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APPENDIX A**NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT****FILED**

AUG 22 2022

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 21-50140

Plaintiff-Appellee,

D.C. No.  
3:20-cr-02510-LAB-1

v.

JOSE ALFREDO SOLIS,

MEMORANDUM\*

Defendant-Appellant.

UNITED STATES OF AMERICA,

No. 21-50142

Plaintiff-Appellee,

D.C. No.  
3:17-cr-03121-LAB-1

v.

JOSE ALFREDO SOLIS,

Defendant-Appellant.

Appeal from the United States District Court  
for the Southern District of California  
Larry A. Burns, District Judge, Presiding

Argued and Submitted August 1, 2022  
Pasadena, California

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: SILER, \*\* CALLAHAN, and H. THOMAS, Circuit Judges.  
Dissent by Judge H. THOMAS.

Jose Alfredo Solis appeals from the district court’s imposition of an 84-month sentence he received after pleading guilty to importing methamphetamine in violation of 21 U.S.C. §§ 952 and 960.<sup>1</sup> We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Solis first argues that the district court erred in denying his request for a two-level minor role reduction under Section 3B1.2(b) of the United States Sentencing Guidelines. “[W]e review the district court’s identification of the correct legal standard *de novo* and the district court’s factual findings for clear error.” *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). “[A]s a general rule, a district court’s application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion.”

*Id.*

Section 3B1.2(b) provides for a two-level reduction if the defendant “was a minor participant in any criminal activity.” U.S.S.G. § 3B1.2(b). To be eligible for this adjustment, the defendant must establish that he is “substantially less

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\*\* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

<sup>1</sup> In Case No. 21-50142, Solis also appealed the revocation of his supervised release. However, Solis expressly waived this argument in his consolidated opening brief.

culpable than the average participant in the criminal activity.” *Id.* at cmt. 3(A). As we recently held, in assessing whether the defendant has met this burden, the district court must engage in a three-step analysis:

First, the court must identify all of the individuals for whom there is sufficient evidence of their existence and participation in the overall scheme. Second, the court must calculate a rough average level of culpability for these individuals, taking into consideration the five factors in comment 3(C) to the Mitigating Role Guideline. Third, the court must compare the defendant’s culpability to that average. If the defendant is substantially less culpable than that average and meets the other criteria, he should be granted a mitigating role adjustment.

*United States v. Dominguez-Caicedo*, 40 F.4th 938, 2022 WL 2799169, at \*17 (9th Cir. 2022) (internal quotation marks and citations omitted).

We agree with Solis that the district court erred in articulating and applying these standards. As an initial matter, while the district court identified two other individuals involved in the criminal scheme, it disregarded the organizer of the scheme as a valid comparator because the organizer was “not an average participant,” and the intended recipient of the drugs because Solis had failed to provide sufficient information about that person. This was error because “the proper comparison is to the average of *all* of the individuals who participated in [the] offense, including those that the district court believed were leaders or organizers or who were otherwise highly culpable.” *Id.* at \*18; *see also id.* at \*17 (rejecting approach comparing “the defendant’s culpability to only the *median* participants’ actual level of culpability”).

The district court also erred in identifying the legal standards applicable to three of the non-exhaustive factors set forth in Comment 3(C) to U.S.S.G. § 3B1.2. The first of these factors calls for a court to consider “the degree to which the defendant understood the scope and structure of the criminal activity.” U.S.S.G. § 3B1.2 cmt. 3(C)(i). We have held that this factor requires the court to assess the defendant’s knowledge of “the scope and structure of the criminal enterprise in which he was involved.” *United States v. Diaz*, 884 F.3d 911, 917 (9th Cir. 2018). However, the district court here focused on Solis’s knowledge of the importation crime at issue, stating that it “cannot be the standard” that the court was required to assess Solis’s knowledge of the criminal enterprise itself. This statement is inconsistent with our decision in *Diaz*.

The second factor requires the district court to assess “the degree to which the defendant participated in planning or organizing the criminal activity.” U.S.S.G. § 3B1.2 cmt. 3(C)(ii). The district court held this factor weighed against granting Solis an adjustment because Solis “was part of the plan,” though it “didn’t originate with him” and “[h]e was a cog.” The district court’s apparent view that being a “part of the plan” is the equivalent to participating in the planning of the crime misconstrues the text of Comment 3(C)(ii).

Finally, the fifth factor identified in Comment 3(C) is “the degree to which the defendant stood to benefit from the criminal activity.” U.S.S.G. § 3B1.2 cmt.

3(C)(v). In applying this factor, courts are required to evaluate not only the amount of payment, but whether the payment was set at a fixed sum or if the defendant had a “ownership interest or other stake in the outcome of the trafficking operation.” *Diaz*, 884 F.3d at 917; *see also* U.S.S.G. § 3B1.2 cmt. 3(C) (“[A] defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.”). The district court erred by failing to consider whether Solis had any proprietary interest in the criminal activity at issue here.

2. However, we agree with the government that the district court’s error in articulating and applying these standards was harmless. A Guidelines calculation error can be harmless in several circumstances, including where “the district court: (1) acknowledges that the correct Guidelines range is in dispute and performs his sentencing analysis twice, beginning with both the correct and incorrect range; [and] (2) chooses a within-Guidelines sentence that falls within both the incorrect and the correct Guidelines range and explains the chosen sentence adequately.” *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 n.5 (9th Cir. 2011); *see also United States v. Mendoza*, 121 F.3d 510, 513–14 (9th Cir. 1997). “To establish harmlessness, the Government must show that it is more probable than not that the error did not affect the sentence.” *Dominguez-Caicedo*, 2022 WL 2799169, at \*19 (internal quotation marks and citation omitted).

Without the minor role reduction, the district court calculated that the Guidelines range for Solis's offense was 188–235 months' imprisonment. After considering the factors set forth in 18 U.S.C. § 3553(a), the district court departed downward from this range and instead imposed a sentence of 84 months' imprisonment. The district judge stated that with the minor role adjustment, the Guidelines range would have been 110–137 months, and that he "wouldn't have gone any lower [than 84 months], even if I had granted a minor role."

Solis contends that any error could not have been harmless because the district court miscalculated what the Guidelines range would have been if the minor role adjustment had been granted. Solis contends the correct Guidelines range would have been 92–115 months, not 110–137 months. Solis also argues that the district court's statement that it would not have imposed the same sentence in any event was conclusory and entitled to less weight because it came near the end of the sentencing hearing. *See Dominguez-Caicedo*, 2022 WL 2799169, at \*20.

We disagree. Even assuming that Solis is right that the alternative Guidelines range was miscalculated,<sup>2</sup> harmless error can still apply when the

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<sup>2</sup> In its briefing, the government initially conceded that the district court incorrectly calculated the alternative Guidelines range. But at argument, the government changed its position and stated that it now believes the district court's calculation was correct. We need not address this dispute because we find the district court's error was harmless even if Solis's proposed range is accurate.

district court chooses a “within-Guidelines sentence that falls within both the incorrect and the correct Guidelines range and explains the chosen sentence adequately.” *Munoz-Camarena*, 631 F.3d at 1030 n.5. Here, the 84-month sentence imposed by the district court was *below* even the “correct” Guidelines range that Solis advocated for.

Further, the district judge explained the reasoning for his sentence in significant detail. For example, the district judge considered the fact that Solis attempted to smuggle a relatively small quantity of drugs, and the fact that he pleaded guilty and promptly resolved the case. But the judge also factored in Solis’s history, which was “bad” and indicated that Solis just “does not learn a lesson.” He noted that this was the third time Solis has tried to import drugs. The court considered Solis’s motivation—to help his girlfriend—but found that “doesn’t get us very far” because the girlfriend herself was working for a drug cartel. The court further justified the sentence by reference to the need for punishment and the need to specifically deter a repeat offender like Solis from continuing to commit these types of crimes. 18 U.S.C. § 3553(a)(2)(A)–(B).

Additionally, the fact that the district court sentenced Solis to a term of imprisonment below even the Guideline range Solis argues should have applied distinguishes this case from *Dominguez-Caicedo*. There, the district court imposed a 180-month sentence. That sentence was below the incorrectly calculated

Guidelines range of 292–365 months, but still well above the alternative, correctly calculated Guidelines range of 97–121 months. 2022 WL 2799169, at \*19–20. By contrast, Solis’s sentence was eight months below the low end of the Guidelines range he now argues should have applied. This, when combined with the court’s reasoned explanation for the sentence, was sufficient to establish harmless error under these specific circumstances.

3. Solis also argues that the district court erred by imposing, without notice, a condition permitting law enforcement officers to conduct suspicionless searches of Solis as part of the terms of his supervised release. Solis contends that, during the district court’s oral pronouncement of the sentence, the district judge indicated that Solis would not be subject to suspicionless searches, and that an unambiguous oral pronouncement of a sentence controls when it conflicts with the written judgment. *United States v. Allen*, 157 F.3d 661, 668 (9th Cir. 1998); *United States v. Jones*, 696 F.3d 932, 938 (9th Cir. 2012). Even if the oral statement was ambiguous, Solis argues that the sentence should still be vacated and remanded because Solis didn’t have adequate notice that the condition would be imposed and thus didn’t have a chance to object. See *United States v. Reyes*, 18 F.4th 1130, 1133 (9th Cir. 2021).

We disagree. At the sentencing hearing, the district judge stated that:

[Solis is] subject to search, that includes his person, his property, his residence, and his vehicle. . . . What this means, Mr. Solis, [is that] if

any cop wants to search you or your property, or your car, or your house, you have to permit it. You can't say no. You're subject to a waiver here. It's forced on you. It's not really a waiver. It's a condition of supervised release, but you have to permit search.

The district judge went on to state that "I'm not going to let that be abused. I'm not going to let anybody arbitrarily, you know, search you or continually search you when there's no good reason."

Read together, the hearing transcript does not support Solis's argument that the district judge unambiguously announced that Solis would not be subject to a suspicionless search condition. While the district judge did not expressly state that searches could be "suspicionless," he clearly indicated that Solis would be required to submit to any search by any peace officer and had no right to "say no." This inability to "say no" to *any* search (without reference to a minimum degree of suspicion), at the very least, strongly implied that Solis would be subject to a suspicionless search condition. Because there was ambiguity in the oral pronouncement of the sentence, the unambiguous written judgment imposing the suspicionless search condition controls. *Fenner v. U.S. Parole Comm'n*, 251 F.3d 782, 787 (9th Cir. 2001).

Nor is remand necessary because Solis lacked notice that a suspicionless search requirement might be imposed. The district judge's statement that he was imposing a condition which required Solis to consent to any search was sufficient to put Solis's counsel on notice that the court was at least "considering" a

suspicionless search requirement. *See Reyes*, 18 F.4th at 1133 (noting that “at no time prior to the imposition of sentence did the district court provide any notice to the parties that it was considering a substantial modification and expansion of the search condition”).

**AFFIRMED.**

FILED

*United States v. Solis*, No. 21-50140+

AUG 22 2022

H. THOMAS, Circuit Judge, dissenting:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

I agree with the majority that the district court erred in interpreting and applying the legal standards that determine eligibility for a minor role reduction under Section 3B1.2(b) of the Sentencing Guidelines. *See United States v. Dominguez-Caicedo*, — F.4th —, No. 19-50268, 2022 WL 2799169, at \*18 (9th Cir. July 18, 2022); *United States v. Diaz*, 884 F.3d 911, 916–18 (9th Cir. 2018). But I cannot agree that the errors were harmless. In light of the multiple mistakes of law committed during the sentencing proceedings, I do not believe it is more likely than not that the errors did not affect Solis’ sentence. I would therefore vacate and remand the sentence to give the district court the opportunity to recalculate the sentence under the correct legal framework. *See Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016) (“When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant’s ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable possibility of a different outcome absent the error.”); *United States v. Munoz-Camarena*, 631 F.3d 1028, 1031 (9th Cir. 2011) (holding that a district court’s statement that it would have imposed the same sentence no matter the correct calculation “cannot, without more, insulate the sentence from remand”).

Because I do not believe Solis had proper notice of the district court’s intent

to impose a suspicionless search condition, I would also vacate and remand the condition to give Solis the opportunity to object. *See United States v. Reyes*, 18 F.4th 1130, 1133 (9th Cir. 2021).

I therefore respectfully dissent from the majority's decision affirming Solis' sentence.

## APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

4 UNITED STATES OF AMERICA, )  
5 Plaintiff, ) No. 20-CR-2510-LAB  
6 v. ) 17-CR-3121-LAB  
7 JOSE ALFREDO SOLIS, ) June 7, 2021  
8 Defendant. ) 10:56 a.m.  
 ) San Diego, California

10 TRANSCRIPT OF SENTENCING AND REVOCATION OF SUPERVISED RELEASE  
11 BEFORE THE HONORABLE LARRY ALAN BURNS  
12 UNITED STATES DISTRICT JUDGE

12 | APPEARANCES:

13 For the Plaintiff: UNITED STATES ATTORNEYS OFFICE  
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16 For the Defendant: FEDERAL DEFENDERS OF SAN DIEGO, INC.  
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25 | Reported by Stenotype, Transcribed by Computer

1 SAN DIEGO, CALIFORNIA, JUNE 7, 2021, 10:55 A.M.

2 \* \* \* \*

3 THE CLERK: Calling number 5 and number 6 on the  
4 calendar, 20-CR-2510 and 17-CR-3121, United States of America  
5 versus Jose Alfredo Solis, on for sentencing and revocation of  
6 supervised release.

