

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

JUAN SEPULVEDA-ARREOLA

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, **JUAN SEPULVEDA-ARREOLA**, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:

July 20, 2023.

Respectfully submitted,
Yolanda Jarmon
/s/ *Yolanda Jarmon*
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QUESTIONS PRESENTED

I. Whether the Fifth Circuit violated federal law when it conducted a cursory review of the facts related to the district court's erroneous refusal to deem Sepulveda-Arreola a minor participant and thereby refused to apply a two-level adjustment under U.S.S.G. § 3B1.2(b); and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, upon review, should reverse the judgment of the Fifth Circuit.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption of the case before the Court.

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Exhibit B: Original Judgment and Sentence of the District Court,

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PRAYER

The petitioner, **JUAN SEPULVEDA-ARREOLA** respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on **April 21, 2023**.

OPINIONS BELOW

The case reflecting the Original Judgment and Sentence of the District Court can be found at ***United States v. Sepulveda-Arreola, Cr. No. 7:21:CR:909-2 (S.D. Tex. July 06, 2022)***. (Exhibit B). However, on April 21, 2023, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Sepulveda-Arreola's conviction and sentence. See ***United States v. Juan Sepulveda-Arreola 22-40394, 2023 U.S. App. LEXIS 9646, *1, 2023 WL 3034325 (5th Cir. April 21 2023) (affirmed) (unpublished (Exhibit A)***. In affirming the district court's opinion, the Fifth Circuit found that it was plausible in light of the record as a whole for the district court to find that Sepulveda-Arreola's involvement in multiple incidents of drug transportation, as well as his connection to a large quantity of narcotics, support the inference that he understood the scope of the criminal activity and played more than a minor role.

No petition for rehearing was filed.

JURISDICTION

On April 21, 2023, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence in this case. This petition is filed within ninety days after entry of the judgment. See. Sup. Ct. R. 13.1 and 13.3. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

FEDERAL STATUTES INVOLVED

The applicable law states that pursuant to U.S.S.G. § 3B1.2:

(a) if the defendant was a minimal participant in any criminal activity, decrease by 4 levels;

(b) if the defendant was a minor participant in any criminal activity, decrease by 2 levels;

in cases falling between (a) and (b), decrease by 3 levels.

STATEMENT OF THE CASE

A. Course of Proceedings

The Indictment and Plea

On August 31, 2021, pursuant to a plea agreement, Juan Sepulveda-Arreola ("Sepulveda-Arreola") entered pleas of guilty to the Counts Four and Six of the Indictment in this case. (ROA.105-106, 132-133).

Count Four charges that on or about April the 13th, 2021, in the Southern District of Texas and within the jurisdiction of the

Court, Sepulveda-Arreola with another, did knowingly and intentionally possess with intent to distribute a controlled substance. (ROA.25, 87).

The controlled substance involved 500 grams or more, approximately 51 kilograms, of a mixture or substance containing a detectable amount of methamphetamine, a Schedule Two controlled substance in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and Title 18, United States Code, Section 2. (ROA.25, 87-88).

Count Six charges that on or about April the 13th, 2021, in the Southern District of Texas and within the jurisdiction of the Court, Sepulveda-Arreola while knowingly being an alien illegally and unlawfully in the United States, that he knowingly possessed in and affecting interstate and foreign commerce a firearm, namely a Ruger Model AR-556 5.56 by 45millimeter NATO caliber rifle. In violation of Title 18, United States Code, Section 922(g)(5)(A) and 924(a)(2). (ROA.26).

Sepulveda-Arreola agreed to waive any and all interest in any and all firearms, weapons, and ammunition, and to the judicial or administrative forfeiture of those assets seized in connection with the case included but not limited to a Ruger Model AR-556, 5.56x 45mm NATO caliber rifle bearing S/N 851-75721. (ROA.27, 131-132,).

In exchange, the Government agreed to (1) recommend a two-level decrease in sentencing points pursuant to U.S.S.G. 3E1.1(a) if Sepulveda-Arreola clearly demonstrated acceptance of responsibility; and (2) to dismiss the remaining Counts of the indictment before sentencing. (ROA.131-132). The government proffered the following as the stipulated factual basis of Sepulveda-Arreola's plea.

