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In the Supreme Court of the United States

Rodolfo Cuellar Jr.
Petitioner,
vs.
United States of America,
Respondent.

U.S.D.C. case no. 3.94-CR-62-1
U.S.C.A. case no. 20-10 182

NOTICE OF APPEAL

On petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit.

MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 404 OF THE
FIRST STEP ACT, AND PRE-BOOKER ISSUES. CORRECTION OF INCOR-
RECT DRUG CALCULATION AND CORRECTION OF A SENTENCE ABOVE
THE STATUTORY MAXIMUM AUTHORIZED BY CONGRESS

Gomes Now the petitioner, Mr. Rodolfo Cuellar, Jr. in pro se
who respectfully moves this Honorable Court for an Order Reducing
his sentence, Correction of Incorrect Drug Calculation that
caused Mr. Cuellar, Jr. to be sentenced above the statutory max-
imum authorized by Congress for his crime of conviction. The in-
correct Drug amount was given to the FBI by an informant. That
Drug amount was never submitted to a jury or admitted to by
Mr. Cuellar, Jr.

Mr. Cuellar, Jr. contends that this court has the authority
to grant him the relief that he seeks under one of the above
provisions. Mr. Cuellar, Jr. would also request appointment of
counsel to present his claims.

INTRODUCTION

At all time material to this Indictment:

1. Defendant Rodolfo Cuellar, Jr A/K/A "Rudy" A/K/A "Chaparro"
A/K/A "Raul Martinez" was the head of the Dallas-based drug
trafficking enterprise which acquired, transported, and distri-
buted quantities of cocaine, a Schedule II narcotic substance, and

heroin, a Schedule I narcotic controlled substance.

SUPERSEDING INDICTMENT.

2. Defendant Rodolfo Cuellar, Jr, occupied a position as the principal administrator, organizer, and leader of said enterprise. This enterprise is hereinafter in this indictment referred to as the "Cuellar Organization."

Count 1 Beginning on or about November 1, 1993, the exact date which is unknown to the Grand Jury, and continuing thereafter through on or about February 2, 1994, in Dallas Division of the Northern District of Texas and elsewhere, defendant Rodolfo Cuellar, Jr, knowingly, intentionally, and unlawfully, with each other, and with diverse other persons known and unknown to the Grand Jury, to commit certain offenses against the United States to wit: the distribution of five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, and the distribution of (1) kilogram or more of a mixture or substance containing a detectable amount of heroin, a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and 846.

Count 2 On or about November 8, 1993, in the Dallas Division of the Northern District of Texas, defendant Rodolfo Cuellar, Jr knowingly and intentionally used a communication facility; that is a telephone, in committing, causing, and facilitating the commission of an act constituting a felony under Title 21, United States Code Section 841(a)(2) and 846, in that defendants used the telephone to discuss various matters concerning the collection of money obtained through the distribution and sales of a narcotic controlled substance. In violation of Title 21, United States Code, Section

843(b)). Count 2-6 and counts 8-11 all were phone counts and charged the same violation of Section 21 U.S.C. 843(b).

Count 12 On or about February 2, 1994, in the Dallas Division of the Northern District of Texas and elsewhere defendants Rodolfo Cuellar Jr, aided and abetted person known and unknown to the Grand Jury, knowingly, and intentionally possessed with intent to distribute and caused to be possessed with the intent to distribute approximately 89.6 grams of heroin, a Scheduling I narcotic controlled substance. In violation of Title 21 United States Code, Section 841(a)(1), and Title 18 United States Code, Section 2.

Count 13 On or about February 2, 1994, in the Northern District of Texas and elsewhere, defendant Rodolfo Cuellar, Jr, willfully, knowingly and unlawfully used and carried a firearm, to wit: one (1) .38 caliber Colt Semi-Automatic Pistol, Serial number CLW009135, during and in relation to a drug trafficking crime, that is, the distribution of cocaine and heroin, in violation of Title 21, United States Code, Section 841(a)(1), for which he may be prosecuted in a court of the United States. In violation of Title 18, United States Code, Section 924(c)(1).

"it should be noted that this count was vacated but Mr. Cuellar, Jr. was never given a re-sentencing. This conviction affected his whole sentence and remand for resentencing was and is required.

Count 15 Beginning in at least November 1993 and continuing through on or about February 2, 1994, in the Dallas Division of the Northern District of Texas and elsewhere, defendant Rodolfo Cuellar, Jr, aided and abetted by individuals known and unknown to the Grand Jury, knowingly and intentionally employed, hired, used, persuaded, induced,

and enticed certain persons whose names are known to the Grand Jury and who were during said time frame under the age of eighteen, to violate Title 21, United States Code Section 841(a)(1), pertaining to five (5) Kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Scheduling II controlled substance, and distribution of one (1) kilogram or more of a mixture or substance containing a detectable amount of heroin, a Scheduling I controlled substance. In violation of Title 21, United States Code Sections 861(a)(1), (b) and (e) and Title 18, United States Code Section 2.