7 MR. DAVIS: Good morning, Your Honor. Ben Davis,  
8 Federal Defenders. I'm appearing for Mr. Solis in both cases.

9 THE COURT: Good morning. Mr. Sausedo, you're  
10 representing the United States on this?

11 MR. SAUSEDOD: Good morning again, Your Honor. Yes.

12 THE COURT: All right. Some folks have come in since  
13 I made this announcement initially. Let me make it again.  
14 It's up to you. You don't have to wear a mask here anymore.  
15 If you want to take your mask off, you may. On the other hand,  
16 if you want to keep your mask on, you can do that, too.

17 (Discussion off the record.)

18 THE COURT: Okay. Mr. Solis is present.

19 MR. DAVIS: Yes, Your Honor. He's present in custody.  
20 He speaks English.

21 THE COURT: Good morning, Mr. Solis.

22 MR. DAVIS: Good morning.

23 THE COURT: Mr. Solis is here on two different cases.  
24 The first is denominated as 20-CR-2510, and this involves a new  
25 charge to which he's pled guilty. A more recent charge, I

1 should say, of importing methamphetamine.

2 The second, 17-CR-3121, relates to a prior conviction  
3 from 2017. He was sentenced then, transporting aliens. And  
4 that case involves revocation allegations based on his  
5 violation of law.

6 We'll start with the importing methamphetamine case.  
7 I have read and considered the presentence report, Mr. Davis,  
8 that was filed in this case. I assume you've gone over that  
9 with Mr. Solis?

10 MR. DAVIS: Yes, I have, Your Honor.

11 THE COURT: On behalf of Mr. Solis, you filed a  
12 sentencing memo. And you've analyzed the guidelines, and given  
13 me background I should know. And I've looked at that and  
14 considered it. Your sentencing recommendation is contained  
15 within that memo. The government filed, for its part, a  
16 sentencing summary chart and I have reviewed that.

17 Is there anything, other than the things I've  
18 mentioned, that I should have reviewed in connection with the  
19 sentencing on the new charge?

20 MR. DAVIS: No, Your Honor.

21 THE COURT: All right. I'm happy to hear from you,  
22 Mr. Davis.

23 MR. DAVIS: Thank you, Your Honor.

24 Does the Court want me to begin with the guidelines or  
25 just talk generally about Mr. Solis? I'm happy to do either.

1                   THE COURT: You know, there's a correction that needs  
2 to be made. On the face sheet, I kind of blanched when I saw  
3 this, the face sheet says it's 484 kilos of methamphetamine.

4                   MR. DAVIS: The face sheet being what I wrote or on  
5 the presentence --

6                   THE COURT: No, the presentence report. So that needs  
7 to be corrected to --

8                   MR. DAVIS: Yes, Your Honor, it was 484 grams. Thank  
9 you for catching that. I'm so used to seeing kilograms, I  
10 probably didn't notice it.

11                  THE COURT: Yeah, that's -- I think, if I'm following  
12 this correctly, it produces a guideline range of -- starting  
13 offense level, I should say, of 32. Do you agree with that?

14                  MR. DAVIS: Yes, I do, Your Honor.

15                  THE COURT: Okay. And then you have --

16                  MR. DAVIS: There's two differences -- well, there's  
17 two major differences, Your Honor. First, I've asked the Court  
18 for the minor role adjustment, which I'm happy to argue.

19                  THE COURT: Sure.

20                  MR. DAVIS: And I've also argued that Mr. Solis is not  
21 a career offender.

22                  THE COURT: Okay.

23                  MR. DAVIS: The parties don't come out particularly  
24 different on their sentencing recommendations.

25                  THE COURT: Okay.

1                   MR. DAVIS: But there is that difference.

2                   THE COURT: Let's start with the role determination.

3 It doesn't make as big a difference in this case as it  
4 typically does. What, it's a four-level difference?

5                   MR. DAVIS: Yes, it reduces the base offense level by  
6 two, and then there's the additional two points, so it's a  
7 four-level difference.

8                   THE COURT: Yeah, I'm happy to hear from you. I'm  
9 having a little bit of trouble understanding, because paragraph  
10 6 that goes on to page -- starts on page 3, and goes on to page  
11 4 makes it very clear that the defendant was in the process of  
12 selling drugs. And that he deliberately went down to get these  
13 drugs, strapped them to his body, brought them across, was  
14 going to sell them.

15                  None of that bespeaks somebody who's substantially  
16 less culpable than the average participant, but I'm happy to  
17 hear from you.

18                  MR. DAVIS: Your Honor, that's what he said  
19 post-arrest.

20                  THE COURT: Yeah.

21                  MR. DAVIS: But I think nobody believes that he was  
22 actually going to purchase drugs and sell them. He doesn't  
23 have the financial wherewithal to purchase half a kilo of drugs  
24 and sell them.

25                  When he was interviewed by the presentence officer,

1 and that's on paragraphs 10, 11, and 12, he explained what his  
2 involvement was, which was not that -- he explained that he had  
3 not told the truth when he was arrested because he was nervous  
4 and didn't want to talk about the cartel situation with his  
5 girlfriend.

6 So he explained -- he acknowledged that he had not  
7 told the truth about going to sell the drugs. And as I've  
8 said, I don't -- there's not any -- there's no way that  
9 Mr. Solis was purchasing a half pound of drugs, which would  
10 cost, you know, several thousand dollars and coming to sell  
11 them.

12 He was taking them for somebody. It was -- you know,  
13 that's what he was doing, and it's corroborated by his sister's  
14 comments to the presentence officer.

15 THE COURT: He's been arrested before for bringing  
16 drugs in at the port of entry, correct?

17 MR. DAVIS: At least one of them, I believe, was at  
18 the port of entry. I don't have specific facts about the  
19 other --

20 THE COURT: He's got a long history of involvement  
21 with drugs, including -- including distributing drugs. But the  
22 325.210, it looks like it was prosecuted in Chula Vista. It  
23 was one of those cases that was handed over by the government  
24 to the state. And he pled guilty to importing marijuana. You  
25 know, he got a small sentence, but he was a pedestrian

1 according to the brief write-up.

2 MR. DAVIS: Correct.

3 THE COURT: Trying to smuggle drugs in.

4 MR. DAVIS: That's correct.

5 THE COURT: That's not dispositive, but it does sort  
6 of inform my judgment about the 3B1 factors.

7 MR. DAVIS: I understand. I think, you know, the  
8 Court can certainly look at the prior convictions -- or  
9 conviction where he was coming through as a pedestrian carrying  
10 marijuana as part of the -- I guess for his credibility about  
11 his involvement in this case.

12 But I think what Mr. Solis has explained to the  
13 probation officer -- and he went into some detail, and he  
14 answered the probation officer's questions about it as well,  
15 was, you know, Mr. Solis lives in Tijuana, although he's a U.S.  
16 citizen. And he was living in the United States at the halfway  
17 house, completing his -- you know, on supervised release.

18 And when he returned to Tijuana after that, he  
19 found -- you know, the girlfriend that he'd been living with,  
20 this woman, Marie Cruzcosa, his partner for some time, she was  
21 fairly heavily involved with one of these -- I call it the  
22 cartel. That's sort of a loose term. I mean, I guess I use  
23 that to mean drug dealing gang. I'm not sure, you know, when I  
24 say the cartel, if I'm specifically referring to one of the  
25 major, you know, transnational organizations.

1                   But those gangs, I'm sure the Court is aware, you  
2 know, there's a lot of drug dealing that happens in Tijuana.  
3 That's where a lot of the violence comes from, is the drug --  
4 gangs that are controlling the local market for selling  
5 methamphetamine.

6                   And his girlfriend had been involved with these people  
7 and had been selling, and had accrued a debt for, basically,  
8 what they called rent for the place where she was staying.

9                   THE COURT: He was staying there with her, right?

10                  MR. DAVIS: When he was released, he went there to  
11 stay with her.

12                  THE COURT: Okay.

13                  MR. DAVIS: And they had to leave it. And there was  
14 -- basically, he had to leave the place where they had been  
15 staying. He was trying to get his girlfriend out of that  
16 situation. The TECS records that the government produced  
17 reflect, Your Honor, that he crossed basically every day since  
18 he went out, because he would come to the United States, go  
19 visit his sister, try to work. He went to secondary inspection  
20 every single time, because he's on supervised release.

21                  So he never comes to the border without being sent  
22 through secondary inspection. And what the PSR reflects is  
23 that he was first asked to cross a carload to erase the debt  
24 that his girlfriend had accrued.

25                  He refused, saying, look, if you send me in a car,

1       they're just -- you know, there's no way I'm going to get  
2       through. They're going to immediately get me, because I'm on  
3       supervised release. And then they said, okay, well, you can  
4       start by carrying some in your pocket, a small package. And it  
5       wasn't a very large amount.

6               And he told the officer that he was not -- you know,  
7       it was for compensation, in the sense that he was trying to  
8       erase a debt, so he's not doing it for free, obviously, but  
9       that was the motivation for it.

10              THE COURT: You say he was living in Tijuana, but at a  
11       place different from where his girlfriend was living that  
12       accrued this supposed debt to the cartel?

13              MR. DAVIS: When he came out -- when he came back,  
14       they had to find a new place to live together.

15              THE COURT: Were they living together before, though?  
16       That's my question.

17              MR. DAVIS: Before?

18              THE COURT: At the time of this event, this occurred  
19       July 23rd, was he living with her?

20              MR. DAVIS: I believe so. Yes, he was.

21              THE COURT: And were they living in the place that was  
22       the subject of the money that was owed for past rent?

23              THE DEFENDANT: No, I was living in my own place. She  
24       was living where she was living. And when I got arrested, she  
25       moved to my place to get out of that situation, but these

1 people follow her to my apartment. I was incarcerated at that  
2 time, so I can do nothing about it.

3 THE COURT: But I thought -- wait a minute, because  
4 there's something in the probation report about the cartel  
5 notifying her that because he was arrested, she no longer had  
6 to pay rent at the place that was the subject of the debt  
7 accrual in the first place.

8 MR. DAVIS: I think that's after he was arrested in  
9 this case.

10 THE COURT: Yeah, but he says that after he was  
11 arrested, she moved to his apartment.

12 MR. DAVIS: Is that correct, Mr. Solis?

13 THE DEFENDANT: I was in my own apartment. And she  
14 was living in -- with some of her family. When I got arrested,  
15 I tell her, move to my -- to my apartment, so you can leave  
16 that situation.

17 But while I was incarcerated, these people follow her  
18 and make her do the same work. And when I get out, I tell  
19 them, stop everything, but I was on probation, so I can't go  
20 back there. But in that time, she got beat up very badly  
21 because she tell these people, you know, I don't want to do it  
22 no more.

23 So there's a report, medical report, Mr. Davis has it,  
24 about the -- about the conditions she was beaten. So when I  
25 get out, I moved out of there, and we get our own place.

1                   MR. DAVIS: And I can confirm, Your Honor, on Friday,  
2 I did receive documents that are in Spanish that I wasn't able  
3 to translate in time for this hearing, but they are a police  
4 report that the girlfriend filed with the Tijuana police,  
5 reflecting that she'd been attacked and hospitalized.

6                   THE COURT: It's a small point, but it's a point which  
7 has caused some confusion. I'm talking about paragraph 12 at  
8 the top of page 5, "when Solis's girlfriend told the cartel  
9 that the defendant had been arrested, they no longer required  
10 her to pay rent so she could send Solis money while he was in  
11 custody."

12                  All of that made me think that she's still living in  
13 the same place where the debt was accrued. He's now saying  
14 otherwise, that he told her to move to his apartment once he  
15 got arrested.

16                  MR. DAVIS: I think he may be confusing the time when  
17 he was arrested in this case versus when he was arrested in the  
18 prior case, Your Honor. That's what he was trying to clarify.

19                  THE COURT: You mean the transporting case?

20                  MR. DAVIS: Yes.

21                  THE COURT: Okay. All right.

22                  MR. DAVIS: That's what I think he's trying to clarify  
23 right now.

24                  THE COURT: Like I said, it's a small point. So you  
25 say that the statement that he made to the -- the post-arrest

1 statement was false.

2 MR. DAVIS: Yes.

3 THE COURT: And he did that to cast shade on any  
4 involvement of the drug organization?

5 MR. DAVIS: Yes, I think it's common. I've had  
6 clients before, especially body carriers, who when they're  
7 arrested, they try to take responsibility for every aspect of  
8 what they're carrying.

9 THE COURT: Right.

10 MR. DAVIS: And I think the Court knows that people  
11 don't really cross -- it's not a huge amount, but it's enough  
12 -- it's a large amount. He can't sell half a kilo.

