Martinez to a prison term of 108 months. ROA.173. The Court ran the sentences concurrently. ROA.173.

Notice of Appeal

Notice of appeal was timely filed. ROA.80-81. The appeal to the Fifth Circuit followed. (Appendix A).

The Opinion of the Fifth Circuit

On appeal, Mr. Hernandez-Martinez argued, among other things, that it was reversible error to significantly increase the amount of marijuana for which he was held

accountable with extraneous marijuana seizures. The Fifth Circuit disagreed and affirmed the sentence. (Appendix A). Mr. Hernandez-Martinez now respectfully files this Petition for Writ of Certiorari.

**ARGUMENT AMPLIFYING REASONS RELIED
ON FOR ALLOWANCE OF THE WRIT**

I.

Standard of Review

A.

The Fifth Circuit's Opinion

Mr. Hernandez-Martinez argued to the Fifth Circuit that the determination of drug quantity to be used for the base offense level was reversible error. (Opening Brief, pages 20-26). Mr. Hernandez-Martinez also argued that the standard of review was for abuse of discretion because he timely objected to the use of the marijuana seizures from July 21 and August 2. (Opening Brief, pages 20-26). However, the Fifth Circuit disagreed with respect to the standard of review as to the “inclusion of the July 21 and August 2 seizures as relevant conduct because Mr. Hernandez did not object on this specific basis in District Court.” (Appendix A, page 3). Thus, the Fifth Circuit held review on this issue was for plain error. (Appendix A, page 3) (citing *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

B.

The Error was Preserved

At the outset, the Government did not argue review was for plain error. (Government's Brief, page 14). Rather, the Government declared the issue of the drug quantity to set the base offense level was preserved for review because Mr. Hernandez-

Martinez objected before the District Court. (Government's Brief, page 14). The Government took this position even though Mr. Hernandez-Martinez argued the July 21st seizure should not have been included as part of his relevant conduct. (Opening Brief, pages 23-25). Therefore, this should be observed as persuasive authority that Mr. Hernandez-Martinez did preserve error as to the issue of whether the July 21st and August 2 seizures were part of his relevant conduct.

This Court's jurisprudence further establishes that the error was preserved. In *Holguin v. United States*, 140 S. Ct. 762, 766 (2020), it was explained that, "[b]y 'informing the court' of the 'action' he 'wishes the court to take,' Fed. Rule Crim. Proc. 51(b), a party ordinarily brings to the court's attention to a contrary decision." The rules do not "require an objecting party to use any particular language or even to wait until the court issues its ruling." *Id.* Thus, "the question is simply whether the claimed error was 'brought to the court's attention.'" *Id.* (citing FED. R. CRIM. P. 52(b)).

Mr. Hernandez-Martinez objected to Paragraph 54 of the PSR because "the total amount is overrepresented." ROA.180. Paragraph 54 provided: "as identified in the Offense Conduct section above, the defendant is held accountable for 1,558.71 kilograms of marijuana." ROA.180. The offense conduct included descriptions of the marijuana that was seized on July 21, 2017, and August 2, 2017. ROA.186-87. In response to the objections, the Probation Officer stated:

The investigation revealed that the defendant transported 535.99 kilograms of marijuana seized on July 21, 2017; 255.37 kilograms of marijuana on August 2, 2017; 222.5 kilograms of marijuana on September 27, 2017; 306 kilograms of marijuana on September 28, 2017; 10.88 kilograms of marijuana

on March 21, 2018; 222.62 kilograms of marijuana on April 7, 2018; and 5.35 kilograms of marijuana on May 10, 2018, for a total of 1,558.71 kilograms. A laboratory report is unavailable. As such, the weight is unknown. Given a 5% reduction for wrapping material, the amount becomes 1,480.77 kilograms which merits a base offense level of 30, pursuant to U.S.S.G. § 2D1.1(c)(5).

ROA.212 (emphasis added). At the sentencing hearing, Mr. Hernandez-Martinez's attorney argued:

MR. ESQUIVEL: These seizures of these drugs were on five different, six different occasions, Judge. The first seizure occurred 7/21/17 for 535 kilos. The only thing linking my client to that was, in our opinion, latent prints, Judge. He was nowhere present. He did plead to over 100 kilos on Count 6, Judge.

And on the second seizure 8/2/17, again, 255 kilos. Individuals were carrying bundles. They were left in the vehicle and they fled. My client was nowhere around.

ROA.159.