SENTENCING

On ~~February~~, 1, 1995, Mr. Cuellar, Jr was sentenced as follows:

Count 1 Conspiracy to Distribute Cocaine and Heroin (21 U.S.C. 846)- not less than 10 years or more than Life, a Class A Felony.

Count 2-6 and 8-11 Use of a Communication Facility to Facilitate a Drug Trafficking Crime (21 U.S.C. 843(b)- 4 years each, a Class E Felony.

Count 12 Possession with intent to distribute Heroin, Aiding and Abetting, (21 U.S.C. 841(a)(1) and 18 U.S.C. 2) - 20 years, a Class C Felony.

Count 13 Use of a Firearm in Relation to a Drug Trafficking Crime (18 U.S.C. 924(c)(1)- Mandatory 5 years, a Class D Felony. This Count was Vacated and the case was remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Bailey V. United States, 516 U.S. __[58 CcL 2030](1995), The case was sent back in 1997 and the count was dismissed. However, Mr. Cuellar, Jr never went back for resentencing. He is still entitled to a full resentencing because this conviction affected the whole sentencing.

Count 15 Employment of Person Under 18 Years of Age Pertaining to Distribution of Cocaine and Heroin, Aiding and Abetting

(21 U.S.C. §§ 861(a)(1), (b) and (e) and 18 U.S.C § 2)-
Life, a Class A Felony.

STATEMENT OF THE CASE

Mr. Cuellar contends that he is entitled to have this court reduce his sentence based on the extraordinary circumstances of this case. First Mr. Cuellar, Jr Statutory offense was set based on a drug quantity that was never submitted to the jury, and was based on information provided to the FBI in a report. That information was used to set his statutory crime of conviction at 10 to Life.

Mr. Cuellar, Jr. was given a Life sentence under 21 U.S.c. § 861, without ever having been convicted of a Drug Trafficking offense

Mr. Cuellar, Jr, after having his 924(c) conviction vacated never received a full re-sentencing, which he is entitled because that sentence was part of a sentencing package. He was entitled to be sentence under the new laws and guidelines in effect at the re-sentencing.

Mr. Cuellar, Jr, was sentenced under the Pre-Booker Mandatory guidelines, which contained the residual clause that the Supreme Court has ruled was unconstitutionally vague. His Pre-Booker sentence violates due process, because it allowed him to be sentenced based on determinations not decided by the Jury.

Mr. Cuellar, Jr Contends that 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B) are covered offenses, because they statutorily carry a mandatory minnum and a statutory maximum sentence, entitling him or making him eligible for a reduction. →

GROUND ONE

Mr. Cuellar, Jr. contends that this whole issue is based on a violation of the principles announced in Apprendi v. New Jersey, 530 U.S. 466, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 159 L.Ed.2d 403 (2004) and United States v. Booker, 543 U.S. 220, 160 L.Ed.2d 621 (2005), because his sentence was based on facts not found by a jury beyond a reasonable doubt. Specifically Mr. Cuellar, Jr. refers to the Drug Quantity that was used to set his Statutory offense, under 841(b)(1)(A) and his guidelines under USSG § 2D1.1, which were mandatory at the time, under the mandatory guidelines system, which included the residual clause that the Supreme Court has ruled unconstitutionally vague. Pre-Booker Sixth Amendment is violated when the court takes into account facts not proven to a jury and used to set the Statutory offense or to enhance the sentence. Mr. Cuellar, Jr.'s sentence violates Booker, as the Court stated in United States v. Mares, 402 F.3d 511, 518 (5th Cir.) cert. denied, 126 S.Ct. 43, 163 L.Ed.2d 76 (2005), "It was the mandatory aspect of the sentencing regime [under the guidelines] that the court concluded violated the Sixth Amendment's requirement of a jury trial."

The information used in this case came in the form of a Memorandum, To: Sac, Dallas (245D-D1-62804)(P). From: SA Arturo Canedo. Subject: Rodolfo Cuellar, Jr,

"Four co-defendants have entered into proffer agreements with the United States Attorney's office and provided information regarding the organization. Specifically three (3) of these four co-defendants Victor Manuel Moreno, Ramiro Moya Gonzales, and Jorge Merced Losand Guerrero have provided information as to the amount of heroin and cocaine that Cuellar was responsible for importing into the United States

for distribution in his drug houses. As his body-guard, Moreno was able to provide information regarding Cuellar's method of distributing his drugs particularly to the process used in the "laboratories" to dilute heroin and prepare it for resale. Subsequent to Moreno's interview, Noya was interviewed on 1/24/94 and he independently verified the information provided by Moreno, being involved and working at the laboratories, Moya was able to provide even more explicit details regarding the laboratory procedures.