On or about April 13, 2021, the Defendant did knowingly and intentionally possess with intent to distribute more than 500 grams of methamphetamine, a Schedule Two controlled substance. (ROA.107). On said date, the Defendant was further an alien illegally and unlawfully present in the United States who did knowingly possess in and affecting interstate commerce a firearm. On said date, the Defendant had agreed to receive a load of methamphetamine from a coconspirator that was to be distributed to other individuals. (ROA.107-108).

On said date, as part of a controlled delivery, the Defendant received approximately 51 kilograms of methamphetamine that were subsequently seized by law enforcement near McAllen, Texas. (ROA.108).

The Defendant subsequently consented to a search of his residence where officers found a Ruger Model AR-5565.56 by 45-millimeter NATO caliber rifle that belonged to the Defendant. (ROA.108).

On said date, the Defendant knew he was an alien illegally and unlawfully present in the United States, and that he could not possess said firearm. The firearm was manufactured outside the State of Texas and, therefore, traveled in interstate commerce. (ROA.108).

B. The Sentence

The 2021 Guidelines Manual, incorporating all guideline amendments, was used to determine the defendant's offense level, pursuant to U.S.S.G. § 1B1.11. Pursuant to U.S.S.G. § 3D1.1, Procedure for Determining Offense Level on Multiple Counts, when a defendant has been convicted of more than one count, "the Court shall (1) group the counts resulting in conviction into distinct Groups of Closely Related Counts by applying the rules specified in U.S.S.G. § 3D1.2; (2) determine the offense level applicable to each group by applying the rules specified in U.S.S.G. § 3D1.3..." (ROA.165).

Pursuant to U.S.S.G. § 3D1.2(c), Multiple Counts, the counts were grouped together: "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to the guideline applicable to another of the counts." In this case, each count can be treated as specific offense characteristics in the other count. Thus, Count Six was treated as a specific offense characteristic in Count Four. (ROA.165).

The Base offense level was set at a 20 pursuant to 18 U.S.C. §§ 922(g)(5)(A), 924(a)(2), U.S.S.G. 2K2.1 2k2.1(a)(4)(b). The base offense is set at 20 when (i) the offense involved a (I) semiautomatic firearm that is capable of accepting a large caliber magazine; (II) or firearm describe in 28 U.S.C. § 5845(a). and

(ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. (The Final PSI erroneously set the Base Offense Level at 14; however it was corrected and changed to level 20 in a Supplement to the Final PSI dated March 17, 2022). (ROA.115-116, 182-183).

In this case, agents seized a Ruger AR-556 .223/5.56x45 rifle inside a black case along with two .223 magazines. The firearm is considered a firearm capable of accepting a large capacity magazine and the defendant was a prohibited person at the time he committed the instant offense, in that, he was identified as an undocumented alien, who was illegally present in the United States. Therefore, the base offense level was calculated at 20.

However, this assessment had no impact on the Total Offense Level, or the guideline imprisonment range noted in the presentence report, because in this case, the offense level was established pursuant to U.S.S.G. § 2X1.1(a), which is greater than the one established under U.S.S.G. § 2K2.1. Therefore, the Total Offense Level remained a 40 and presentence investigation report was not revised. (ROA.182-183).

A four-level increase was added warranted pursuant to U.S.S.G. 2K2.1(b)(6)(B). The Final PSI alleged that Sepulveda-Arreola possessed the firearm and ammunition in connection with the possession and distribution of methamphetamine (actual). (ROA.165).

Sepulveda Areola was held accountable for an estimated total amount of 983,042.7 kilograms of converted drug weight. Pursuant to U.S.S.G. § 2D1.1(c)(1), 90,000 kilograms or more of Converted Drug Weight resulting in a Base Offense Level of 38. (ROA.167).

According to the Final PSI, Sepulveda-Arreola was found in possession of one firearm and four magazines which were discovered in his residence along with \$8,857.16 in U.S. currency and cocaine. A two-level increase was assessed pursuant to U.S.S.G. § 2D1.1(b)(1). (ROA.167).