13 THE COURT: Even if I put that aside, though,  
14 Mr. Davis, and accept his statement as true, it still indicates  
15 that, you know, he did this knowingly, with premeditation. He  
16 did it to pay off a debt. And it was -- it was a debt that was  
17 incurred by his girlfriend because of drug dealing.

18 MR. DAVIS: Correct.

19 THE COURT: I mean, so it's not like, you know, an  
20 operation or something like that, where you feel some  
21 compassion, and say, well, I understand there was no way out.  
22 She's drug dealing. And part of her compensation is in kind to  
23 live at this place. And then they say, hey, you owe us more  
24 money, and he steps in.

25 I mean, I just don't see anything that suggests to me

1 that -- you know, aside from crossing drugs, knowing he was  
2 crossing drugs, that he's substantially less culpable than the  
3 other people involved. Obviously, whoever put him up to this  
4 is more culpable than he is, the people that strapped the drugs  
5 on him. But, you know, they're the masters of the offer, too.  
6 They're saying, here, we'll reduce the debt by this amount, put  
7 this on, do this, do the other thing. They're not average  
8 participants.

9           They've got access to the dope. You know, they  
10 control how much the compensation is going to be. And, you  
11 know, I don't -- his girlfriend doesn't seem to be implicated  
12 in this, other than, you know, he's trying to get her out of a  
13 jam.

14           Who else am I to compare him to?

15           MR. DAVIS: Well, Your Honor, I think -- first of all,  
16 the Court referenced, you know, the amount of compassion that  
17 we might have for him, and what his motivations are. And I  
18 don't think that those are the role factors that are listed in  
19 3B1.2.

20           The Court looks to what role did he play. What  
21 knowledge did he have of where the drugs were going, and what  
22 the, you know, larger scheme of the offense was. And I just  
23 think that his statement to the presentence report indicates  
24 that all he knew what he was going to do was cross the drugs,  
25 go to the McDonald's, give them to someone. And he wasn't

1 going to get paid anything. You know, there's obviously  
2 compensation. They're going to waive the debt.

3 THE COURT: Right. In one way or another, though,  
4 Mr. Davis, you and I both know that that's what importers know.  
5 I mean, that's all they know, typically. And not every  
6 importer is a minor participant. This is a stand-alone crime.

7 And the problem I have with the argument is that, you  
8 know, well, did he know the scope and structure presupposes  
9 that he's been versed on the hierarchy of this drug  
10 organization, which, of course, if you practice in this  
11 district for a month, you know that that never happens, that,  
12 in fact, there's a deliberate effort to keep the importers in  
13 the dark, so that they can't tell on people if they get caught.

14 So that cannot be the standard. I mean, to generalize  
15 it, and say, well, of course, in the great scheme of a drug  
16 organization, the importers are at the bottom of the pyramid.  
17 Of course that's true. But they're not pleading to  
18 international drug conspiracy, RICO, or anything like that.  
19 They're pleading to importing.

20 So when it says, you know, did he know the scope and  
21 structure of the criminal activity, he knew he was going to be  
22 smuggling drugs for this organization. He knew he was going to  
23 turn them over to somebody at a prearranged place. He knew how  
24 he was going to try to get through. He brought his bicycle  
25 with him this time, right, as a subterfuge. I think so. I'm

1 just having trouble saying, well, you know, there's something  
2 minor about this importation.

3 MR. DAVIS: I understand the Court's perspective on  
4 minor role, Your Honor. I think I would say my perspective is,  
5 the Court referenced that most couriers in this district are  
6 kept in the dark about these -- you know, the scope and  
7 structure of the offense. And I think that's what that means,  
8 is that the drug organizations keep their roles minor in most  
9 importation offenses. And I think --

10 THE COURT: If that were the case --

11 MR. DAVIS: -- the guideline -- the Commission  
12 recognized that when they changed the minor role requirement  
13 specifically because minor role reductions were not -- being  
14 applied inconsistently and more sparingly than the Commission  
15 originally --

16 THE COURT: You've read that whole commentary, though.  
17 They pointed to the Ninth Circuit as a place that was applying  
18 it correctly prior to that change. So, you know, whatever we  
19 were doing here was correct.

20 One thing is clear from the circuit law on this. Not  
21 everybody that imports drugs is a minor participant. They're  
22 just not. I mean, it's not enough to say, well, all he did was  
23 bring drugs in, knowing that he had drugs on him or in the car.  
24 That's not enough. That just defines the crime.

25 MR. DAVIS: Right. I agree with that, Your Honor.

1                   THE COURT: So there's got to be something more that  
2 sets somebody apart from average participants in this. I've  
3 found it in some cases, but I find it gets -- you know, gets  
4 recommended way more often than it's deserved on the facts.  
5 And when you start to peel the layers back a little bit, you  
6 often find things that cut against it.

7                   MR. DAVIS: Understood, Your Honor. And I'll say  
8 this, that I don't always recommend it in every case.

9                   THE COURT: No, I know you don't. I'm not making an  
10 accusation against you. You have high credibility with me.

11                  MR. DAVIS: But I'm saying that I've had clients who  
12 do know more about the scope and structure, who unload the  
13 drugs places, who, you know, negotiate sales. I've had clients  
14 who are -- you know, their phones reveal that they're talking  
15 about prices, and they're going to the stash houses, and  
16 they're talking -- you know, discussing who -- you know, I'm  
17 going to drop this package off for this guy, and this other  
18 package off at the other stash house.

19                  THE COURT: Does the government ever recommend an  
20 upward adjustment on those cases for organizers or leaders in  
21 the drug enterprise?

22                  MR. DAVIS: No, because I don't think they would be  
23 organizers or leaders. They're just people who have a larger  
24 role, that are more involved in the importing. Someone like  
25 Mr. Solis, I think Mr. Solis's role here was, they gave him a

1 package, they said, go to McDonald's and give it to another  
2 person. He didn't know -- the other person was going to  
3 recognize him. They didn't tell him who it was. They didn't  
4 give him a phone number.

5 We have the phones. The government produced the  
6 phones in discovery. There's no communication with anybody  
7 about crossing anywhere. So I think all of that supports the  
8 idea that what his role to do here was to take a single  
9 package, go over the single most risky point of the whole --  
10 you know, the life of the package going from Tijuana to  
11 wherever its end users are, the most risky moment is right when  
12 you go across the border. So they get the guy who's almost  
13 blind, and can't walk with his knees, and who's -- you know, if  
14 he gets caught, he's going to go to jail, and he doesn't have  
15 anybody to dime on, that's the person they do it to.

16 THE COURT: He was a sitting duck. I mean, I grant  
17 you that. That he had been sent to secondary each and every  
18 time before should have dissuaded them that this was not the  
19 guy that they wanted to try to cross drugs. It was a small  
20 amount, they could probably absorb the loss. But it was still  
21 ill-advised and ill-fated from the beginning.

22 MR. DAVIS: Absolutely, Your Honor. No disagreement  
23 about that from me.

24 THE COURT: Anything else on this issue?

25 MR. DAVIS: No, Your Honor.

1                   THE COURT: Let me resolve this, then. Mr. Sausedo,  
2 anything you want to offer on this?

3                   MR. SAUSEDOD: No, submitted.

4                   THE COURT: So, you know, look, I well know what the  
5 standard is, everyone here does. I have to find by a  
6 preponderance of evidence that the defendant is substantially  
7 less culpable than the average participant.

8                   One of the things I have to do is look at known and  
9 likely participants, including those that are more culpable  
10 than the defendant. But when it comes down to the measuring  
11 stick, he's compared to other average participants in the drug  
12 smuggling enterprise.

13                  I'm to take into consideration the 3B1 factors, but  
14 they're not exclusive. I can consider other factors. And I'm  
15 to look at all of the circumstances. The defendant bears the  
16 burden of proof as the proponent of the adjustment.

17                  Here the degree to which the defendant understood the  
18 scope and structure of the criminal activity, those words are  
19 important to me. The criminal activity in this case is what he  
20 pled guilty to. I mean, there's sort of a consistent theme  
21 that you sentence people for what they pled guilty to. And,  
22 you know, to vary outside that, you've got to have some higher  
23 form of evidence, clear and convincing evidence, this, that,  
24 and the other thing.

25                  But I mention that because it underscores to the point

1 I made earlier. It's very easy to generalize in these  
2 importation cases. And if you do that, then it's also very  
3 easy to reach the conclusion that everybody's a minor  
4 participant that imports crime [as spoken], but that's wrong.  
5 It's counterintuitive.

6 I mean, we wouldn't have a stand alone offense for  
7 importing drugs into the United States, the actus reus of which  
8 is walking across with drugs. The mens rea is knowing there's  
9 drugs in there. If every case was going to be a lesser  
10 included offense of that one, so it doesn't make any sense to  
11 compare him to some offense that he didn't plead guilty to.

12 I understand that the background on these cases is  
13 that they're drug organizations. As you say, they're violent.  
14 They enforce their way with violence. They ensnare a lot of  
15 people. I understand all of that. And that certainly is the  
16 background here.

17 But, again, I'm also of an understanding different  
18 from yours, slightly, perhaps, Mr. Davis, that the importers  
19 invariably don't know any of the details about the hierarchy of  
20 an organization. And my own experience over now, what, 36  
21 years, I think, both as a lawyer and as a judge of this court  
22 has been that there is a deliberate effort to keep the  
23 importers in the dark. They don't tell them things.

24 And the reason is obvious. They don't want somebody  
25 to point the finger, and say, well, here's how it works, and

1 here's the place where the drugs are stored, and here's the guy  
2 that -- here's guy's name, and here's what he looks like who  
3 offered me the money for this.

4 I mean, you know, part of that is just being -- I  
5 think probably super cautious on the part of the drug  
6 organizations. And I say that because there's very little  
7 cooperation between U.S. and Mexico on a day-to-day drug  
8 importation case. The likelihood that U.S. authorities could  
9 pass information on to Tijuana authorities and they'd go arrest  
10 these people is, like, nil.

11 But the criminal activity, to me, relates to what he's  
12 pled guilty to, which is importing drugs here. And I'm  
13 not -- I'm not saying that that forecloses consideration of any  
14 other factors, but they have much less weight in the analysis  
15 to me than what he knew about the importing.

16 And what did he know? He knew what any importer would  
17 know, that he was working for an organization that smuggled  
18 drugs in, in this case, through a pedestrian lane on people.

19 He knew that, you know, once he crossed, if he got  
20 across, he would turn the drugs over. There's lots of  
21 variations about how people turn the drugs over. So I'm not  
22 persuaded by the fact that he didn't know the person he turned  
23 them over to is a significant factor here.

24 It's often that somebody is told, you'll get  
25 directions after you get across. They don't even know where to

1 go or to meet somebody, in particular. So in this case, he  
2 knew he would meet somebody at a specific location. I don't  
3 see anything here that suggests that he didn't know the scope  
4 and structure of the importing activity in which he was  
5 involved.

6 Did he plan? Well, yeah, by his own words, he did.  
7 Look, he's in a jam. His girlfriend is in a jam. He's trying  
8 to help her out. I get it. But all of this was planned and  
9 meditated. He showed up at the appointed time, and had the  
10 drugs strapped to his body.

11 It's a little curious to say somebody with, you know,  
12 drugs strapped to them didn't participate in the planning. It  
13 didn't originate with him. I'm jumping ahead a little bit.  
14 I'm sure they told him what to do, but, you know, he was -- he  
15 was part of the plan. He was a cog in this plan to bring drugs  
16 in.

17 The third factor does favor him. None of this  
18 originated with him. He didn't influence it at all. He was  
19 just there for the manipulation by these others. Nature and  
20 extent of his participation, you know, I don't know what that  
21 is. No timetable has been given for when, you know, the choice  
22 was given to him to help her out by smuggling drugs himself.  
23 But, you know, the point is, look, the context here is, his  
24 girlfriend is working for this drug organization. And this is  
25 a guy that's very sophisticated about such things.

1                   He's been arrested many times. He's been convicted  
2 many times for trafficking and drugs. He, in fact, has been  
3 arrested at the border. So, you know, he knows what's up here.  
4 And he knows the risk involved. And he agrees, at some point,  
5 that the way out of this for her and for him, because he wants  
6 to help her, is to participate in this. I don't have enough  
7 detail here to inform me, certainly to make a finding that he's  
8 substantially less culpable, that this happened spur of the  
9 moment. I think there was time for reflection.

10                  As I said, I'm a little surprised, because in one  
11 sense, I suppose you could say this was kind of an act of  
12 desperation on his part. The only wild card here is the  
13 bicycle, I suppose, because he's getting referred to secondary  
14 you tell me each time. And this was unlikely to succeed from  
15 the inception. I mean, he's a sitting duck.

16                  If they're doing their job -- I mean, the only way he  
17 gets through is if they're not doing their job, right? If they  
18 don't check him out carefully, or say, oh, you again, because  
19 he's crossing every day.

20                  Maybe he was banking on that. Maybe they were banking  
21 on that, the fact that, well, he's getting sent to secondary  
22 every time and they're probably tired of it, so they give him  
23 the heave-ho, you know, through secondary. I don't know what  
24 their thinking was, but it was ill-advised from their  
25 perspective and from his.