On 6/28/94 Jorge Merced Losano was interviewed and he validated information provided by both Moreno and Moya. Losano further confirmed that he, in fact, had been the individual most responsible for transporting large amounts of cocaine from Mexico into Dallas Texas for Cuellar and verified information previously obtained regarding their method for secreting the cocaine across the border.

To calculate the amount of drugs the Cuellar organization is believed to have distributed in the Dallas area an average was made of the amounts produced at the laboratories based on the interviews of Moya, Moreno and Losano. Even though information obtained from these individuals indicated that Cuellar had been distributing drugs in Dallas Texas from between four and seven years, only the length of the investigation was used in calculating these amounts. Time periods and amounts were averaged conservatively.

Information obtained from the three co-defendants indicated that they mostly dealt in encapsulating the heroin into capsules for resale. In order to obtain a measurement in grams that could be used to determine the amount produced by this organization, measurements obtained from the Drug Enforcement Administration (DEA) Laboratory for the heroin that was bought as part of the investigation was averaged out. The determined average weight of the heroin brought from this organization was 1.5 grams per ten (10) capsules.

Jorge Merced Losano estimated the organization encapsulated heroin in the average of twice a week. He said that three (3) individuals normally encapsulated the heroin averaging between 2,500 and 3,000 capsules per operation. In Moya's interview, he estimated that they encapsulated between 900 and 1,100 capsules of heroin per every 25 grams (roughly an ounce) of pure heroin. An average of the lower amount 3,000 capsules was used as the amount encapsulated at least twice a week by this organization. Even though a larger amount could be argued in that Losano appears to have been more involved in encapsulation process and this organization was operating roughly three to four drug houses at a time, the more conservative figure was employed.

An average of 1,000 capsules encapsulated per operation was divided by Ten (10) (see above) in order to arrive at a weight estimate. Based on this calculation, each operation was believed to have yielded one hundred units. The one hundred units were then multiplied by 1.5 (grams) equaling 150 grams of diluted heroin which was subsequently encapsulated. Being that Losano said they would encapsulate at least twice a week, the amount of 150 grams was multiplied by two (2) arriving at a figure of 300 grams of heroin encapsulated for resale per week.

Even though it is believed that Cuellar was using this operation way before he was fully identified in November of 1992. in order to remain conservative, the calculations for the drugs were taken as of November 1993, it was estimated that the Cuellar organization encapsulated 15,600 grams of heroin for resale (300) grams per week times 52 weeks per year. Since each kilogram equals 1,000 grams, the Cuellar organization is believed to have encapsulate 15.6 kilograms of heroin each year until the Cuellar organization was dismantled on 2/2/94 when arrests were affected. The total, taken into account the three (3) months subsequent to November, 1993, came to 19 kilograms of heroin distributed by the Cuellar organization from the time the investigation fully identified Cuellar until the time of his arrest.

During the debriefings with Victor Manuel Moreno, he identified Jorge Merced Losano (whom he knew as Flaco) as being the person responsible for transporting drugs from Mexico to the Dallas area, Moreno estimated that Losano and anyone else who was helping him would transport four or five kilograms of cocaine every 15 days. On 6/28/94 Losano was independently interviewed and verified that he was responsible for bringing cocaine to Dallas, Losano specifically said that he would bring between Two (2) and ten (10) kilograms of cocaine for Cuellar every 15 to 20 days. An average of the amount reported by Losano were taken and it was estimated every 18 days Losano would transport at least Six Kilograms of cocaine to the Cuellar organization. In one year (365 days) it was estimated that Cuellar organization would have made 20.28 trips (365/18). At an average of six kilograms per trip, it was calculated that from November 1992 to November of 1993, the Cuellar organization received 121.68 kilograms of cocaine. In order to account for the time period November 1992 Through 2/2/94 (the date of the arrests), the number of days making up this period (94) were divided by 18 (the average amount of days between the drug runs) and it was determined that there were 5.22 trips made during this time period. with an average of six kilograms per trip, it was determined that at least 32.1 kilograms of cocaine were imported during this time period. Therefore, it is believed that from November, 1992 to 2/2/94, the Cuellar organization imported 153 kilograms of cocaine for resale in the Dallas

Texas area.