Sepulveda-Arreola objected to the application of U.S.S.G. § 2D1.1(b)(1), arguing that (1) the weapon was never brandished or used in the offense; (2) there was no evidence to place this firearm, or any other at the firearms in the location; and that there was no evidence of who placed that weapon at that location or when. Sepulveda-Arreola noted that even the preparer of the Final PSI notes that "although Juan Sepulveda did not possess the firearm, the firearm was located in his resident." (ROA.155-156, 164).

He argued that, based upon his full cooperation and debriefing by the Government, and in light of his objection to the firearm enhancement should be considered for a safety valve reduction. (ROA.156). He argued that the Final PSI stated that he did not possess the firearm, although the firearm was in his residence. (ROA.164.) The objection to the two-level enhancement was denied. (ROA.115).

Pursuant to U.S.S.G. § 2D1.1(b)(5), if the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and the defendant is not subject to an adjustment under U.S.S.G. 3B1.2, increase by two levels. In this case, it was confirmed that Sepulveda-Arreola was aware that the methamphetamine was imported from Mexico. Therefore, a two-level increase was assessed. (ROA.167).

Since the Final PSI indicated that Sepulveda-Arreola possessed a firearm during the commission of the instant offense, he did not meet the criteria set forth in subdivision (2) of subsection (a) of U.S.S.G. § 5C1.2 (Limitation on Application of Statutory Minimum Sentenced in Certain Cases).

Additionally, according to the Final PSI, Sepulveda-Arreola had not been fully debriefed by the Government at the time of its completion; therefore, he did not meet the 2nd or 5th criterion for

the application of U.S.S.G. § 5C1.2, which would have allowed for a two-level reduction under U.S.S.G. § 2D1.1(b) (18). This resulted in an offense level 40 for the substantive offense. (ROA.167). However, because, the offense level established pursuant to U.S.S.G. § 2X1.1(a), was greater than the one established under U.S.S.G. § 2K2.1, the offense level was assessed at a level 42. (ROA.168).

Sepulveda-Arreola requested a minor role adjustment because, according to the Final PSI, his role was that of a courier or transporter. (ROA.155, 122). The request was denied. The Adjusted Offense Level (Subtotal) resulted in a level 42. (ROA.168).

Three points were deducted from the Base Offense Level for acceptance pursuant to U.S.S.G. §§ 3E.1 (a) and (b). (ROA.118-119, 168). Thus, the Total Offense Level was calculated at a level 39. (ROA.119, 171).

The total criminal history score was set at 0. According to the sentencing table in U.S.S.G. Chapter 5, Part A, a criminal history score of 0 establishes a criminal history category of I. The guideline range resulted in 262-327. (ROA.119).

For Count Four, the minimum term of imprisonment is 10 years, and the maximum term is life, pursuant to 21 U.S.C. § 841(a) (1), 841(b) (1) (A) and 18 U.S.C. § 2. For Count Six, the

maximum term of imprisonment is 10 years, pursuant to 18 U.S.C. § 922(g)(5)(A) and 924(a)(2). (ROA.119, 171).

Ultimately, with respect to Count Four, Sepulveda-Arreola was sentenced to a term of 262 months; and for Count Six, to a term of 120 months to run concurrent for a total of 262 months to be served concurrently. (ROA.126-127). Counts Three and Five were dismissed. (ROA.128). The court ordered Sepulveda-Arreola to serve five years of supervised release for Count Four and no supervised release for Count 6. (ROA.127). The court imposed a special assessment of \$100 as to each Count of conviction for a total of \$200 dollars. (ROA.127-128). No fine was imposed. The court also ordered the forfeiture of the Ruger Model AR-556 5.56 by 45millimeter NATO caliber rifle. (ROA.128).