1                   And then, you know, I don't know what the amount of  
2 the rent was, but there was something of value for this. And  
3 I'm not sold on this metric between the amount of the drug and  
4 the amount one's being paid. Somebody came up with that. It  
5 doesn't make any sense to me, you know, that that really  
6 affects this is.

7                   Looking at the other participants, I don't know who  
8 the people were -- person or people that put him up to it. But  
9 as I said, they were the masters of the offer in this case.  
10 They were the ones that told him when to do it, how to do it,  
11 where to go, how much he -- how much deduction of the debt  
12 would be. Maybe it was complete deduction of the debt. But  
13 everything I know about the person that put him up to this and  
14 strapped the drugs on is that they were, at a minimum, an  
15 organizer.

16                   So while it's safe to say Mr. Solis was less culpable  
17 than that person, it doesn't advance the minor role argument,  
18 because I'm to compare him to other average participants. As  
19 far as I can tell, other than perhaps having knowledge, his  
20 girlfriend wasn't involved in this. He doesn't claim that she  
21 encouraged him or anything else.

22                   MR. DAVIS: Correct.

23                   THE COURT: And then the only other participant that  
24 I'm aware of is the person to whom he was to turn this over.  
25 And what do we know about that person? Not much, other than

1 that was another person in the chain of distribution here. So  
2 when I look at these factors, only one favors him, four do not.

3 And then, you know, I have to say, I considered his  
4 history here, too. The fact that he has experience in being  
5 arrested at the border for importing drugs in the past. All of  
6 that, looking at that totality of circumstances, convinces me  
7 that he was not a minor participant in this offense.

8 That application is denied. Do you want to speak  
9 about the career offender provision?

10 MR. DAVIS: Yes, Your Honor, I think it's fairly  
11 straightforward. I put it in my briefing. One of -- the  
12 presentence report refers to one of his -- so there's two --

13 THE COURT: One of his priors?

14 MR. DAVIS: Yes, there's two. There's the first one,  
15 and I'm going to pull up the PSR, so I have the correct  
16 paragraphs to reference. I'm not contesting the 2016  
17 conviction for possession for sale.

18 THE COURT: Okay.

19 MR. DAVIS: So I'm not contesting that one.

20 THE COURT: All right.

21 MR. DAVIS: But I am contesting the 2010, that's  
22 paragraph 47, for import/transport more than 28.5 grams. And  
23 I've provided the Ninth Circuit cases that state that that  
24 particular statute, the health and safety code, 11360, is not a  
25 career offender predicate, because of its overbreadth.

1                   It includes transportation for personal use, which is  
2 not a drug -- you know, a controlled substance offense under  
3 4B1.2. Here the only information that the presentence report  
4 says is that it was more than one ounce. And, you know, more  
5 than one ounce can certainly be a personal use amount.

6                   THE COURT: What would his -- what would his criminal  
7 history score be without regard to career offender?

8                   MR. DAVIS: It would still be a VI, Your Honor. The  
9 main difference is that -- well, the Court's denied the minor  
10 role, but the career offender erases the minor role reduction.  
11 So if the Court had granted minor role, it would have left it  
12 available to him --

13                   THE COURT: It really doesn't matter here, one way or  
14 the other, then. It doesn't affect anything?

15                   I mean, I happen to agree with you, based on the  
16 cases, that 2010 doesn't qualify as a predicate offense. But  
17 it still leaves him in category VI. And as you say, I've made  
18 a stand alone decision on the minor role, denying that. So I  
19 don't think he's in any different position under the  
20 guidelines.

21                   MR. DAVIS: I think that's correct, Your Honor, but I  
22 still think, to be complete, the Court should rule on it,  
23 because --

24                   THE COURT: I'm prepared to. Mr. Sausedo, do you have  
25 any argument on this point?

1                   MR. SAUSEDOD: No, Your Honor. I would just note that  
2 the notes I received reflect that the matter was addressed by  
3 counsel, and there was no opposition by the government of a  
4 finding --

5                   THE COURT: Okay. So I sustain that -- well, I -- if  
6 it's an objection, I sustain that objection. I don't find he's  
7 a career offender.

8                   MR. DAVIS: Thank you, Your Honor.

9                   THE COURT: That still leaves him in category VI. And  
10 the guidelines remain the same.

11                  MR. DAVIS: I agree. And then the next option, Your  
12 Honor -- or I'm sorry, option -- the next issue is the question  
13 of Safety Valve. I know -- I'm sure the Court is familiar with  
14 the Lopez case. I think it's pretty clear under the Lopez case  
15 that Mr. Solis remains eligible for Safety Valve.

16                  THE COURT: Well, I don't know. He's above -- the new  
17 Safety Valve has the cutoff at III criminal history -- category  
18 III, right?

19                  MR. DAVIS: Your Honor, what the new -- I have to pull  
20 up the statute with me right now, but what the new Safety Valve  
21 says --

22                  THE COURT: First of all, we don't have a new Safety  
23 Valve per se, right? We have a First Step Act that's  
24 inconsistent with existing guidelines. And they haven't been  
25 changed by the Sentencing Commission yet, because the

1 Sentencing Commission doesn't have a quorum. Everyone expects  
2 that there's going to be consistency at some point, but the  
3 guidelines, as they apply today, foreclose him from Safety  
4 Valve relief, if he's got more than one criminal history point.

5 MR. DAVIS: That's correct, Your Honor.

6 THE COURT: In the past, people have been using a  
7 variance, understanding that it's inevitable that these things  
8 will be brought into sync with one another.

9 But my understanding, Mr. Davis, is under even the  
10 revised First Step Act, that you can't have more than three  
11 criminal history points -- or you can't be higher than criminal  
12 history category III.

13 MR. DAVIS: Well, what it says, Your Honor, is that  
14 there are -- and I'm referring to the statute now, 3553(f), it  
15 says that you are foreclosed from Safety Valve if you do not  
16 have, A, more than four criminal history points, B, a prior  
17 three-point offense.

18 THE COURT: Oh, I see.

19 MR. DAVIS: And C, a prior two-point violent offense.

20 THE COURT: Okay. Yes, I am familiar with the case  
21 now that says that's to be considered in the conjunctive, not  
22 disjunctive, right?

23 MR. DAVIS: Correct. And he does not have a two-point  
24 violent offense.

25 THE COURT: Yeah.

1                   MR. DAVIS: So I'm asking the Court to find that he's  
2 statutorily eligible for the Safety Valve. And then to  
3 consider -- I've included as part of my request for a variance  
4 for the Court to consider --

5                   THE COURT: Yeah, I think that's probably right at  
6 this point.

7                   MR. SAUSEDOD: That's correct. The Court made the  
8 distinction between statutorily available and the guidelines  
9 not reflecting the two levels. And so the government's  
10 position is, yes --

11                  THE COURT: Here's what we're up against still. The  
12 guidelines haven't been changed. And the mandate for me is to  
13 apply the guidelines in effect at the time. And that  
14 interpretation is of a new provision. And it seems to me to  
15 provide prospective relief to someone, but he's still  
16 ineligible, technically. The only way we get to two levels,  
17 which I'm willing to give him --

18                  MR. DAVIS: Sure.

19                  THE COURT: -- is through a variance.

20                  MR. DAVIS: I don't disagree with that. I guess,  
21 procedurally, the finding I'm asking the Court to make is that  
22 he's eligible under 3553(f) for relief from the mandatory  
23 minimum.

24                  THE COURT: And I will -- I will find that.

25                  MR. DAVIS: And I'm asking the Court to incorporate

1 that as part of our request for a variance.

2 THE COURT: I will. And the government's recommended  
3 that anyway, right?

4 MR. SAUSEDOD: Correct, Your Honor.

5 THE COURT: Okay. The only distinction here is I'm  
6 going to treat it as a variance, just to be in line with what I  
7 understand the sentencing obligation to be, which is to  
8 correctly calculate the guidelines first, applying the  
9 guidelines that are in effect at the time of the sentencing.

10 If I do that, he doesn't qualify for Safety Valve, but  
11 understanding everything that's been discussed here, the  
12 government doesn't oppose it, he would get it under the First  
13 Step Act in light of the new case, and I'm prepared to vary to  
14 compensate for that.

15 MR. DAVIS: I appreciate that. Thank you, Your Honor.

16 I think those are the only guidelines issues that I've  
17 raised for the Court. I have several -- I can talk generally  
18 about Mr. Solis, and I've got several specific requests for a  
19 variance.

20 THE COURT: Okay.

21 MR. DAVIS: One of those requests I'd like to address  
22 upfront, because it's not a guidelines -- I'm not asking for a  
23 change to the guidelines, but it's guidelines-related. And  
24 that's that Mr. Solis did not plead with a plea agreement in  
25 this case. And I'm -- but he nonetheless resolved the case

1 quickly without putting the case -- you know, filing any  
2 motions or preparing for trial.

3 THE COURT: Right.

4 MR. DAVIS: We notified the government early of our  
5 intent to plead guilty. It was a body carrier case. We were  
6 never going to go to trial.

7 THE COURT: Okay.

8 MR. DAVIS: The question was just simply finding terms  
9 of an agreement that were reasonable, and that would adequately  
10 protect Mr. Solis.

11 THE COURT: I agree with you --

12 MR. DAVIS: So --

13 THE COURT: -- that that's a factor I can and should  
14 consider as a basis for variance.

15 MR. DAVIS: Okay.

16 THE COURT: Strictly speaking, he doesn't qualify for  
17 Fast Track, because the government has to bring that motion,  
18 but I can certainly consider that, and will.

19 MR. DAVIS: Okay. I've asked the Court to consider  
20 that as a variance, just to -- I guess to find that he's -- you  
21 know, he didn't litigate motions, he didn't --

22 THE COURT: No.

23 MR. DAVIS: We offered early to plead guilty. This  
24 was -- this case was always heading towards a guilty plea. We  
25 didn't consume any government resources in pleading.

1                   So although it's not Fast Track, and I agree that the  
2 government controls the 5K Fast Track departure, I'm asking the  
3 Court to vary, if not an equivalent amount, a similar amount,  
4 in light of his early acceptance of responsibility and his  
5 willingness to plead guilty to the offense, including his full  
6 confession after he was arrested -- or not full confession, but  
7 his prompt confession to guilt after he was arrested.

8                   So to turn to Mr. Solis, generally, Your Honor, if  
9 that's all right.

10                  THE COURT: Yes.

11                  MR. DAVIS: Okay. So, Your Honor, this is obviously a  
12 hard case for Mr. Solis. He comes before the Court with a  
13 lengthy rap sheet, including prior offenses of similar --  
14 although with marijuana, but, you know, similar in time. And  
15 of course, being on supervised release with the Court, which is  
16 a serious breach of the Court's trust, and a serious problem  
17 that he has.

18                  And Mr. Solis is -- you know, I've tried to portray my  
19 interactions with him. And I'll tell the Court, actually, this  
20 is the first time I've met Mr. Solis in person. He's been --  
21 we've been communicating entirely by phone really because this  
22 case originated and took place during the pandemic.

23                  You know, I've tried to talk to him about the life  
24 choices that he's made, and how he's ended up here. And it  
25 seems, you know, he's battled addiction for a long time, Your

1 Honor.

2 I mean, that doesn't explain everything about the  
3 choices that we make, but it certainly shows that -- you know,  
4 he's talked about -- to me, about his life falling apart after  
5 the first time he went to jail. You know, he was a young guy.  
6 He was drinking hard and he was using drugs. He caught his  
7 first sentence, which wasn't very long, I think it was just a  
8 few months, but when he came back, his wife was sick of it.  
9 And she'd left with the kids, moved across the country.

10 And some people can recover from that, and are able to  
11 rebuild their lives and focus on the future, and leave things  
12 behind. And for Mr. Solis, I think he never really recovered  
13 from that. And since then, it's really been a -- a very  
14 difficult couple of decades for him.

15 You know, I've pointed out, some of these convictions  
16 that he's got are things like, you know, fighting with the cops  
17 when they tried to arrest him. Stealing a toilet from a  
18 restaurant. Shoplifting a burrito. I mean, those are the  
19 kinds of convictions that he often found himself in.

20 Obviously, some of them are more serious. You know,  
21 there's a lot of possessions. There's a lot of -- I think  
22 there's -- you know, there's the marijuana cases. And  
23 obviously, the case before Your Honor.

24 But this is not a guy who's a sophisticated criminal  
25 who's running things for the cartel. This is someone who's

1 battled addiction and battled health issues for a long time.

2 By the time he was -- you know, got involved in this  
3 case, Your Honor, he can barely see. As the Court can see, he  
4 doesn't have his glasses when he's in jail, and so he's  
5 squinting and has a very, very hard time seeing anything.

6 His sister described him as nearly blind. He has a  
7 hard time walking because of his knee problems. And he's  
8 really, you know, reduced to being in -- I don't know how  
9 familiar the Court is with some of these neighborhoods in  
10 Tijuana, but they're very scary places, a lot of these places.