Heroin

10 Capsules - 1.5 grams (approximate) (based on information provided by DEA Laboratory)

$1,00 \times 2 = 2,000$ (average number of capsules made per operation multiplied times average number of operations per week to equal average number of capsules made weekly)

$2,000 / 10 = 200$ (grams of heroin used per week: number of capsules made weekly divided by ten then multiplied by 1.5)

$200 \times 1.5 = 300 \text{ grams.}$

$64 \times 300 = 19,200 \text{ grams}$ (number of weeks making up time period 11/92 - 2/94 multiplied times number of grams of heroin used per week to equal approximate amount of heroin used by the Cuellar organization from onset of investigation to conclusion)
or 19.2 kilograms

COCAINE

$15 + 20 / 2 = 18$ (average number of days between cocaine runs)

$2 + 10 / 2 = 6$ (average number of kilograms of cocaine transported per trip)

$458 / 18 = 25.44$ (number of days making up time period 11/92 - 94 divided by average number of days between cocaine runs to equal approximate number of cocaine runs made)

$25.44 \times 6 = 152.64$ (number of cocaine runs multiplied times average amount of kilograms per run to equal approximate amount of cocaine used by the Cuellar organization from onset of investigation to conclusion) "

See Exhibit #A

Mr Cuellar contends that the district erred by relying on hearsay and unreliable statements made prior to trial in determining the amount of drugs attributed to him for sentencing purposes. In imposing the sentence the district court found that Mr Cuellar Jr was responsible for 1 kilogram of heroin and 5 kilograms of cocaine when in fact only 10 capsules were ever recovered. based on the statements provided from the FBI Using these statements the court set Mr. Cuellar Jr's offense level at 38 and further found that Mr. Cuellar Jr was the leader and organizer of the offense

requiring a four level increase and a two (2) point increase for the quantity of the controlled substance under USSG § 2D1.1, (See PSI Report **Ex. B**), Thus, Mr. Cuellar Jr's base offense level rose to 44 and the district court sentenced him to two (2) life sentences. In calculating the amount of drugs attributed to Mr. Cuellar Jr the district court relied on the statements of Victor Manuel Moreno, Ramior Moya Gonzales and Jorge Merced Losano Guerrero made to the FBI three (3) months prior to trial. It must be noted that there was another person, Arturo Avalos Rodriguez, who was charged in count 12, (which charged 86 grams of heroin), but was a fugitive at the time of trial, in fact he was deported by Immigrations back to Mexico. Jorge Merced Losano was also not available for trial the unavailability of these two (2) violated Mr. Cuellar, Jr's right to confrontation under Crawford v. Washington, 541 U.S. 36, 158 L.Ed 2d 177 (2004), Nevertheless these statements were included in the presentence investigation report that was utilized by the district court at sentencing and the government presented these statements and the testimony of the FBI agent..Mr. Cuellar Jr, contends that all these statements and testimony lacked the necessary reliability to resolve or determine the drug quantity for purposes of sentencing. Mr. Cuellar, Jr objections to the district court's use of these hearsay evidence/statements as a basis for deciding his sentence. According to the sentencing Guidelines and our case law interpreting them, the distridt court "may consider any information including "Reliable Hearsay", regardless of the imformation's admissibility at trial, provided that there are sufficient indicia of reliablility to support its probable accuracy" United States v. Castellanos, 9 04 F.2d 1490, 1495 (11th Cir. 1990)(emphasis added);

See also U.S.S.G. § 6A1.3; United States v. Griffin, 945 F.2d 378, 381-82 (11th Cir. 1991)(Morgan. J.), cert. denied, 504 U.S. 917, 112 S.Ct. 1958, 118 L.Ed.2d 561 (1992); United States v. Query, 928 F.2d 383, 384-58 (11th Cir. 1991). Thus, the focus is upon the question of its reliability, which must be determined on a case by case basis.

Mr. Cuellar, Jr contends that the only evidence of the large amounts of drugs attributed to him was the hearsay statements of Victor Manuel Moreno, Ramiro Moya Gonzales and Jorge Merced Loaano. Not only were two of these people unavailable for the trial, Specific findings on their crediability was necessary before the district court could use these statements as the basis for determining the base offense level in order to sentence Mr. Cuellar, Jr, United States v. Miele, 989 F.2d 659, 665 (3rd Cir. 1993)(Vacating sentence in absence of any findings by the district court to explain its reliance on hearsay). Thus, Mr. Cuellar, Jr contends that remand to the district court for resentencing is required. See Miele, Supr,

The PSI provided the following estimate of the total quantity of cocaine for which Miele should be held responsible: Based on information provided by the CI [confidential informant] and the defendant, investigators believed the defendant is responsible for distributing approximately eight kilograms of cocaine from late 1984 to early 1990. The PSI's eight kilogram estimate was derived largely from information provided by the informat Frank Habera, a drug addict at the time of the events in question, who told the probation officer that "during 1985 he observed the defendant to in possession of at least fifteen pounds [6.8 kilograms] of cocaine."