This Court should grant certiorari to determine whether the Fifth Circuit violated federal law when it conducted a cursory review of the facts related to the district court's refusal to deem Sepulveda-Arreola a minor participant and thereby refused to apply a two-level adjustment under U.S.S.G. § 3B1.2(b); and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

This case was brought as a federal criminal prosecution under 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2, conspiracy to possess with intent to distribute 500 grams or more, approximately 51 kilograms, of a mixture or substance containing a detectable amount of methamphetamine, a Schedule Two controlled substance; and while knowingly being an alien illegally and unlawfully in the United States, that he knowingly possessed in and affecting interstate and foreign commerce a firearm, namely a Ruger Model AR-556 5.56 by 45millimeter NATO caliber rifle in violation of Title 18, United States Code, Section 922(g)(5)(A) and 924(a)(2). The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR
GRANTING THE WRIT

This Court should grant certiorari to determine whether the Fifth Circuit violated federal law when it conducted a cursory review of the facts related to the district court's erroneous refusal to deem Sepulveda-Arreola a minor participant and thereby refused to apply a two-level adjustment under U.S.S.G. § 3B1.2(b); and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, upon review, should reverse the judgment of the Fifth Circuit.

A. The district court erroneously refused to deem Sepulveda Arreola a minor participant and thereby refused to apply a two-level adjustment under U.S.S.G. § 3B1.2(b).

1. The district court clearly erred in denying Sepulveda-Arreola the minor participant role reduction pursuant to U.S.S.G. § 3B1.2(b) because Sepulveda-Arreola was substantially less culpable than other defendants and acted only in the role of a courier or transporter.

In affirming the district court's opinion, the Fifth Circuit found that it was plausible in light of the record as a whole for the district court to find that Sepulveda-Arreola's involvement in multiple incidents of drug transportation, as well as his connection to a large quantity of narcotics, support the inference that he understood the scope of the criminal activity and played more than a minor role. See U.S.S.G. § 3B1.1, comment. (n.3(C)(i), (iv)).

In this case, Sepulveda-Arreola contends that he acted as a mere transporter or courier in the drug activities and therefore the two-level adjustment pursuant to U.S.S.G. § 3B1.2 (b) was more

than warranted. (ROA.155). Sepulveda-Arreola requested a minor role adjustment. (ROA.155, 122). The request was denied.

The district court failed to articulate factual findings at sentencing to support its denial of a mitigation role adjustment under U.S.S.G. § 3B1.2. However, the Statement of Reasons filed as part of the record in this case indicates that the district court adopted the Final PSI with the exception of the court's decision to add a reduction in points for acceptance of responsibility pursuant to U.S.S.G 3E1.1 (b). (ROA.184). Furthermore, in an addendum to the Final PSI, the U.S. Probation Office maintained its position that a mitigating role adjustment pursuant to U.S.S.G. § 3B1.2 was not warranted and deferred the matter to the district court. (ROA.179).

The commentary to § 3B1.2 provides that the determination of a defendant's status as a minor participant is "heavily dependent upon the facts of the particular case." The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case. U.S.S.G. 3B1.2 comment. (n.3 (C)). The determination of participant status is a complex fact question, which requires the court to consider the broad context of the defendant's crime. *United States v. Mejia-Orosco*, 868 F.2d 807,

clarifying 867 F.2d 216 (5th Cir. 1989).

The applicable law states that pursuant to U.S.S.G. § 3B1.2:

(a) if the defendant was a minimal participant in any criminal activity, decrease by 4 levels;

(b) if the defendant was a minor participant in any criminal activity, decrease by 2 levels;

in cases falling between (a) and (b), decrease by 3 levels.

Under U.S.S.G. § 3B1.2, the sentencing court must reduce a defendant's offense level by four levels if it determines that the defendant was a "minimal" participant in the convicted offense, U.S.S.G. § 3B1.2(a), or by two levels if the defendant was a "minor" participant. U.S.S.G. § 3B1.2(b). A "minimal participant" is any conspiracy defendant who is "plainly among the least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2, Application note 4. A "minor participant" is any defendant who is "less culpable than most other participants, but [his] role could not be described as minimal." U.S.S.G. § 3B1.2, Application note 5.