Therefore, the issue of adding the two seizures of marijuana from July 21 and August 2 to the relevant conduct was preserved for review. As explained in *Holguin*, 140 S. Ct. At 766, when a issue is brought to the Court's attention, it is preserved for review. Indeed, Mr. Hernandez-Martinez's lawyer was far more particular in this case than the defendant in *Holguin* with regard to putting the District Court on full notice of these specific objections. ROA.159. Therefore, Mr. Hernandez-Martinez respectfully requests that this Court grant this petition and allow this case to further review.

II.
The Amount of Marijuana

A.
Legal Background

The base offense level for drug trafficking offenses is governed by § 2D1.1 of the United States Sentencing Guidelines (“the guidelines”). The determined quantity of drugs is the key. “The quantity of drugs include both drugs with which the defendant was directly involved and drugs that are attributed to the defendant as part of his relevant conduct in a conspiracy.” *United States v. Arango-Contreras*, 325 F. App’x 332, 336 (5th Cir. 2009) (citing U.S.S.G. § 1B1.3(a)(1)(B)). “Relevant conduct” includes “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” *United States v. Bryant*, 991 F.2d 171, 177 (5th Cir. 1993). This conduct “cannot include conduct occurring before a defendant joins a conspiracy.” *United States v. Carreon*, 11 F.3d 1225, 1235-36 (5th Cir. 1994).

However, relevant conduct is not necessarily applicable to *all* actions of co-conspirators. “A sentencing court cannot assume that all acts of each participant in a jointly undertaken criminal activity were reasonably foreseeable to all participants.” *United States v. Scurlock*, 52 F.3d 531, 540 (5th Cir. 1995). Importantly, “reasonable foreseeability does not follow automatically from proof that the defendant was a member of the conspiracy.” *United States v. Puig-Infante*, 19 F.3d 929, 942 (5th Cir. 1994).

Indeed, the Fifth Circuit has explained how “the relevant conduct inquiry” should be made:

When calculating a defendant's base offense level in a drug case, the district court may consider a defendant's relevant conduct. *United States v. Culverhouse*, 507 F.3d 888, 895 (5th Cir. 2007). Relevant conduct is defined as "all acts and omissions" that were either (1) part of a "common scheme or plan" or (2) part of the "same course of conduct" as the offense of conviction. U.S.S.G. § 1B1.3(a)(2). Factual findings regarding relevant conduct are reviewed for clear error. *United States v. Rhine*, 583 F.3d 878, 885 (5th Cir. 2009). These findings are not clearly erroneous as long as they are "plausible in light of the record as a whole." *Id.* We examine each factor.

United States v. Ortiz, 613 F.3d 550, 556-57 (5th Cir. 2010). On the "common scheme or plan" theory, the Fifth Circuit explained:

An unadjudicated offense may be part of a "common scheme or plan" if it is "substantially connected to [the offense of conviction] by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." *Id.* at 885 (quoting U.S.S.G. § 1B1.3 cmt. n.9(A)) (alterations in original). We broadly define what constitutes a "common scheme or plan" in a drug distribution case. *Id.* However, the analysis cannot be too broad, otherwise "almost any uncharged criminal activity can be painted as similar in at least one respect to the charged criminal conduct." *Id.* at 889 (quoting *United States v. Mullins*, 971 F.2d 1138, 1145 (4th Cir. 1992)).

Id. at 557. On this inquiry, the Court further explained "we have vacated a sentence where the only factor indicting a common scheme or plan was that the two offenses shared the goal of importing drugs into the United States. *Id.* (citing *United States v. Wall*, 180 F.3d 641, 645 (5th Cir. 1999)).

With respect to the issue of the "same course of conduct," the Fifth Circuit issued the following clarity on the guidelines:

An unadjudicated offense that is not part of a common scheme or plan with the offense of conviction may still be considered relevant conduct if the offenses are part of the "same course of conduct." U.S.S.G. 1B1.3 cmt. 9(B). Unadjudicated offenses can be considered part of the same course of conduct "if they are sufficiently connected or related to [the offense of conviction] as

to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.” *Id.*

The guidelines identify factors that help in this determination:

[1] the degree of similarity of the offenses, [2] the regularity (repetitions) of the offense, and [3] the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. *Id.* Two offenses may be sufficiently similar to be part of the same course of conduct if “there are distinctive similarities between the offense of conviction and the remote conduct rather than isolated, unrelated events that happen only to be similar in kind. *Wall*, 180 F.3d at 646 (quoting *United States v. Maxwell*, 34 F.3d 1006, 1011 (11th Cir. 1994)).

Id. at 557-58.

B.