In this case Miele's involvement with cocaine was extensive and continued over a long period of time. However, A

determination that miele's drug activity was substantive do not translate readily into a specific drug quantity from which the ultimate issue for sentencing purposes, as we explained in detail above, the record here leaves us with serious questions as to the "reliability" of the information provided, accordingly, We require the district court articulate more than a conclusory finding, we will therefore vacate the sentence and remand for further fact finding and resentencing.

Mr Cuellar, Jr further contends that he must be resentenced because the whole sentence violates Booker. The Judge decided not only the drug quantity but also the statute of conviction(s), and the guideline range. Court's have concluded that a misclassification of the guidelines can be a fundamental defect if the sentencing occurred preBooker. In Lester v. Flournoy, 909 F.3d 708, 715 (4th Cir), the court explicitly noted that had Lester's career offender misclassification overrule under post-Booker advisory guidelines, his petition would have been barred. But See Meadows v. United States, 2019 U.S Dist Lexis 113809; Moore v. United States, 871 F.3d 72, 82 (1st Cir. 2019); Cross v. United States, 892 F.3d 288, 294 (7th Cir. 2018). The Fifth Circuit finds the arguments of the First and Seventh Circuit to be persuasive, and the conclusion is bolstered by two recent Supreme Court cases holding a functionally identical residual clause to be unconstitutionally vague, Dimaya, 138 S.Ct. 1204, 1223 (2018); Davis, 138 S.Ct. 1319, 1323 (2019), The court explained that - "Johnson is a straightforward decision with equally straightforward application here, this straightforward application of Johnson must be applied to the pre-Booker "mandatory guidelines. Mr. Cuellar, Jr was sentenced

under the pre-Booker mandatory guidelines scheme, therefore the maximum sentence authorized by the facts established by the jury verdict was set by the range required by the sentencing guidelines. See United States v. Blood, 435 F.3d 612, 630 (6th Cir 2006); United states v. Oliver, 397 F.3d 369, 378 (6th Cir. 2005)(given that federal sentencing guidelines were mandatory at the time the district court sentence Mr. Cuellar, Jr its seems clear now in light of Booker that the sentence imposed violated the Sixth Amendment). It is undisputed that Mr. Cuellar, Jr's sentence was predicated on the district judge's findings, based on the preponderance of the evidence, [drug amount]. The drug amount calculated by the district court judge by the preponderance of the evidence resulted in Mr. Cuellar Jr's going from a Statutory offense of 0 to 20 years, for the 10 capsules, to 10 - to Life. An for an extreme guideline based on the drug quantity table of section § 2D1.1, to the extreme-highest possible base offense level based on a quantity of drugs alone of level 38. In United states v. Edwards, 2019 U.S. Dist Lexis 146571 (7th Cir. 2019), The jury returned a verdict of guilty of conspiracy to possess with intent to distribute cocaine, heroin and marijuana. If the defendant is not charged with a statutorily specified weight of controlled substance, then the maximum statutory penalty is 20 years, 28 U.S.C. § 841(a)(1), The same applies to a 21 U.S.C. § 861 conspiracy, the defendant was not charged with a specific drug amount. Here, Mr. Cuellar, Jr's crimes of convictions were predicated on a drug quantity that was never submitted to the jury or admitted by Mr. Cuellar, Jr, thus he must be re-sentenced under the Statutory offense of 21 U.S.C § 841(b)(1)(C), 0 to 20 years.

GROUND TWO

Not only did the District Court violate Booker, But it also Sentenced Mr. Cuellar, Jr, above the statutory maximum authorized by Congress for a violation of 21 U.S.C. § 861 because Mr. Cuellar Jr, could not be sentenced to Life on that count because he has NO prior drug trafficking offense. 21 U.S.C. § 861 reads:

"It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally-
(1) employ, hire, use, persuade, induce, entice or coerce, a person under eighteen years of age to violate any provision of this subchapter or subchapter II of this chapter;

(2) employ, hire, use persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any offense of this subchapter or subchapter II of this chapter by any Federal, State, or local law enforcement official; or
(3) receive a controlled substance from a person under 18 years of age, other than an immediate family member, in violation of this subchapter or subchapter II of this chapter.

(B) Penalties

Any person who violates subchapter (a) of this section is subject to twice the maximum punishment otherwise authorized and at least twice any term of supervised release otherwise authorized for a First offense. Except to the extent a greater minimum sentence is otherwise provided, a term of imprisonment under this subchapter shall not be less than One Year.