Application Note 3 (C) provides, the determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, the court should consider the following non-exhaustive live factors:

(1) the degree to which the defendant understood the scope and structure of the criminal activity; (ii) the degree to which

the defendant participated in planning or organizing the criminal activity; (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision making authority; (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts; (v) the degree to which the defendant stood to benefit from the criminal activity.

Application Note 3 (C) further provides, for example, a defendant who does not have a proprietary interest in the criminal activity and who is being paid to perform certain tasks should be considered for an adjustment under this guideline. The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity. U.S.S.G. 3B1.2 comment. (n.3 (C)).

The Final PSI states that Juan Sepulveda-Arreola's role in the instant offense was that of a narcotics courier or transporter. The Final PSI also states the following:

"...it appears that Juan Sepulveda-Arreola took affirmative steps to commit the instant offense by assisting

identified/unidentified unindicted co-conspirators in picking up a drug laden vehicle and extracting the narcotics from said vehicle. He would then transport the narcotics to a residence to further the drug trafficking venture." (ROA.167).

Here, according to the Final PSI, after a careful review of the investigation material and an interview of the case agent, it was determined that the nature and extent of Sepulveda-Arreola's criminal activity was merely that of a courier or transporter. (ROA.164).

Based upon the information provided in the Final PSI, Sepulveda-Arreola should have received a two-level mitigating role adjustment. First, the Government did not prove by preponderance of the evidence that Sepulveda-Arreola understood the scope and structure of the criminal activity.

Second, the Government failed to prove by a preponderance of the evidence that Sepulveda-Arreola exercised decision-making authority in the sell or delivery of narcotics. The Final PSI indicates that Sepulveda-Arreola made consensual telephone calls to coordinate the drug smuggling event, and the delivery of the Ford Ranger carrying narcotics. However, this attempted coordination was done at the direction of law enforcement agents after Sepulveda-Arreola was apprehended. (ROA.162). Therefore, this information does not prove by a preponderance that Sepulveda exercised

decision-making authority or control of the operation. Likewise, the Government failed to prove by a preponderance of the evidence that Sepulveda-Arreola participated in planning or organizing the criminal activity.

According to the Final PSI, the drug offense involved a drug smuggling operation. Sepulveda-Arreola did not organize the organization, but only worked for someone with more of a leadership role within the drug smuggling operation. Sepulveda-Arreola admitted to extracting illicit controlled substances from a Ford Ranger only twice and just once from a Cadillac SUV. His role was to deliver them to a residence in McAllen, Texas. He further stated he was supposed to pick up illicit controlled substances from another vehicle, but never picked it up. (ROA.162).

In this case, Sepulveda-Areola was merely paid \$1,000 per load. Sepulveda-Arreola did not stand to benefit much from the criminal activity. He extracted illicit control substance only three times and was to be paid only \$1,000 per load. (ROA.162).

In cases where defendants have participated in drug operations and their involvement was substantially more than Sepulveda-Arreola's in this case, district courts have awarded a two-level mitigating role reduction. See e.g., *United States v. Brown*, 29 F.3d 953, 960 (5th Cir. 1994); (2-level mitigating role adjustment applied where defendant's participation in a large drug

operation amounted to providing travel money to organization drivers and participating as a passenger in one of the drug smuggling vehicles; *United States v. Sotelo*, 97 F.3d 782, 799 (5th Cir. 1996) (2- level mitigating role adjustment applied where there was evidence of defendant's long-term involvement and participation in more than twenty deliveries supports the district court's rejection of minimal participation.); *United States. Mora-Estrada*, 867 F.2d 213, 215 (5th Cir. 1989) (2-level minor adjustment applied where defendant and two other couriers smuggled 110 pounds of marijuana into the country. and at the time of his arrest, he alone remained in the vicinity of the drugs and tried to hide them while the other couriers fled), *United States. v. Matthews*, 168 F.3d 1234, 1249 (11th Cir. 1999) (2-level rather than 4-level mitigating role adjustment applied because defendant was minor participant though "heavily involved" in drug deals); and *United States v. Dawson*, 587 F.3d 640, 646 (4th Cir. 2009) (2-level mitigating role adjustment applied because defendant was minor drug courier who only provided part-time services).