11 Obviously, Tijuana is, you know, a vibrant city with a  
12 lot of good things going on there. But for people who are  
13 living on the margins, as Mr. Solis has been, a lot of these  
14 drug gangs really control the neighborhoods in very violent and  
15 scary ways. And he's not the kind of person that is really  
16 able to extricate himself well from those situations.

17 When I've talked to him about the future, he's talked  
18 about the most important thing for him is that he doesn't want  
19 to be back in Tijuana. And I told him the Court's likely going  
20 to impose a condition of supervised release that he not enter  
21 Mexico. I think that's a good thing.

22 He can go to the halfway house and try to establish  
23 himself here in San Diego. But, you know, in some ways, this  
24 is sort of the culmination of 10 years of using drugs, and  
25 being homeless, and being in and out of jail constantly. And

1 making worse and worse choices. And finding himself with  
2 really no way to extricate him and his girlfriend from the  
3 situation.

4 He doesn't have any resources. He doesn't have an  
5 ability really to get a job with his health problems and his  
6 record. And then, you know, after 10 or 15 years of going to  
7 jail and battling with addiction, Your Honor, it's just very  
8 hard. And, you know, I know he faces a very significant amount  
9 of time in front of this Court for -- you know, for bringing in  
10 less than half a kilo of meth, but it's still obviously enough  
11 to cause a lot of damage in the community. And I'm aware of  
12 that, and I know that he's aware of that.

13 THE COURT: Is he entitled to any form of public  
14 benefit? Does he get SSI or anything like that?

15 MR. DAVIS: I don't -- let me look in the PSR, Your  
16 Honor.

17 THE COURT: I didn't see it.

18 MR. DAVIS: I don't recall off the top of my head. I  
19 can ask him.

20 THE COURT: Do you get Social Security disability or  
21 anything like that?

22 THE DEFENDANT: No, sir, I never applied for it.

23 THE COURT: No public -- you haven't applied for it?

24 THE DEFENDANT: I never applied for it.

25 THE COURT: Well, maybe you should do that at some

1 point. I don't -- it seems to me you qualify, but, you know,  
2 I'm not the final arbiter on that.

3 THE DEFENDANT: I always tried to get out for my work.

4 THE COURT: Yeah.

5 THE DEFENDANT: I was working in the Home Depot before  
6 the pandemic. They kicked me out. And I was surviving from  
7 the few money I saved. That's it.

8 MR. DAVIS: And I'm sure the Court is aware of this,  
9 Your Honor, but during the pandemic, a lot of cases were  
10 brought federally that ordinarily would have gone to the state.

11 We've seen a lot of -- a big increase in body carriers  
12 with a longer criminal history. I don't know if the Court has  
13 seen that in its sentencing recently. Typically, in my  
14 experience, you know, the federal court keeps the ones with the  
15 high drug amounts.

16 THE COURT: Yeah.

17 MR. DAVIS: Or people they suspect of being serious  
18 traffickers.

19 THE COURT: Right.

20 MR. DAVIS: A lot of these, you know, half a key,  
21 couple of ounces cases go to the state. During the pandemic,  
22 the supervisor of the U.S. Attorneys Office explained this to  
23 one of your colleagues at a recent sentencing, that during the  
24 pandemic, the state court shut down more than our court did.  
25 And so there was a drop off in 1326 prosecutions as the

1 government started to prosecute more and more of these body  
2 carriers.

3 THE COURT: Yeah, I know. I know I've seen more of  
4 those. I mean, I don't know where it gets us. For one thing,  
5 in most of these body carrier cases, not this one, they  
6 recommend time served.

7 MR. DAVIS: That's happened.

8 THE COURT: I haven't gone along with that. And, you  
9 know, for another thing, the state sentences imposed for these  
10 cases are no benchmark for me whatsoever.

11 They had some rule at one point, you know, a day per  
12 pound of marijuana. I mean, where did they come up with that?  
13 So, you know, if it's an arbitrary thing that just processes a  
14 case, assembly line, I'm not inclined to be persuaded or to  
15 follow that.

16 MR. DAVIS: No, I wasn't going to reference the state  
17 sentencing scheme or anything like that. I'm just saying that  
18 part of the reason that Mr. Solis is facing, you know, even --  
19 I'm not even talking about what the judges actually impose, but  
20 the statutory scheme in California is significantly different.

21 THE COURT: Right.

22 MR. DAVIS: You would be looking at significantly less  
23 time.

24 THE COURT: Right. I don't know. I mean, would a  
25 half a pound of meth have gone over there under ordinary

1 circumstances?

2 MR. DAVIS: Your Honor, it's hard to speculate where  
3 it would go.

4 THE COURT: It's complicated because the defendant is  
5 in category VI, has a prior record of importing drugs, along  
6 with a record of distributing drugs on many, many occasions.  
7 So I don't know, Mr. Davis. I don't know that this case  
8 necessarily would have been destined for state court if it  
9 hadn't been for COVID, but --

10 MR. DAVIS: Perhaps anyway. It just strikes me  
11 as -- to my experience, maybe the Court has a different  
12 experience, it's a pretty unusually low amount. I mean, less  
13 than half a kilo.

14 THE COURT: It is. No, I don't have a different  
15 experience. Look, I just sentenced somebody today for 10  
16 kilos, somebody else for 18 kilos. And, you know, by those  
17 measurements, this is certainly at the benign end of the  
18 smuggling spectrum.

19 MR. DAVIS: And it doesn't undermine the seriousness  
20 of it, obviously. It's still plenty of damage that it can do.

21 THE COURT: Yeah. No, his -- Mr. Solis's problem is  
22 that, you know, for three decades now, he's been involved in  
23 the same thing. And when one looks at his record, it's not  
24 just drug distribution. And in particular, you know, trying to  
25 cross drugs in the pedestrian lane before, but it's all the

1 revocations.

2 You know, he just can't complete a grant of probation  
3 or parole. He's remanded back to prison on every occasion. If  
4 you look down at every one of these things, he can't behave  
5 himself. I mean, it's just a revolving door of him in and out  
6 of jail for the same thing.

7 And, you know, I -- I understand that, you know, he's  
8 got aspirations to change. But you look at this record  
9 objectively, and you say, you know, not a great chance of that.

10 We get statistics from the Sentencing Commission. One  
11 of them is really a dismal one. It's the percentage of  
12 recidivists among federal drug offenders, 85 percent, 85  
13 percent recidivate, who get convicted of federal drug offense.

14 And, you know, he's certainly -- it doesn't surprise  
15 me that he would be in that category, given his record. So  
16 that's what's driving this, his bad record and the fact that  
17 he's done this many, many times before. And he's never learned  
18 any lesson from, you know, prior incarceration.

19 MR. DAVIS: Yeah.

20 THE COURT: So I mean, I take all the points that  
21 you're making, I do. And they're valid points. But it  
22 doesn't -- it doesn't explain these other things that are  
23 aggravators here.

24 MR. DAVIS: I certainly agree that this case has, you  
25 know, aggravating factors, including the record and the

1 priors -- the marijuana priors. The court made reference to  
2 him having, you know, many times of distribution. And perhaps  
3 I'm missing this in the presentence report, but I count the two  
4 marijuana cases. I think, you know, one is an import, one was  
5 convicted for possession for sale. And I take the Court's  
6 point on those.

7                   The other ones that I'm looking at are almost all  
8 possessions. There's a -- I mean, they start in 1990. There's  
9 the felony possession, 1994, felony possession, 1998, felony  
10 possession, possession, possession, misdemeanor, another  
11 possession, speeding.

12                  THE COURT: You know, I think you're right. You're  
13 right about that. I should correct myself, my thinking, and  
14 the record on that. I do see that there's only two that are  
15 denominated as distribution offenses. He's got another one  
16 where he had drugs in prison. It's not the same thing. I  
17 mean, it's more aggravated than just having them. But it kind  
18 of underscores what I was saying earlier about, here's a fellow  
19 that just does not learn any lessons.

20                  MR. DAVIS: Well, I think one -- another way to  
21 characterize that same phenomenon is someone who's really  
22 struggling with addiction and has had a hard time --

23                  THE COURT: Right. Right.

24                  MR. DAVIS: -- fighting it for a long time. I think  
25 all of those possessions, those are all times that he probably

1 just got busted by the cops while he was holding. And when  
2 that happens, you know, it starts stacking up, and you start  
3 going to jail. And people use drugs in jail, as the Court is  
4 aware. Addicts, their addiction doesn't stop when they get to  
5 the jailhouse doors, and they continue to use. And so I think  
6 that's what's really driving what's going on here. Has his  
7 addiction led him to make bad decision after bad decision? Of  
8 course, there's no question about that.

9 And should he face a significant amount of time in  
10 custody, I mean, we can -- I can debate about whether I think  
11 that's, you know, the right outcome in some just sense, but I  
12 think that certainly he faces a lot, based on his record and  
13 his recidivism. I don't dispute that.

14 THE COURT: Mr. Davis, when I sentenced him in 2017,  
15 one of the terms of supervised release, which he was on, was  
16 participate in a program of drug and alcohol abuse treatment.  
17 Did he do that? Did he go to a drug and alcohol abuse program  
18 or participate?

19 MR. DAVIS: I believe that he did, but let me just --  
20 THE COURT: Did you do that, Mr. Solis? Did you go to  
21 a program?

22 THE DEFENDANT: No, Officer Reyes told me to go to a  
23 test and everything.

24 PROBATION OFFICER: Joshua Padua with Probation, Your  
25 Honor. He did not go to a drug treatment program. He was

1 actually in drug testing for a considerable amount of time, I  
2 think almost six months. There was no indication of drug use  
3 at the time. And so we wrote to Your Honor, and asked that  
4 that condition be suspended, based on that information.

5 THE COURT: Okay. All right. All right.

6 MR. DAVIS: And I apologize, Your Honor, I didn't have  
7 the petition in front of me.

8 THE COURT: Yeah, I didn't remember it either, but I  
9 now see it here. There was a letter to me, February 16th,  
10 2019, saying an assessment concludes that drug treatment is not  
11 needed. And I signed off on it as approved. They wanted to  
12 not send him. I mean, it seems like he's been using drugs all  
13 along.

14 MR. DAVIS: I don't know about all along, because he  
15 did have this period of testing clean. He did test -- I mean,  
16 one thing I think is significant is that he tested positive the  
17 week before he was arrested, which indicates to me that he was  
18 using again. And that obviously affects his judgment.

19 THE COURT: Your overall recommendation for both cases  
20 is 84 months, right?

21 MR. DAVIS: Yes. And I think that we are -- the  
22 parties are not that far away from each other or from the  
23 probation officer. The probation officer's recommended six  
24 years on the new case. And the government's recommended seven  
25 years on the new case.

1                   And I'm asking for -- it's obviously up to the Court  
2 how to divide it up. I'm asking for, between the two cases,  
3 for a total of seven years. One way the Court could do it  
4 would be six years in the new case, plus a year consecutive on  
5 the OSC. I'll leave it to the Court on how to distribute it.

6                   THE COURT: We'll handle the other case separately.

7 It's important that I make a distinct record on that case.

8                   MR. DAVIS: I understand.

9                   THE COURT: As you know, all the 3553 factors don't  
10 apply on revocation cases. They do -- for example, punishment  
11 is not a valid objective on a revocation, where it is on  
12 original sentencing.

13                  MR. DAVIS: Correct. So I guess if I were to break  
14 down my recommendation for this new case, I would join the  
15 probation officer's recommendation of six years, which I  
16 believe is twice as long as any -- the longest sentence that  
17 he's gotten before.

18                  He's 57 years old. He's going to be turning 58 in a  
19 couple of months. A six-year sentence, plus whatever he gets  
20 on the OSC, he'll be getting out in his, you know, mid-60s, you  
21 know, maybe mid to upper 60s. And with his health problems,  
22 you know, I can tell the Court, he and I talked a lot about his  
23 knees, because he's got arthritis in his knees, which I know is  
24 extremely painful and very, very difficult to walk and  
25 standing. And the Court can see he's using a cane today.

1                   THE COURT: Right.

2                   MR. DAVIS: And, you know, I haven't made this part of  
3 my sentencing recommendation, but I can just tell the Court  
4 that he's been at the San Luis facility, where the medical care  
5 is not particularly up to the standards of some of the other  
6 facilities. And since he's been there, he hasn't gotten any of  
7 his injections, and he hasn't gotten his glasses.

8                   So the last -- I think it's been a couple of months  
9 since his guilty plea, that's when he's been at San Luis. And  
10 He's really suffering out there. I'm not saying that the Court  
11 should formally --

12                  THE COURT: Did he contract COVID at any point?

13                  MR. DAVIS: I don't believe he did, no.

14                  THE COURT: You never got COVID?

15                  THE DEFENDANT: No, I got two shots already.

16                  THE COURT: You're vaccinated. Okay. All right.

17                  MR. DAVIS: So I'm not asking the Court formally to  
18 consider, you know, those things. I'm just giving them for the  
19 Court's information about what his life is likely to be like  
20 when he gets out in his mid to late 60s.