(C) Any person who violates subsection (a) after a prior conviction under subsection (a) of this section has become Final, is subject to three times the maximum punishment otherwise authorized and at least three times any term of supervised release otherwise authorized for a first offense. Except to the extent a greater minimum

sentence is otherwise provided, a term of imprisonment under this subsection shall not be less than one year. Penalties for Third and Subsequent conviction shall be governed by section 841(b)(1)(A).

(d) Penalty for providing or distributing controlled substance to underaged person

Any person who violates subsection (a)(1) or (2) of this section.

(1) By knowingly providing or distributing a controlled substance or a controlled substance analogue to any person under eighteen years of age; or

(2) if the person employed, hired, or used is fourteen years of age or younger, shall be subject to a term of imprisonment for not more than five years or a fine of not more than \$50,00 or both, in addition to any other punishment authorized by this section.

Mr Cuéllat contends that clearly he could not receive a LIFE sentence under this statute because he has never been convicted of violating this statute and he does not have any prior drug trafficking offenses. Mr. Cuellar, Jr, contends that a defendant may only receive a life sentence for a Third offense under this statute in order to be subject to a sentence under 21 U.S.C. § 841(b)(1)(A), which carries a sentence of 10 years to Life. Mr. Cuellar, Jr was a first time offender under this statute, thus could never receive a sentence above two (2) years.

Mr. Cuellar, Jr, has demonstrated that a Booker error has occurred. He has raised a colorable claim regarding his sentence, he argues that his sentence which the district court imposed prior to the Supreme Court's decision in Booker is unconstitutional in light of that decision because the district court erred in its determination of the drug quantity and in finding that prior convictions that did not qualify as predicate offense for a life enhancement under 21 U.S.C § 861, and in applying various enhancements to his sentence. Mr. Cuéllat, Jr has demonstrated that the district court treated the guidelines as mandatory, in violation of Mr. Cuellar, Jr's 5th and 6th Amendment rights

GROUND THREE

Mr Cuellar Jr contends that when the Fifth Circuit Court of Appeals Vacated the judgment of conviction and sentence on count 13 (the 28 U S C § 924(c)) See Cuellar v United States No 95 8431 (U S July 29 1996) it gave the following statement

We have reviewed the sentencing transcript are convinced that the § 924(c)(1) conviction did not impact the guide lines on the other convictions

Mr Cuellar Jr contends that he is entitled to be resentenced because his firearm conviction formed part of the same sentencing package, his convictions were grouped together and points were added to determine his offense level and his guideline range. It was error not to resentence him and that error was compounded because he was sentenced under pre-Booker guidelines which were mandatory at the time and affected his sentence calculation. See United States v. Clark 816 F 3d 359, 360 (5th Cir 2016)(Noting that consecutive sentence was not part of sentencing package), Here Mr Cuellar Jr's sentence from part of a integrated sentencing package and the court must resentence Mr Cuellar Jr, because one or more of the counts of a multicount conviction were reversed and one or more counts were affirmed, the result is an [unbundled] sentencing package, because the sentence were interdependent the reversal of the underlying § 924(c) but not all renders the sentencing package ineffective in carrying out the district court's sentencing intent, as to any one of the sentences on the affirmed convictions, See United States v. Bass, 104 F. App'x 997, 1000 (5th Cir. 2004)(Bass II)(Quoting United States v. Shui, 825 F 2d 1111, 1114 (7th Cir. 1987). This court has authority under § 2243 to dispose of this matter as law and justice require. and that this author

ity included the power to resentence Mr Cuellar Jr to the over all term that he would have received on the interdependent sentencing package absent the unlawful § 924(c)(1) conviction See United States v. Harvey, 2016 U.S. Dist Lexis 181047 Harvey was resenteded United States v. Curry 2018 U S Dist Lexis 60560 (the motion was granted, the court will resentence Curry on all counts of conviction); United States v. Walker, 768 Fed App'x 877 (5th Cir.) (the government conceded that the district court plainly erred by imposing sentence that exceeded the statutory maximum for his firearm conviction, as the firearm conviction were part of the sentencing package, the sentences for all counts were vacated and remanded for resentencing on all counts Mr Cuellar Jr, contends that he is entitled to a full resentence on all counts.