Based upon the foregoing law and facts, the district court clearly erred in denying the two-level mitigating role adjustment. Accordingly, the sentence must be vacated and remanded to the district court for re-sentencing.

C. Harmful error occurred.

"[A] sentence within a properly calculated Guideline[s] range is presumptively reasonable". *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006). The Supreme Court expressly directed that, in reviewing a district court's sentencing decision, the courts of appeals "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." While the Guidelines are advisory, in light of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), district courts still must properly calculate the applicable guidelines range before imposing a sentence. See also; *United States v. Kimbrough*, 536 F.3d 463, 468 (5th Cir. 2008). The Supreme Court was. quite explicit in stating that miscalculating the Guidelines range is a significant procedural error that requires reversal. *Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Delgado-Martinez*, 564 F.3d 750, 752-753 (5th Cir.2009) (quoting *United States v. Langford*, 516 F.3d 205, 215-17 (3d Cir. 2008) (explaining "the improper calculation of the Guidelines range can rarely be shown not to affect the sentence imposed").

A procedural error during sentencing is harmless if "the error did not affect the district court's selection of the sentence imposed." See *Williams v. United States*, 503 U.S. 193, 203 (1992);

United States v. Mejia-Huerta, 480 F.3d 713, 720 (5th Cir. 2007).

See also, *United States v. Ibarra-Luna*, 628 F.3d 712, 713-14 (5th Cir. 2010) (holding that an error in the calculation of the applicable Guidelines range is subject to a harmless error analysis and "the harmless error doctrine applies only if the proponent of the sentence convincingly demonstrates both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing.").

The burden of establishing that an error is harmless rests on the party seeking to uphold the sentence. *United States v. Delgado-Martinez* at 753. If the district court has committed such an error, this Court must remand unless the proponent of the sentence establishes that the error "did not affect the district court's selection of the sentence imposed." *Williams*, 503 U.S. at 203; *Delgado-Martinez*, at 753. To satisfy this high burden, the proponent of the sentence "must point to evidence in the record that will convince this Court that district court had a particular sentence in mind and would have imposed it, notwithstanding the error made in arriving at the defendant's guideline range." The crux of the harmless-error inquiry is whether the district court would have imposed the same sentence, not whether the district court could have imposed the same sentence. *Id.*

Mere speculation as to the sentencing judge's motives will not meet the burden. *United States v. Huskey*, 137 F.3d 283, 289-291 (5th Cir. 1998) (Sentence vacated and remanded where there was no convincing evidence in the record that the trial judge would have imposed the same sentence absent the error in calculating the criminal history score.). See e.g., *United States v. Juarez*, 812 F.3d 432, 438-39 (5th Cir. 2016) (Reversal required where the record was unclear as to whether that the district court would have departed upward if it had known that the Guidelines suggested a sentence of seven years and not seven years to life, and the district court believed the sentence it was imposing was far below the Guidelines' maximum recommended sentence of life imprisonment, when in fact it was three years above the Guidelines sentence.); *United States v. Aguilar-Alonzo*, 944 F.3d 544 553 (5th Cir. 2019) (Harmful error occurred and the sentence vacated where the district court's sentence was entirely outside the appropriate Guidelines range and the record lacked evidence that the court intended to increase the sentence beyond the Guidelines range.); *United States v. Tello*, 9 F.3d 1119, 1130-31 (5th Cir. 1993) (Harmful error occurred, and reversal required where the actual sentence fell within both ranges, at the middle of the erroneous range, but at the top of the correct range, and the district judge's "simple, antiseptic comments" did nothing to illuminate why he

imposed the particular sentence and, hence, did not support the government's position that he would have levied the same sentence had no error occurred.).