21                  I think all of these health problems are likely going  
22 to be present, if not exacerbated. He's going to be certainly  
23 not elderly. I would never say someone at that age is elderly,  
24 but, you know, further out of the job force. Further having a  
25 hard time getting his life together. And he's really going to

1 have a big challenge in front of him. So I know the guidelines  
2 are significantly -- they're high. The guidelines are high.

3 THE COURT: Yeah, they're high.

4 MR. DAVIS: They're driven by his criminal history.  
5 And I don't dispute all those things. But I think that the  
6 probation officer and the government and I, we're pretty close  
7 to each other. Obviously, the Court makes its own independent  
8 determination of the appropriate sentence, but I'd urge the  
9 Court to consider those recommendations thoughtfully, and think  
10 that -- is a six year sentence, double his last sentence, or  
11 I'm sorry, his longest sentence he's ever gotten, six years in  
12 federal prison, that's -- that's strong mustard for someone  
13 who's getting into his 60s, and suffering from the health  
14 problems, and who's dealt with a drug addiction for many, many  
15 years.

16 So unless the Court has further questions for me on  
17 Mr. Solis, Your Honor, I'm happy to submit on that  
18 recommendation.

19 THE COURT: Okay. Thank you, Mr. Davis. Mr. Solis,  
20 what do you have to say on your own behalf this morning?

21 THE DEFENDANT: Yes.

22 THE COURT: You have an opportunity to speak. I'm  
23 happy to hear anything else you want me to know, beyond what  
24 Mr. Davis has mentioned.

25 THE DEFENDANT: Well, yeah, I got one point people

1 don't know, like, when they get busted for the marijuana, the  
2 people ask me to -- he buy a truck and he told me, do me a  
3 favor, go and register at the DMV. I had no aware it was full  
4 of marijuana.

5 THE COURT: You're talking about the 2010 case?

6 THE DEFENDANT: Yes. Yes. And I can give you the  
7 name of the people who gave me the truck and everything.

8 THE COURT: Yeah. Look, you pled guilty to that. You  
9 got sentenced for that. It's kind of --

10 THE DEFENDANT: I know. I know. But it is like  
11 people say, it's not like I like to do that. No, I never would  
12 have --

13 THE COURT: Yeah. But you're talking about a truck.  
14 And as I read the probation report, this time, it says you went  
15 through the pedestrian entrance.

16 THE DEFENDANT: No, it was a truck.

17 THE COURT: So that's not correct, then.

18 MR. DAVIS: I think he's referring to the second case,  
19 Your Honor.

20 MR. SAUSEDOD: I believe he's referring to paragraph  
21 49, Your Honor.

22 THE COURT: Okay.

23 THE DEFENDANT: Yeah, on this last time --

24 THE COURT: Oh, I didn't even realize. That was at  
25 the port of entry, too?

1                   THE DEFENDANT: Yes.

2                   THE COURT: So there have been two times that he's  
3 gone through the port before this?

4                   MR. DAVIS: I don't have the underlying documents from  
5 those cases, Your Honor, but it appears that the arresting  
6 agency was US CBP in the presentence report.

7                   THE COURT: Okay. Well, like I said, you pled guilty  
8 to that, Mr. Solis. And, you know, it's -- the arrow has left  
9 the bow on that. What happened, happened. You can say, well,  
10 I didn't know or this or that, but you pled guilty.

11                  THE DEFENDANT: I know, Your Honor. I know very well  
12 out of my way, you know, because I can do nothing about it.

13                  THE COURT: Yeah.

14                  THE DEFENDANT: I'm not going to hire a good lawyer or  
15 defend myself good.

16                  THE COURT: No, you would have had a lawyer appointed  
17 for you, then, just as you do now.

18                  THE DEFENDANT: No. Right now, Mr. Davis is doing an  
19 excellent job. He's the first attorney I've actually in all my  
20 cases, because if you remember, the last case, my attorney  
21 threatened me to don't speak in front of you.

22                  THE COURT: The last case -- I'm sorry, what happened?

23                  THE DEFENDANT: Mrs. --

24                  THE COURT: McMullan?

25                  THE DEFENDANT: Yes. He threatened me to don't speak,

1 you know, so I --

2 THE COURT: Oh, he told you not to speak?

3 MR. DAVIS: Your Honor, can I speak with Mr. Solis  
4 real quick, please?

5 THE COURT: Yeah.

6 (Discussion off the record.)

7 THE COURT: Okay. Anything else, Mr. Solis?

8 THE DEFENDANT: Yes. On this case, you know, I was  
9 only trying to save my girl and my grandson, because the child  
10 was born while I was incarcerated.

11 THE COURT: Right.

12 THE DEFENDANT: It's only what I want. I want to save  
13 my family, and get out of TJ, and make a new life. I'm really,  
14 really sorry. I apologize for what I did, but it was not  
15 because I want to do it. It's because I needed to do it. They  
16 almost killed my lady, and now I'm worried for the grandson.

17 THE COURT: Yeah. Well, you know, look, Mr. Solis, I  
18 understand your motivation, but at the same time, she's working  
19 for a drug cartel. They're dangerous people. And I know you  
20 were trying to get her out of that, but, you know, she's  
21 working for them.

22 THE DEFENDANT: No more, sir.

23 THE COURT: And these kinds of things -- these kinds  
24 of things come up, so --

25 THE DEFENDANT: She was there, but she's no more,

1 since I get out.

2 THE COURT: That's fine. That's fine.

3 THE DEFENDANT: She get out. She gets beat up almost  
4 to death, because she doesn't want to work no more, because I  
5 tell her, get out of there.

6 THE COURT: Yeah. Okay. Anything else?

7 THE DEFENDANT: No, nothing else. I'm sorry for what  
8 I did.

9 THE COURT: Okay. Thank you.

10 THE DEFENDANT: Thank you.

11 THE COURT: On behalf of the United States?

12 MR. SAUSEDOD: Your Honor, for the reasons the Court  
13 has articulated, we agree that the guidelines are too high for  
14 the appropriate sentence in this case. Based on all of those  
15 reasons, we are recommending a variance to 84 months custody.  
16 And we submit.

17 THE COURT: Okay. Thank you. The Court finds as  
18 follows: The base offense level here is 32. The Court has  
19 already made the record on minor role.

20 Two points are added because I did not find the  
21 defendant had a minor role, so the adjusted starting offense  
22 level is a 34. Mr. Solis has accepted responsibility. Three  
23 come off for that. So that reduces the offense level to a 31.

24 The Court finds that no other departures or  
25 adjustments apply here, so at 31 in category VI, it's conceded

1 the defendant is in category VI, notwithstanding the Court  
2 sustaining the objection to the career offender designation.

3 The guideline range is 188 to 235, 188 months to 235 months.

4 I'll keep that in mind as I turn to the 3553 factors.

5 Most of this has been rehearsed already. Look, as  
6 drug smuggling cases go, this is, you know, fairly stated, at  
7 the benign end of the spectrum because of the amount involved.

8 It's not unusual anymore for the Court to see 40, 50  
9 kilos. This fellow had a half a kilo. And like it or not, the  
10 most salient thing in drug importation sentencing is the  
11 amount and kind of drug involved. And by that measure, this is  
12 a more benign case, so I have that in mind.

13 I have the defendant's explanation for why he was  
14 involved in mind. Let me go back and clean up a couple of  
15 things. First, I indicated that although the guidelines have  
16 to be applied, in terms of what they provide as of today,  
17 everyone believes that the Safety Valve provision will be  
18 adjusted to conform with the First Step Act. And that that  
19 being the case, the defendant would ordinarily be eligible and  
20 maybe even retroactively eligible for Safety Valve.

21 So if I reduce by two levels, the guidelines for that  
22 -- and this is just hypothetical, the guidelines have already  
23 been correctly calculated. But that would put us at a 29. And  
24 the defendant's guideline range would be reduced to 151 to 188.  
25 So I do have that in mind as -- as a comparative for sentencing

1 under 3553.

2 Mr. Davis has asked me also to consider the fact that  
3 the defendant promptly resolved this case. And I think that's  
4 an important factor, which I will take into consideration. The  
5 government has asked me to consider the quantity of  
6 methamphetamine and the defendant's history. This is a mixed  
7 bag. The quantity certainly favors a variance from even the  
8 low end of 151. The history does not.

9 As I said, the history is bad. And it's one of a guy  
10 that just -- that does not learn a lesson. He obviously had an  
11 abiding addiction to this. But at the same time, Mr. Davis,  
12 he's shown that, you know, if he needs to, he can stop using  
13 drugs.

14 He was tested for a while, to the point that the  
15 probation department, after I sentenced him in 2017, asked me  
16 to change one of the required conditions of supervised release,  
17 which was that he participate in drug -- a drug program. And  
18 they said, Judge, no need, you know, it's kind of a waste of  
19 resources, because we're testing the fellow, and he's not on  
20 drugs. And yet, you know, we come back to it, and it -- all  
21 roads lead back to a fellow who's consistently used drugs over  
22 three decades.

23 I'm bothered also, I have to tell you, by the fact  
24 that, you know, now I know this is the third time that he's  
25 tried to bring drugs through the port. He's got an explanation

1 for the truckload of marijuana. But like I said, he pled  
2 guilty to that. And I'm entitled to, and do assume that he was  
3 guilty of that offense. And then there's the smaller amount,  
4 you know, which was prosecuted in state court, but this is the  
5 third time.

6 I mean, he knows what he's doing. And I just don't  
7 understand the futility here, because, as you said, he'd been  
8 to secondary each time. He was a sitting duck going through.  
9 I mean, I don't know why he didn't -- he probably didn't tell  
10 these people that put him up to this that, you know, that was  
11 his history.

12 If they'd known that, they were surely foolish to send  
13 him through with any quantity of, you know, valuable drugs,  
14 because it wasn't going to happen. I mean, maybe it was a test  
15 or something, but -- maybe they can afford to lose a half a  
16 kilo of methamphetamine, but, you know, this was ill-advised  
17 and ill-fated from the beginning.

18 You know, what this comes down to is the last several  
19 factors for me. I think the last several factors predominate  
20 in my thinking, which is just punishment, and it is deterrence,  
21 both specific and general. More in his case, specific. In  
22 terms of just punishment, a sentence of 151 months is way, way  
23 too long for this. I mean, people that bring in those gigantic  
24 amounts don't get near this amount, I mean, even with me. And  
25 I am told that I'm one of the harsher sentencers on these drug

1 importation cases. They get, you know, less than half for a  
2 giant amount.

3 Now, they don't have a record that's put them in  
4 criminal history category VI. And that's certainly a factor.  
5 But, you know, all of that said, to sentence him to 151 months  
6 for a half a kilo of methamphetamine on his body is out of  
7 proportion. It's not the kind of sentence that's imposed  
8 anywhere, let alone here.

9 So that, in my judgment, forms a basis for a variance.  
10 Under 3553(a)(6), I'm to look at the kinds of sentences, which  
11 is broader than just, well, I can put him on probation or I can  
12 do that. It's a comparative analysis with similarly situated  
13 offenders. And I don't know of anybody, even in category VI,  
14 that gets 151 months for that. So I do find that there's a  
15 basis for a variance here.

16 The parties have recommended that I impose a  
17 significant variance, one that would take into consideration  
18 the quantity of methamphetamine, and, you know, just the  
19 circumstances of this case.

20 I believe him. I mean, I guess I believe him, that he  
21 was doing this to try to help his girlfriend out. Now, you  
22 know, again, that doesn't get us very far. She's not wet,  
23 she's not cold, she's not hungry. She's a drug addict,  
24 probably, too. And she's doing this because she's working for  
25 a drug cartel. And she gets in a jam with them, so shame on

1 her.

2                   And this is the point I was making earlier. I'm not  
3 as sympathetic here for the reason that the debt was accrued as  
4 I might be if somebody had some kind of serious illness or a  
5 child that needed an operation, and out of desperation did  
6 this. But, you know, I'll accept what he says is that this  
7 wasn't -- he wasn't going to benefit personally from this,  
8 other than trying to help her out.

9                   When I take into consideration all of that, and his  
10 history of drug addiction, I think that a variance down to the  
11 recommendation made by the United States is warranted here.  
12 And, you know, by the way, leaving aside the supervised release  
13 violation, it's what you recommend, too. Both sides have  
14 recommended a total sentence here of 84 months. As I said,  
15 we'll get to the supervised release violation in a minute.

16                   But I -- I'll follow that recommendation. I find it's  
17 supported by all of the facts that I've articulate now. So the  
18 Court varies from 151 months down to 84 months. And that's the  
19 sentence I impose on this.

20                   That's to be followed by a period of five years  
21 supervised release. The defendant is subject two to five years  
22 for this importation offense. Mr. Davis suggested that one of  
23 the conditions should be that he not go into Mexico. I agree  
24 with that.

25                   He's a United States citizen. He's entitled to be and

1 live in this country. Again, it seems to me, Mr. Solis, that  
2 you're eligible for Social Security disability. If not, you  
3 may be eligible for regular Social Security, because the  
4 sentence that I have imposed will probably have you in until  
5 you're 62 years old. And you can draw regular Social Security  
6 beginning at 62.