Mr. Hernandez-Martinez’s Argument to the Fifth Circuit

As noted above, the first factor to be addressed is “common scheme or plan.” The crucial incident for the Government to include in the scheme or plan is the oldest incident—the 535.99 kilo incident from July 21, 2017—where, as pointed out to the District Court, Mr. Hernandez-Martinez was not present. This incident is important for the Guidelines issue because if it is not included in the relevant conduct, Mr. Hernandez-Martinez cannot be accountable for over 1,000 kilograms of marijuana. Hence, the relevant conduct would include less than 1,000 kilos, the objection would be on point, and remand for resentencing would be in order.

Because it is undisputed Mr. Hernandez-Martinez was not there, the Government attempts to use evidence that shows Mr. Hernandez-Martinez might have been involved with this incident. It relies on a fingerprint belonging to Mr. Hernandez-Martinez on the vehicle involved in the July 21 incident. However, the fingerprint does not establish that Mr.

Hernandez-Martinez was involved in the transaction. It only shows that Mr. Hernandez-Martinez once touched the vehicle. Furthermore, because Mr. Hernandez-Martinez pleaded guilty to possession of a large amount of marijuana, it would not be surprising that he touched someone else's vehicle who was in the business of transporting marijuana. The fingerprint is of even less value considering that the Court did not know the area of the truck where that print was found. The print is of even less value considering there were no prints on the bags or bundles of marijuana. The relevant value of the print is further discounted when it is considered that law enforcement used numerous technical tools to watch these incidents and it could only be determined Mr. Hernandez-Martinez was not present. In this regard, any allegation that Mr. Hernandez-Martinez participated in this transaction is mere speculation.

It should be noted the PSR makes reference to an anonymous cellular telephone found at a separate incident that had a picture of Mr. Hernandez-Martinez and a separate photograph of the license plate found on the vehicle seized on July 21, 2017. Respectfully, this evidence is repetitious to the fingerprint because it shows only Mr. Hernandez-Martinez was "in touch" with the vehicle. This evidence does not show when he was near the vehicle or even more substantially that he was near the vehicle at the time in question or that had any involvement with the use of the vehicle to transport marijuana. Accordingly, the Government has failed to show Mr. Hernandez-Martinez was involved with this possession and delivery of marijuana and thus it is not part of a common scheme or plan in this conspiracy.

This evidence also establishes this offense was not part of the conspiracy in this case. As the above review of the evidence establishes, there are no “distinctive similarities” in this transaction to attach this incident to Mr. Hernandez-Martinez. Just as in *Ortiz*, 613 F.3d at 557-58, there is no evidence there were common accomplices, suppliers or buyers. The only common element with this delivery is that it took place on the border and hence it is irrelevant, just as in *Ortiz*, 613 F.3d at 558, because it was only “similar in kind.” All of this is bolstered by the fact that it is undisputed Mr. Hernandez-Martinez was not even present at this incident.

Finally, the clear impact of the circumstances in this case are not probative on the issue of whether this was part of Mr. Hernandez-Martinez’ relevant conduct. In this regard, the Government had every opportunity to fully develop the record when Mr. Hernandez-Martinez fully debriefed in this case.

In sum, the Government had a fingerprint that shows the Court cannot guess when Mr. Hernandez-Martinez touched some portion of this truck. The photographs on the cellular telephone only shows that someone—whose involvement in this offense is unknown—took Mr. Hernandez-Martinez’ picture and a picture of the license plate. In other words, all this evidence shows is that Mr. Hernandez-Martinez was previously in the proximity of the vehicle used at the July transaction. Furthermore, Mr. Hernandez-Martinez cannot be connected to this transaction due to the fact he fully debriefed and the Government failed to establish his involvement in this incident. Therefore, Mr. Hernandez-Martinez respectfully submits that this petition should be granted.

C.
The Fifth Circuit's Opinion

While the Fifth Circuit's opinion is flawed because the incorrect standard of review was applied, some of the particulars should be addressed. The Fifth Circuit focused on the fact that the plea included the transporting of marijuana from July 21, 2017, to May 10, 2018. (Appendix A, page 2). However, the observation is irrelevant because the plea agreement made no specific mention of the marijuana which was seized on July 21 or August 2.

Furthermore, the Court held the fingerprints and the cell phone picture were sufficient links to those seizures. (Appendix A, page 2). Again, there was no specific information about the location of the fingerprint or how a "photograph" could link Mr. Hernandez-Martinez to the trafficking of marijuana on July 21st when it was not proven that he was even there when the marijuana was seized. Thus, this Court should grant this petition so this matter may proceed to further review.

CONCLUSION

Mr. Hernandez-Martinez therefore respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the District Court denying Mr. Hernandez-Martinez's objection to the increase in the base offense level, conflicts with the decisions of this Court. Therefore the decision by the Fifth Circuit calls for an exercise of this Court's supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, MARCELINO HERNANDEZ-MARTINEZ, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari.

Respectfully Submitted,

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