In the instant case, there is no evidence that the district court would have imposed the same sentence absent the Guidelines error. Here, a Total Offense Level of 39 with and a Criminal History Category of I, resulted in a guidelines range of 262-327 months of imprisonment. See Chapter 5 Part of A, Zone D of the guidelines. Had Sepulveda-Arreola been awarded the two-level deduction in points pursuant to U.S.S.G. 3B1.2, the Total Offense Level would have resulted in a level 37 and guideline range of 210-262, not 262-327. *Id.* But had Sepulveda-Arreola received the mitigating role adjustments under U.S.S.G. 3B1.2(b), two more points would have been deducted because U.S.S.G. § 2D1.1(b) (5) would not have applied as indicated in paragraph 45 of the Final PSI. Absent the application of U.S.S.G. § 2D1.1(b) (5), the Total Offense Level would result in a level 35. The guideline range would then be calculated at 168-210 months, significantly lower than the erroneous 262-327 guidelines range applied in this case. See Chapter 5 Part of A, Zone D of the guidelines.

On remand, the district court should begin with the correct guideline range and is free to consider all the facts and circumstances of the case, along with the factors in 18 U.S.C. §

3553(a), that it deems relevant to its individualized assessment of the proper sentence to be imposed. See *United States v. Kimbrough*, at 468.

"[A] sentence within a properly calculated Guideline[s] range is presumptively reasonable". *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006). The Supreme Court expressly directed that, in reviewing a district court's sentencing decision, the courts of appeals "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." While the Guidelines are advisory in light of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), district courts still must properly calculate the applicable guidelines range before imposing a sentence. See also *United States v. Kimbrough*, 536 F.3d 463, 468 (5th Cir. 2008).

Because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, petitioner **JUAN SEPULVEDA-ARREOLA** respectfully prays that this Court grant certiorari, to review the judgment of the Fifth Circuit in this case.

Date: July 20, 2023.

Respectfully submitted,
Yolanda Jarmon
/s/ Yolanda Jarmon
YOLANDA E. JARMON
Attorney of Record for Petitioner
2429 Bissonnet # E416
Houston, Texas 77005
Telephone: (713) 635-8338
Fax: (713) 635-8498

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

JUAN SEPULVEDA-ARREOLA

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

CERTIFICATE OF SERVICE

YOLANDA E. JARMON, is not a member of the Bar of this Court but was appointed under the Criminal Justice Act 18 U.S.C. § 3006 A(b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit, certifies that, pursuant to Rule 29.5, **On July 20, 2023**, she served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, by Federal Express and further certifies that all parties required to be served have been served and copies addressed to:

The Honorable Elizabeth Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

/s/ Yolanda Jarmon
Yolanda Jarmon
YOLANDA E. JARMON

APPENDIX

United States Court of Appeals for the Fifth Circuit

No. 22-40394
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

April 21, 2023
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JUAN SEPULVEDA-ARREOLA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:21-CR-909-2

Before KING, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:*

Juan Sepulveda-Arreola appeals the sentence imposed following his conviction for possession with intent to distribute 500 grams or more of methamphetamine and possession of a firearm by an alien unlawfully present in the United States. We review his complaint about the denial of a minor

* This opinion is not designated for publication. *See 5TH CIR. R. 47.5.*

No. 22-40394

role adjustment for clear error. *United States v. Gomez-Valle*, 828 F.3d 324, 327 (5th Cir. 2016).

Section 3B1.2 “provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.” U.S.S.G. § 3B1.2, comment. (n.3(A)). A “minor participant” is any participant “who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.” § 3B1.2, comment. (n.5). A decision whether to grant a minor role adjustment is “based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.” § 3B1.2, comment. (n.3(C)).

Contrary to Sepulveda-Arreola’s assertion, he had the burden of demonstrating his entitlement to a minor or minimal role adjustment. *See United States v. Castro*, 843 F.3d 608, 612 (5th Cir. 2016). Although a defendant “should be considered for an adjustment” if he “does not have a proprietary interest in the criminal activity and . . . is simply being paid to perform certain tasks,” the commentary merely states that a reduction is allowed, not that it is required. § 3B1.2, comment. (n.3(C)). Sepulveda-Arreola’s involvement in multiple incidents of drug transportation, as well as his connection to a large quantity of narcotics, support the inference that he understood the scope of the criminal activity and played more than a minor role. *See* U.S.S.G. § 3B1.1, comment. (n.3(C)(i), (iv)). Thus, the district court could have plausibly found, based on the record as a whole, that his actions were not minor. *See Gomez-Valle*, 828 F.3d at 328.