7           But I think with your knee problem and your eye  
8 problem, and some of the other health problems you've had, you  
9 should talk to Mr. Davis, and maybe get the forms online, and  
10 apply for Social Security disability, and see if you can get  
11 that in advance.

12           All that said, it's a way for you to stay here in the  
13 United States. You don't have to go to Mexico because it's  
14 cheaper down there. And I don't think you should. This is the  
15 third time now that you've been caught bringing drugs across  
16 the border. It's a bad place for you to be. The temptations  
17 are too great. The circumstances that put you in a jam like  
18 this are too great.

19           So you're not to go into Mexico. You're to find a  
20 residence here in the United States, and you're not to go there  
21 for any reason. That's number one.

22           Number two, if you have an automobile, you're to tell  
23 the probation officer about the automobile, any one you own or  
24 drive. You don't have to own it, even if you drive it.

25           This time, he's to participate in a program of drug

1 and alcohol abuse treatment, including drug testing. He's to  
2 be tested randomly twice a month. He's not to miss any tests.  
3 He's not to have any dirty tests.

4 If after the first year and 24 tests, he's made each  
5 test, he's not tested dirty, the probation officer will retain  
6 discretion to relax or eliminate the drug testing condition.  
7 But I do want him to be involved in an outpatient drug program  
8 this time.

9 He's subject to search, that includes his person, his  
10 property, his residence, and his vehicle. That's not just by  
11 the probation officer. Given his criminal record, which  
12 includes stealthy conduct, theft, many state law violations,  
13 the Court expands the search condition to any peace officer,  
14 state, federal, or local.

15 I find that's warranted, as I said, by his criminal  
16 record, and the nature of that criminal record. What this  
17 means, Mr. Solis, if any cop wants to search you or your  
18 property, or your car, or your house, you have to permit it.  
19 You can't say no. You're subject to a waiver here. It's  
20 forced on you. It's not really a waiver. It's a condition of  
21 supervised release, but you have to permit search.

22 THE DEFENDANT: Okay.

23 THE COURT: Now, I'm not going to let that be abused.  
24 I'm not going to let anybody arbitrarily, you know, search you  
25 or continually search you when there's no good reason. And you

1 can come to court and complain to me if that happens, but for  
2 the time being, that condition will be one of those.

3 And then to the extent you're able to work, I don't  
4 think you're going to be, but to the extent you're able to  
5 work, I want you to seek and maintain employment, so you can  
6 support yourself.

7 The Court imposes no fine. I do impose a hundred  
8 dollar penalty assessment.

9 Where are you recommending placement, Mr. Davis?

10 MR. DAVIS: Your Honor, our recommendation -- we'd ask  
11 the Court to recommend Terminal Island. It's close to San  
12 Diego and they have a good health care facility.

13 THE COURT: Right. The Court recommends Terminal  
14 Island, or such other institution that's as close as possible  
15 to San Diego, and can address the defendant's health concern.

16 I also recommend the defendant for a placement in the  
17 RDAP program. Did Mr. Davis talk to you about that program?  
18 You're going to have a lot of time on your hands, Mr. Solis.  
19 And this is a 500-hour drug program. I don't know if you  
20 qualify for it. Your criminal record may be such that they  
21 say, no, you don't qualify. But if you do qualify, you should  
22 take advantage of that program. You know, if you want to get  
23 straight, and get off the drugs after three decades, that's a  
24 start. And under some circumstances, if you complete that  
25 program successfully, they cut a year off of the sentence, too.

1 So that's an added incentive.

2               Okay. Those things said, you have a right to appeal.  
3 If you think I made a mistake. If you think the sentence is  
4 too long, or anything else having to do with the sentence, you  
5 can appeal. I think the other -- a lot of other basis for  
6 appeal have been waived by your guilty plea, but you still have  
7 the right to appeal the sentence and the Court's determinations  
8 on that.

9               I went along with just about everything that your  
10 lawyer advocated. I imposed a sentence that was jointly  
11 recommended for this offense, but it's up to you whether you  
12 want to appeal. You talk to Mr. Davis about it. What you need  
13 to know is that you have 14 days from today's date to make that  
14 decision. So if you want to appeal, you tell Mr. Davis and  
15 he'll file the paperwork and get that going, okay? Do you  
16 understand?

17               THE DEFENDANT: Yes.

18               THE COURT: Okay. Let's turn now to the supervised  
19 release violation. The defendant was on -- yes?

20               MR. DAVIS: I'm sorry, Your Honor. Before we turn to  
21 the supervised release, can I make my record with some  
22 objections, please?

23               THE COURT: Yeah, sure.

24               MR. DAVIS: First, I do object procedurally to the  
25 Court's interpretation of the minor role guideline. A couple

1 of specific things. The Court referenced sort of whether the  
2 Court felt compassionate towards him and his motives. And the  
3 motive, for example, to reduce the debt for drug dealing. And  
4 I don't think those are factors under the minor role guideline.

5 THE COURT: Well, they're not per se, Mr. Davis. But,  
6 look, common sense, if somebody says, man, I was up against the  
7 wall. And, you know, my kid needed an operation or he was  
8 going to die. And I did this, and, you know, I wasn't thinking  
9 well, I mean, anybody looking at a situation like that would  
10 say, I understand why the judgment was so off here. And, you  
11 know, I'm just not going to view this person the same way I do  
12 as somebody that thought about it, had the chance to reflect on  
13 it, had the chance to change his mind about it. None of that  
14 was driving him here. As I said, I made that distinction. So  
15 that's my point on that, but your objection is noted.

16 What else?

17 MR. DAVIS: Thank you. And then also, Your Honor, the  
18 Court referenced a bit about its interpretation of the minor  
19 role guideline, that minor role is -- the universe of minor  
20 role is the offense that he pleaded guilty to, and that's what  
21 the Court looked at, you know, what was the offense? It's an  
22 importation offense. And I think that that interpretation of  
23 the guideline is contrary to the guideline's overall focus on  
24 not being simply on the statute of conviction, but on the  
25 entire scope of the conduct. And chapter 1 of the

1 guidelines --

2 THE COURT: Well, I did consider the entire scope of  
3 the conduct. It wasn't that I constrained the consideration.  
4 It was just an application where it says, the degree to which  
5 the defendant understood the scope and structure of the  
6 criminal activity.

7 Look, let me expand on that. Your objection is noted.  
8 We run into this situation a lot in qualified immunity cases.  
9 And the Ninth Circuit has been perpetually reversed by the  
10 Supreme Court for overgeneralizing the existence of a right  
11 that should be recognized by law enforcement.

12 And they perpetually tell the Ninth Circuit, don't  
13 overgeneralize this. It's easy to say, okay, the Fourth  
14 Amendment, you know, provides for, you know, reasonableness in  
15 searches and seizures. But that's not the point. The point is  
16 exactly what happened here, and were the cops on notice that  
17 this specific activity violated the Fourth Amendment, therefore  
18 qualified immunity is out the window.

19 I think that's analogous here. And the analogy is, we  
20 can generalize every imported case. And as I said, in every  
21 importing case, the pyramid would be, El Chapo is at the top,  
22 and the importers of drugs -- which, by the way, I think is  
23 another important distinction. He's an importer of drugs.  
24 He's not a courier. He knew he was going to be scrutinized by  
25 law enforcement. People that go from one place to the other

1 here in the United States, as he's done on other occasions, you  
2 know, they don't anticipate that they're going to come face to  
3 face with a suspicious border guard.

4 The Sentencing Commission didn't take that into  
5 consideration at all. There's no -- there's no line item for  
6 importers, as opposed to couriers. So we're told casually that  
7 everybody is a mere courier. Well, that's not true. They're  
8 not mere couriers. I mean, there's heightened scrutiny when  
9 one goes through the border.

10 You've got to get past a gauntlet of drug sniffing  
11 dogs. You've got suspicious people. Not suspicious generally.  
12 They don't care about, you know, whether your taillight is out  
13 or anything like that. They care specifically about whether  
14 you're bringing drugs in, most of them do. And the secondary  
15 inspection that he was subject to kind of underscores that.

16 But, you know, back to my point about generalizing  
17 this. If we generalize it, and you're suggesting that, well,  
18 okay, at the top is El Chapo, and all of these people who know  
19 of the intricacies of the drug organization, at the bottom the  
20 importer, if that's true, then what follows from that? Then  
21 every importer is a minor participant. And that can't be true.

22 The actus reus on this crime is coming into the United  
23 States with drugs. The mens rea is knowing there's drugs in  
24 there. He fits both of those. And to say, well, that's all he  
25 did, so he's a minor participant is to redefine the offense.

1 That's my position on that, but I note your objection.

2 MR. DAVIS: Very well, Your Honor.

3 THE COURT: The other thing I'd say is this. One more  
4 thing. Even if I granted minor role, the variance here was  
5 enormous. And I would not have imposed any different sentence,  
6 even if I granted minor role. Minor role would have been a  
7 four-point deduction, right? In this case? Which would have  
8 reduced him from, what, 31 down to 27. And it would have been  
9 130 to 162, 130 to 162.

10 And then we take other two off that I was going to  
11 give him as credit, which would take it to a 25. This was the  
12 variance for the Safety Valve. It would have been 110 to 137.

13 So even at that, an 84-month sentence is significantly  
14 lower than that. I wouldn't have gone any lower, even if I had  
15 granted minor role. So I have to tell you that looking at it  
16 both ways, that's the sentence that I think is fair and  
17 reasonable, in light of the factors that I mentioned were the  
18 most important to me, which was just punishment, and  
19 deterrence, specific deterrence in his case. But go ahead.

20 MR. DAVIS: Understood, Your Honor. I'm happy to  
21 engage the Court on its minor role interpretation, but I think  
22 I've preserved my record.

23 THE COURT: Yeah, you have. You have.

24 MR. DAVIS: And I have objected to it. But the point  
25 that I was just going to make about -- just to articulate, so

1 that it's in the record, is that the guidelines -- the  
2 Commission was deciding whether to -- when they were writing  
3 the guidelines -- and I'm not talking about the minor role  
4 guideline, but just all the guidelines book, they're saying,  
5 should we focus on simply the statute of the conviction, or  
6 should we look at sort of the totality of a person's conduct,  
7 not simply the statute of conviction.

8                   And I think the Court's interpretation of the  
9 guideline is more focused on the statute, saying that's the  
10 universe I'm looking to, what's the crime he pled to.

11                  THE COURT: Yeah, that's true. That's a fair  
12 characterization.

13                  What I tried to say is, I reject the idea that I  
14 should consider minor role as if he pled to international drug  
15 conspiracy or RICO, or something that has a lot of exotic  
16 elements and say, well, this necessarily contemplates many  
17 people being involved. And so the universe of people -- I  
18 mean, here, who do I have to consider? I considered the two  
19 people that have been identified as known or likely  
20 participants.

21                  One guy who's not an average participant, and then  
22 this hypothetical person he's going to turn the drugs over to.  
23 And I ended up saying, I don't find him -- you know, the  
24 importer of a drug substantially less culpable than this guy  
25 that I know very little about.

1           I mean, for all I know, the guy he was to meet when he  
2 got across the border is just another -- is just another link  
3 in the chain of distribution, as he was. Anyway, you've got  
4 your record on it.

5           Anything else?

6           MR. DAVIS: Yes, Your Honor. I just want to  
7 substantively object to the Fourth Amendment condition. The  
8 Court expanded it to any peace officer based on -- I think the  
9 Court said his priors for stealthy behavior and theft --

10           THE COURT: Right.

11           MR. DAVIS: I don't think that that's related to his  
12 conduct in this offense. And I don't think that the --

13           THE COURT: Well, it's part of his history and  
14 characteristics. Look, here's a fellow who's now tried to  
15 import drugs three times into the United States, for starters.  
16 It's a fellow who has been convicted of having drugs in prison,  
17 while he's in prison. It's a fellow with a history of not  
18 following any of the conditions of probation or parole,  
19 repeatedly violated.

20           It's a fellow who has a prior conviction for  
21 possession of firearms, for theft. All of those things make me  
22 think that he should be subject to a broader search condition  
23 than someone that doesn't have that background and history.  
24 And, you know, maybe we nip things in the bud that way. That  
25 also kind of dovetails with deterrence.

1                   MR. DAVIS: I'll submit on the objection. Thank you.

2                   THE COURT: Okay. All right. Let me turn now to the  
3 supervised release violation. The Court takes judicial notice  
4 of the defendant's plea. And I find that he did violate  
5 supervised release by, on July 23rd, importing drugs into the  
6 United States.

7                   There are other factors here. His use of a controlled  
8 substance on July 13th, and marijuana -- methamphetamine  
9 on -- I'm sorry, on July 10th, 2020, and marijuana on July  
10 12th, 2020.

11                  I'll table those for the time being, but I do take  
12 judicial notice of the importation offense, which is a grade A  
13 violation. He's subject to 24 months in custody. I'm not in  
14 agreement with the government or your recommendation to just  
15 ball that into the underlying sentence.