RULE 52(b) PLAIN ERROR

Mr. Cuellar, Jr, contends that under Rosales-Mireles v. United States, 201 L.Ed.2d at 385-390, that miscalculation of the Mandatory guidelines affected Mr. Cuellar, Jr's substantive right and calls for this court to exercise its discretion under Rule 52(b) to vacate his sentence because Mr. Cuellar, Jr, Statutory sentence and guideline enhancements were based on facts not found beyond a reasonable doubt by a jury and because he was sentenced under pre-Booker mandatory sentencing scheme. These errors are plain after the Supreme Court's decision in Booker. Mr. Cuellar, Jr, intites this court to import into Rule 35(a) "Clear Error" measure the plain error standard of Rule 52 (b) as interpreted and applied in countless decision, the invitation should be logically applied because the narrow purpose of Rule 35 (a) dovetailes nicely with the scope of the plain error Rule. Before an

an error is subject to correction under the plain error rule, it must be plain under controlling precedent or in view of unequivocally clear words of a statute or rule; it must have adversely affected the outcome of the proceedings, and it must be such that the failure to correct the error would seriously affect the fairness, integrity or public reputation of judicial proceedings, See United States v. Olano, 507 U.S. 725, 732-37 (1993); United States v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir. 2005). If an error meets all these requirements, it is also the kind of obvious error that "would almost certainly result in a remand of the case to the trial court for further action" and would therefore come within the narrow scope of Rule 35(a) Fed.R.Crim. P.

Mr. Cuellar, Jr, contends that the errors in this case are plain and can be decided under Rule 52(b); See United States v. Infante 404 F.3d 376, 394 (5th Cir. 2005); United States v. Camacho-Ibarquen 410 F.3d 1307, 1315 (11th Cir. 2005); United States v. Duncan, 400 F.3d 1297, 1301 (11th Cir. 2005); United States v. Mangaroo, 504 F.3d 1350, 1353 (11th Cir. 2007); United States v. Perez 661 F.3d 568, 583 (11th Cir 2011).

In order for Mr. Cuellar, Jr. to show that the district court committed plain error or that the errors in his case are plain he must meet the following;

- "(1) there must be an error; (2) the error must be clear or obvious, rather than subject to reasonable dispute;
- (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings; and (4) the error seriously affected the fairness, integrity or public reputation of the judicial proceedings.

THERE WAS ERROR AND THE ERROR WAS PLAIN AND OBVIOUS

Mr. Cuellar, Jr, statutory offense, under 841(b)(1)(A), was determined by the district court. The drug quantity was never submitted to the jury in this case. In fact as stated herein the drug quantity was decided three (3) months before the trial on July 14, 1994, See Exhibit#A, based on information provided to the FBI but was never submitted to the jury. The error was compounded were as here Mr. Cuellar, Jr, was sentenced under the pre-Booker Mandatory guidelines.

Mr. Cuellar, Jr, contends that it was error for the district court to make a drug quantity determination that increased his statutory sentence and enhanced his guideline range. We now know that drug type and quantity are elements of an aggravated offense which must be charged in the indictment, submitted to the jury and proved beyond a reasonable doubt. In this case the judge determined the drug quantity by the preponderance of the evidence standard which violated Mr. Cuellar, Jr's rights under the 5th and 6th Amendment to the United States Constitution, He has a right to be found guilty by a jury of every fact necessary to support the charged offense. When the trial judge decided the element of the charged offense he took away Mr. Cuellar, Jr's constitutional right to a jury trial and the right to counsel for his defense under the 6th Amendment.

Mr. Cuellar, Jr, further contends that it was plain error not to have re-sentenced him after the Fifth Circuit vacated his § 924 (c) conviction. That conviction and sentence was part of the sentencing package that affected the whole sentence, offense level and guideline range, The error was compounded by the fact that because he was not resentenced he remained sentenced under the pre-Booker

Mandatory guidelines. Mr. Cuellar, Jr, was prejudiced by the failure to resentence him. Had Mr. Cuellar, Jr, been resentenced, he would not have been subjected to the pre-Booker Mandatory guideline and the protections of Apprendi v. New Jersey, 530 U.S. 466, 147 L.Ed.2d 435 (2000) would have applied to him at resentencing. Which would have also have affected the district court drug quantity determination, It would have been obvious that drug quantity had to be submitted to the jury and that the judge could not make that determination using the preponderance of the evidence standard, These errors seriously affected Mr. Cuellar, Jr's substantial right.

Mr. Cuellar, Jr, contends that it was plain error to sentence him above the statutory maximum of 21 U.S.C. § 861 for a first time offender who had no prior convictions for violating that statute and No prior drug trafficking offense. However, Mr. Cuellar, Jr received a life sentence for an offense that he could only have received two (2) years, not life. This determination would also be dependent on the quantity of drugs involved in the offense, which would have had to be decided by the jury, not the judge based on the perponderance of the evidence. These errors affected Mr. Cuellar Jr's substantial rights.