The district court’s judgment is AFFIRMED.

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in McAllen

ENTERED

July 06, 2022

Nathan Ochsner, Clerk

UNITED STATES OF AMERICA

v.

JUAN SEPULVEDA-ARREOLA

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 7:21CR00909-002

USM NUMBER: 81722-179

Richard H Garcia

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 4 and 6 on December 6, 2021.

pleaded nolo contendere to count(s) _____ which was accepted by the court.

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

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2	Possession with intent to distribute 500 grams or more, that is approximately 51 kilograms of methamphetamine.	04/13/2021	4
18 U.S.C. § 922(g)(5)(A) and 942(a)(2)	Alien in possession of a firearm.	04/13/2021	6

See Additional Counts of Conviction.

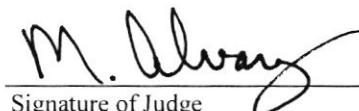
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Count(s) 3 and 5 as to this defendant _____ are dismissed on the motion of the United States.

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

June 16, 2022
Date of Imposition of Judgment


Signature of Judge

MICHAELA ALVAREZ
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

July 6, 2022
Date

EXHIBIT B

DEFENDANT: **JUAN SEPULVEDA-ARREOLA**
CASE NUMBER: **7:21CR00909-002**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 262 months as to Count 4 and 120 months as to Count 6, said imprisonment terms to run concurrently with each other.

- See Additional Imprisonment Terms.
- The court makes the following recommendations to the Bureau of Prisons:
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at _____ on _____
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on _____
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JUAN SEPULVEDA-ARREOLA**
CASE NUMBER: **7:21CR00909-002**

Judgment — Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 5 years as to Count 4.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must 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. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You 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 you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

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

STANDARD CONDITIONS OF SUPERVISION

See Special Conditions of Supervision.

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.
14. If restitution is ordered, the defendant must make restitution as ordered by the Judge and in accordance with the applicable provisions of 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663A and/or 3664. The defendant must also pay the assessment imposed in accordance with 18 U.S.C. § 3013.
15. The defendant must notify the U.S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

DEFENDANT: **JUAN SEPULVEDA-ARREOLA**
CASE NUMBER: **7:21CR00909-002**

SPECIAL CONDITIONS OF SUPERVISION

Immigration Related Requirements

You must immediately report, continue to report, or surrender to U.S. Immigration and Customs Enforcement and follow all their instructions and reporting requirements until any deportation proceedings are completed. If you are ordered deported from the United States, you must remain outside the United States unless legally authorized to reenter. If you reenter the United States, you must report to the nearest probation office within 72 hours after you return.

You must seek proper documentation from U.S. Immigration and Customs Enforcement authorizing you to work in the United States.

DEFENDANT: **JUAN SEPULVEDA-ARREOLA**
CASE NUMBER: **7:21CR00909-002**

Judgment — Page 5 of 6

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment¹</u>	<u>JVTA Assessment²</u>
TOTALS	\$200.00	\$	\$	\$	\$

- See Additional Terms for Criminal Monetary Penalties.
- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

<u>Name of Payee</u>	<u>Total Loss³</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
	\$	\$	

- See Additional Restitution Payees.
- TOTALS** \$ \$
- Restitution amount ordered pursuant to plea agreement \$_____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:
- Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

¹ Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

² Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

³ Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **JUAN SEPULVEDA-ARREOLA**CASE NUMBER: **7:21CR00909-002****SCHEUDLE OF PAYMENTS**

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

A Lump sum payment of \$200.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

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

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

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

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

F Special instructions regarding the payment of criminal monetary penalties:

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

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

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

Joint and Several

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

See Additional Defendants and Co-Defendants Held Joint and Several.
 The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:
Pursuant to 21 U.S.C. § 853 and 970, the defendant shall forfeit the United States the right, title and interest in the real property and the money listed in the Final Order of Forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.