16                  This represents an abuse of trust. It's distinct.  
17 The Court doesn't take into consideration punishment here.  
18 What I can take into consideration, though, is his history of  
19 abusing trust, which is not just the probation, but the parole  
20 revocations. They're repeated.

21                  The fact that he did this fairly quickly, the fact  
22 that he got a reduced sentence from me at the time on the  
23 transporting aliens. I mean, now we have a guy that's really  
24 on his fourth or fifth federal violation. Yeah, he was  
25 prosecuted in state court for a couple of the drug smugglings,

1 but the transportation here, and this offense for which he's  
2 just been sentenced were both prosecuted federally, so two out  
3 of four.

4                   But four times, he's tried to bring things into the  
5 United States -- well, three times he's tried to bring things  
6 into the United States illegally. And another time he's  
7 involved with transportation of aliens. And I just -- I don't  
8 think he's been deterred at all. And I think it is a gross  
9 breach of trust for him to be involved so quickly after he was  
10 placed on supervised release on this.

11                  So I'm not in agreement to run it concurrently. To  
12 run it concurrently is just to reward him for renewed  
13 criminality. So I'm happy to hear what the two of you have to  
14 say.

15                  MR. DAVIS: Understood, Your Honor. My initial  
16 recommendation had been six years on the new case, plus a year  
17 consecutive on the old case.

18                  The Court has now sentenced him to seven years on the  
19 new law violation. I understand where the Court is coming  
20 from, frankly, with the need for -- you know, to say that if I  
21 do it concurrent, then that means there's no difference.

22                  I do urge the Court to look at the overall amount of  
23 time as something that's important, right? Because the Court  
24 can say, oh, I'm going to give him X amount of time for the new  
25 law violation, but that could drive the overall total amount of

1 time that he's going to spend in prison to a time that's more  
2 than is warranted by the two cases together.

3 THE COURT: Okay.

4 MR. DAVIS: So I understand the Court's intention to  
5 impose some time consecutively. I guess what I would ask for,  
6 then, is -- you know, it's obviously a significant breach of  
7 trust. I'm not disputing that. But I'd ask the Court to take  
8 into consideration -- incorporate by reference all of my  
9 comments from the earlier sentencing hearing about his health  
10 and about the time he's going to spend in custody.

11 You know, my recommendation, I guess, would be, if the  
12 Court is going to sentence him consecutively to some, you know,  
13 modicum of time consecutively, whatever the lowest the Court  
14 thinks that it could. I would think that six months  
15 consecutively might do the trick, to let him know that there  
16 are consequences for violating the Court's probation.

17 He's going to be -- to be honest, Your Honor, he's  
18 going to be in prison for the next seven years. You know,  
19 adding additional time on the end of those seven years, I'm not  
20 sure if that's going to convey any particular message about  
21 being on supervised release, as opposed to not being on  
22 supervised release.

23 I think like most people who are sentenced, he's going  
24 to view -- you know, to the extent that there's deterrence  
25 here, it's going to be the overall amount of time. And I think

1 I maintain my position as originally, that the overall amount  
2 of time, I think, that is appropriate is seven years. And so I  
3 guess let me just put it formally.

4 My first request is for the Court to impose a  
5 concurrent sentence. Understanding the Court's disinclination  
6 to do that, I'd ask for a modicum of time afterwards, keeping  
7 -- to have the overall amount of time not be excessive.

8 THE COURT: Okay. Thank you, Mr. Davis. Mr. Solis,  
9 you have a right to speak on this, too. This goes back to the  
10 old case, transporting aliens, where I put you on supervised  
11 release. And I said, don't do certain things, which included  
12 don't bring drugs into the United States, don't commit a  
13 federal felony. So you're subject to a sanction for violating  
14 the terms of supervised release. And I'll hear whatever you  
15 have to say about that.

16 Do you want to make any statement regarding this?

17 THE DEFENDANT: I just apologize, sir.

18 THE COURT: Okay. All right.

19 THE DEFENDANT: There's nothing that I can do more  
20 than that.

21 THE COURT: All right. I don't know if this was part  
22 of the plea agreement, and you're stuck with it. But, you  
23 know, I couldn't disagree more with the government that keep  
24 committing felony offenses, and we'll roll it all back into the  
25 other one. I mean, that doesn't make any sense to me, but if

1 you're stuck with it because it was part of a plea agreement,  
2 then -- oh, there was no plea agreement, right?

3 MR. SAUSEDOD: There was no plea agreement. And I  
4 appreciate the Court's -- the Court's inquiry. Based on our  
5 pleadings and based on the sentence that the government was  
6 seeking in the 20-CR case, and the sentence the Court imposed,  
7 we would defer to Your Honor as the appropriate sanction, and  
8 ask that it be run concurrent.

9 THE COURT: Okay. Just to set the stage here.

10 Mr. Solis has been convicted of offenses beginning in  
11 1988. I don't want to put too much emphasis on that, because  
12 it started off with misdemeanor stuff.

13 Quickly moved to, you know, felonies. Possession of a  
14 controlled substance in 1990, '91, '93 twice, '94, '96, '98,  
15 '99, 2000, 2005 twice, 2006, 2007 twice, 2009, 2010, 2014,  
16 2016, 2017. I won't go into great detail. It's laid out in  
17 the original probation report.

18 The other thing I will reiterate is that in each of  
19 those instances, when he was on probation or parole, he  
20 violated. He violated. And he violated multiple times.

21 There are multiple probation revocations, multiple  
22 parole revocations, where he was sent back to prison. He has  
23 not been deterred. And so I'm not persuaded that rolling this  
24 into the original sentence now, which was, in my judgment, a  
25 fairly lenient sentence, given his record, and the record

1 speaks for itself. I mean, the guidelines were cut way, way  
2 down to give him a variance on that. But rolling this into it  
3 is just a bridge too far for me.

4 It doesn't promote deterrence, which I think is  
5 necessary here. I also regard this as a pretty grievous breach  
6 of trust. Again, you know, as offenses go and as breaches of  
7 trust go, this is a major one. This is a major one.

8 Just as his offense was more benign as an importing  
9 offense, the fact that he commits a felony, and that that's the  
10 supervised release violation, that's at the other end of the  
11 spectrum. That's very aggravated. This isn't missing testing.  
12 This isn't using drugs again. This is a major offense for  
13 which he, you know, is going to pay a penalty.

14 So I have both of those things in mind. I do have in  
15 mind also that he was given a fairly lenient sentence last  
16 time. It was at the low end of the guidelines. Departures  
17 were part of the sentence that he was given, even with his  
18 criminal history category VI. And, you know, the offense to  
19 which he pled guilty and was on supervised release was itself a  
20 serious one. You know, transporting aliens, it's an aggravated  
21 felony.

22 The Court finds that the -- 24 months is the  
23 appropriate sanction in this case, given his history, given his  
24 absolute inability to abide by conditions, and what I regard as  
25 a grievous breach of trust here. So the Court imposes 24

1 months. That's consecutive to the 84-month sentence imposed on  
2 the other case.

3 And supervised release on the transporting case is now  
4 terminated, in light of the supervised release imposed on the  
5 new case.

6 Anything else, Mr. Davis?

7 MR. DAVIS: No, Your Honor. Thank you.

8 THE COURT: Okay. Next case.

9 (The proceedings concluded at 12:16 p.m., June 7, 2021.)

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COURT REPORTER'S CERTIFICATE

3 I, CYNTHIA R. OTT, Official Court Reporter, United States  
4 District Court, Southern District of California, do hereby  
5 certify that pursuant to 28 U.S.C. §753 the foregoing is a  
6 true, complete and correct transcript of the stenographically  
7 reported proceedings had in connection with the above-entitled  
8 matter and that the transcript page format is in conformance  
9 with the regulations of the Judicial Conference of the United  
10 States.

DATED at San Diego, California, July 10, 2021.

/s/ CYNTHIA R. OTT  
CYNTHIA R. OTT, RDR, CRR

APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NOV 17 2022

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
v.  
JOSE ALFREDO SOLIS,  
Defendant-Appellant.

No. 21-50140

D.C. No.  
3:20-cr-02510-LAB-1  
Southern District of California,  
San Diego

ORDER

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
v.  
JOSE ALFREDO SOLIS,  
Defendant-Appellant.

No. 21-50142

D.C. No.  
3:17-cr-03121-LAB-1  
Southern District of California,  
San Diego

Before: SILER,\* CALLAHAN, and H.A. THOMAS, Circuit Judges.<sup>1</sup>

Judge Siler and Judge Callahan have voted to deny the petition for panel rehearing. Judge Callahan has voted to deny the petition for rehearing en banc, and

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<sup>1</sup> \* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Judge Siler has so recommended. Judge Thomas has voted to grant the petition for rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA  
**V.**  
 JOSE ALFREDO SOLIS (1)

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

Case Number: 3:20-CR-02510-LAB

Benjamin P. Davis  
 Defendant's Attorney

**USM Number** 63963-298

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**THE DEFENDANT:**

pleaded guilty to count(s) 1 of the Information

was found guilty on count(s) \_\_\_\_\_  
 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offense(s):

<b>Title and Section / Nature of Offense</b>	<b>Count</b>
21:952,960 - Importation of Methamphetamine (Felony)	1

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) \_\_\_\_\_ is dismissed on the motion of the United States.

Assessment : \$100.00

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JVTA Assessment\*: \$

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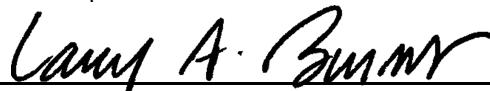
\*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

No fine  Forfeiture pursuant to order filed \_\_\_\_\_, included herein.

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 any material change in the defendant's economic circumstances.

June 7, 2021

Date of Imposition of Sentence

  
 HON. JUDGE LARRY ALAN BURNS  
 UNITED STATES DISTRICT JUDGE

AO 245B (CASP Rev. 1/19) Judgment in a Criminal Case

DEFENDANT: JOSE ALFREDO SOLIS (1)  
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**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 84 months

Sentence imposed pursuant to Title 8 USC Section 1326(b).

The court makes the following recommendations to the Bureau of Prisons:  
TERMINAL ISLAND OR CLOSE TO SAN DIEGO DESIGNATION TO ADDRESS HEALTH CONDITIONS.

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

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

at \_\_\_\_\_ A.M. on \_\_\_\_\_

as notified by the United States Marshal.

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

on or before

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.

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UNITED STATES MARSHAL

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By \_\_\_\_\_ DEPUTY UNITED STATES MARSHAL

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**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant will be on supervised release for a term of:  
5 years

**MANDATORY CONDITIONS**

1. The defendant must not commit another federal, state or local crime.
2. The defendant must not unlawfully possess a controlled substance.
3. The defendant must not illegally possess a controlled substance. The defendant must refrain from any unlawful use of a controlled substance. The defendant 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. Testing requirements will not exceed submission of more than 4 drug tests per month during the term of supervision, unless otherwise ordered by the court.  
 The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (check if applicable)
4.  The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5.  The defendant must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6.  The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, is a student, or was convicted of a qualifying offense. (check if applicable)
7.  The defendant must participate in an approved program for domestic violence. (check if applicable)

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

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## **STANDARD CONDITIONS OF SUPERVISION**

As part of the defendant's supervised release, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's 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 the defendant's conduct and condition.

1. The defendant must report to the probation office in the federal judicial district where they are authorized to reside within 72 hours of their release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
3. The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.
4. The defendant must answer truthfully the questions asked by their probation officer.
5. The defendant must live at a place approved by the probation officer. If the defendant plans to change where they live or anything about their living arrangements (such as the people living with the defendant), the defendant 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, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. The defendant must allow the probation officer to visit them at any time at their home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of their supervision that he or she observes in plain view.
7. The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about their work (such as their position or their job responsibilities), the defendant 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, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. The defendant must not communicate or interact with someone they know is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, they must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.
10. The defendant 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. The defendant 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 the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant notified the person about the risk.
13. The defendant must follow the instructions of the probation officer related to the conditions of supervision.

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### **SPECIAL CONDITIONS OF SUPERVISION**

1. Not enter or reside in the Republic of Mexico without permission of the court or probation officer and comply with both United States and Mexican immigration law requirements.
2. Report all vehicles owned or operated, or in which you have an interest, to the probation officer.
3. Participate in a program of drug or alcohol abuse treatment, including drug testing and counseling, as directed by the probation officer. Allow for reciprocal release of information between the probation officer and the treatment provider. May be required to contribute to the costs of services rendered in an amount to be determined by the probation officer, based on ability to pay. Defendant shall be tested twice a month for one year. Probation may modify or eliminate testing after one year if no dirty tests are reported.
4. Submit to a search of person, property, house, residence, office, vehicle, papers, cellular phone, computer or other electronic communication or data storage devices or media effects, conducted by a United States Probation Officer or any federal, state, or local law enforcement officer, at any time with or without a warrant, and with or without reasonable suspicion. Failure to submit to such a search may be grounds for revocation; you shall warn any other residents that the premises may be subject to searches pursuant to this condition.
5. Seek and maintain full time employment and/or schooling.
6. Enroll in and successfully complete outpatient drug treatment program as directed by the probation officer.

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