THE ERROR AFFECTED Mr. Cuellar JR'S SUBSTANTIAL RIGHTS

Mr. Cuellar, Jr, asserts that his Constitutional Rights have been violated, that he was denied the protection of the 5th and 6th Amendment; He was sentenced on fact-- elements-- not Submitted to a jury, He was sentenced above the statutory maximum of 841(b)(1)(A) and 861 based on fact that were not submitted to a jury, then enhanced under 861 with no qualifying prior drug trafficking offenses: He was denied resentencing after one of his convictions was vacated,

That required Mr. Cuellar, Jr, to be resentenced because that sentenced was part of the whole sentencing package, it effected his offense level and his Mandatory Guidelines. Had Mr. Cuellar been resentenced he would not have been prejudiced by the pre-Booker mandatory guidelines or the Appendi violation of his 5th and 6th Amendment rights. He would have further been sentenced under the guidelines ineffect at the time of the new or resentencing which would have given Mr. Cuellar, Jr, a lower sentence.

Mr. Cuellar, Jr, is prejudiced by not being resentenced without the mandatory guideline, that the Supreme Court was ruled were unconstitutional and could only be used as advisory. Since that decision the law has realized that the mandatory guidelines include the use of the residual clause[s], (924(e)-the ACCA, 16(b) and 924(c)(3)(B)), which have also been ruled unconstitutionally vague.

Mr. Cuellar, Jr, Substantial rights have been affected by all of these plain constitutional error and he has suffered prejudice because he has been incarcerated 26 years, In the worse possible situation Mr. Cuellar, Jr. should have been released over 6 years ago.

THE ERRORS SERIOUSLY AFFECT THE FAIRNESS, INTGRITY AND PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS.

Mr. Cuellar, Jr, contends that the error complained of seriously affect the fairness, intgrity and public reputation of the judicial proceedings, Where a court does not exerce its power to correct plain or constitutional error that deprvie a defendant of life and liberty, or that causes a defendant to send years in prison when the law does not call for or require it. This court also has the power to correct any of these errors Sua Sponte. This Court can

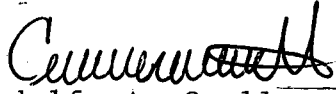
Sua Sponte invited or order the parties to submit supplemental briefs on issue preclusion and specifically held that it [was] proper for the court to raise the issue sua sponte of factual development not raised and hold a hearing, 203 L.Ed.2d 846.

Mr. Cuellar, Jr. also contends that it would be a fundamental miscarriage of justice to recognize all of these errors and leave a defendant, such as Mr. Cuellar, Jr. to languish in prison.

Wherefore, Mr. Cuellar, Jr., respectfully requests that this Honorable Court grant him a sentence reduction and any other relief that his court may deem just and appropriate.

CERTIFICATE OF SERVICE

I, Rodolfo A. Cuellar, Jr., hereby certifies that a true and correct copy of the foregoing Writ of Certorari with Appendix and In Forma Pauperis application has been sent by first class mail, postage pre-paid to the address below on **5-5-2023**

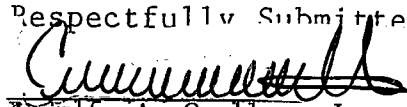
/s/ 
Rodolfo A. Cuellar, Jr.,
pro-se petitioner

CONCLUSION

Petitioner respectfully requests that this Court issue its Writ of Certiorari to review and reverse the judgement of the United States Court of Appeals for the Fifth Circuit.


Dated: 5-5-2023

Respectfully Submitted.


Rodolfo A. Cuellar, Jr.
Petitioner, pro-se
Reg. No. 25755-077
U.S. Penitentiary, "Pollock"
P.O. Box 2099
Pollock, LA 71467

DECLARATION

I, Rodolfo A. Cuellar, Jr., petitioner pro-se declares herein that pursuant to Supreme Court Rules, Rule 29(2) and Houston v. Lack, 487 U.S. 266 (1988), that I am an inmate confined in a federal institution and that I deposited the foregoing Petition for Writ of Certiorari with Appendix and In Forma Pauperis application in the institution's internal mail system with first class postage pre-paid on 5-5-2023, 28 U.S.C. §1746; U.S.C. §1621.

/s/ 
Rodolfo A. Cuellar, Jr.
pro-se petitioner

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 16, 2021

Lyle W. Cayce
Clerk

No. 20-10182
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RODOLFO A. CUELLAR, JR.,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:94-CR-62-1

Before DAVIS, JONES, and ELROD, *Circuit Judges.*

PER CURIAM:*

Rodolfo A. Cuellar, Jr., federal prisoner # 25755-077, was found guilty of conspiring to distribute cocaine, using a communication facility to facilitate drug trafficking, possessing heroin with intent to distribute, and employing a person under 18 years of age in the distribution of cocaine and

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