

No. _____

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

JOSE MANUEL AYALA-ALAS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court violated Mr. Ayala-Alas's due process rights by requiring him to proceed to trial with only a Spanish interpreter despite his limited Spanish proficiency.
2. Whether the district court erred in denying a motion to compel discovery and then allowed late disclosure of critical evidence after jury selection.
3. Whether the sentencing enhancements for leadership and obstruction of justice were improperly applied without sufficient factual support.
4. Whether the trial court's refusal to grant a duress instruction and its denial of a motion to continue deprived Mr. Ayala-Alas of a fair trial.
5. Whether the Government's improper closing arguments and burden-shifting statements prejudiced Mr. Ayala-Alas's right to a fair trial.

STATEMENT OF THE ISSUES

- Did the district court error by forcing Jose Ayala-Alas to proceed through criminal proceedings to include trial with only a Spanish interpreter rather than an interpreter in his native language of Tepehuan despite being told by a court interpreter and qualified language expert that Ayala-Alas understood Spanish at a 2nd grade academic level.

- Did the district court commit error by denying Ayala-Alas Motion to Compel Discover despite the fact the requested discovery were items obtained from Ayala-Alas as articulated in Fed. Rule Crim. Pro. Rule 16. Did the district court commit an error by permitting the government to provide discovery on a terminal element of the charge – testing results of an alleged prohibited substance – after voir dire and jury selection? In the same light, did the district court commit error by not granting continuance for defense to have timely access to discovery to provide adequate opportunity to review and prepare for trial in light of forthcoming discovery as well as to have competency evaluated.

- Did the district court commit error by imposing an unreasonable sentence due to incorrect interpretation of the U.S. Sentencing guidelines. Inherently therein, whether the district court violated Ayala-Alas' Due Process rights by permitting the enhancements without government meeting the preponderance of the evidence standard for the enhancement to be applied. Did the district court commit error by concluding USSG 2D1.1(b)(16) was applicable sentencing enhancement. In the same light, did the district court commit error by concluding the applicability of USSG § 3B.1.1(b) was appropriate. Did the district court commit error by concluding Ayala-Alas committed perjury and was subject to the enhancement of USSG § 3C1.1 with the district court using such conclusory statements as to why this was enhancement was applicable "that doesn't mean that they're both truth or both false." Did the court error in not granting Ayala-Alas safety value reduction and error in not granting Ayala-Alas request for reduction in sentencing calculations for duress.

- Did Government make inappropriate statements during closing affecting the rights of Mr. Ayala-Alas and was there sufficient evidence for the jury to reach its conclusion of guilty.

CERTIFICATE OF INTERESTED PERSONS

Petitioner is Jose Ayala-Alas with respondent being the United States. Prior proceedings include Western District of Texas, Pecos Division, 4-22-CR-533-3, and the 5th Circuit Court of Appeals, No. 23-50226.

/s/ Matthew James Kozik

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JURISDICTIONAL STATEMENT

Jose Ayala- Alas, respectfully petitions this court for a writ of certiorari to review the judgment of the 5th Circuit Court of Appeals. The decision of the 5th Circuit denying Ayala-Alas appeal is reported via the 5th Circuit Court of Appeals, No. 23-50226.

Ayala-Alas requested a rehearing of the case, which was denied on 26 August 2024 with this writ being due either received or post-marked by 26 November 2024.

STATEMENT OF THE CASE

Border Patrol agents found Mr. Ayala-Alas and six (6) other individuals at or near High Lonesome Mountain, in Culberson County, Texas, within the Western District of Texas. At or near the area of apprehension, law enforcement located approximately ten bundles of what appeared to be a prohibited substance – namely marijuana. Upon field testing, these bundles tested positive for marijuana. The government did not provide testing results as to the obtained prohibited substance from Mr. Ayala-Alas until after jury selection (ROA 160-161).

After apprehension Mr. Ayala-Alas was allegedly interviewed during which he supposedly waived his right to counsel and admitted to smuggling in a prohibited substance. He even provided such specifics that he was going to take the prohibited substances to "Odessa, Texas." Mr. Ayala-Alas was asked about Odessa, Texas during trial through direct examination with the following question and answer from counsel to defendant, "what is Odessa, Texas" with Mr. Ayala-Alas stating "huh?" and a question "what is Texas" response from Mr. Ayala-Alas "Texas? I don't know." Mr. Ayala-Alas obtained nominal education with testimony encompassing his educational background being "it was just from 2nd to

4th or 5th. and school would be “well about every 15 days” and Mr. Ayala-Alas struggling to understand questions with a government objection to leading being overruled and the court stating “Overruled. Just don’t – try not to lead. May be kind of difficult.”

When the court conducted a question-and-answer session with Mr. Ayala-Alas regarding testifying, Mr. Ayala-Alas repeated stated words to the effect of “I don’t understand” “I don’t understand this very much” even saying “what is testify.” This obvious lack of understanding of the proceeding was further manifested when asked about Facebook, stating “when I go up to the mountain, it’s not Facebook anymore. It’s regular signal.” It was again manifested during sentencing when directed by the Court regarding reporting, Mr. Ayala-Alas stated “well, it’s that I don’t know how I’m supposed to come – I live too far.” The district court continued despite this lack of language comprehension testimony from a qualified language expert stating Mr. Ayala-Alas speaks Spanish at a “2nd grade” level.

During the questioning of other’s involved at no time did any other defendant articulate Mr. Ayala-Alas as a leader and/or organizer – even

when questioned under oath during criminal proceedings. (ROA 825 – 829, 1002).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion by requiring Mr. Ayala-Alas to proceed through a contested trial without the benefit of an interpreter in his native language despite being informed Mr. Ayala-Alas comprehended Spanish at a 2nd grade level. This decision affected the fundamental due process rights of Mr. Ayala-Alas to participate in the criminal proceedings against him.

Moreover, the district court committed an error by denying Ayala-Alas Motion to Compel Discover despite the fact the requested discovery were items obtained from Ayala-Alas as articulated in Fed. Rule Crim. Pro. Rule 16. Government opposed the discovery request yet inappropriate cited to the lack of evidence on the discovery request they opposed – and the trial court granted their opposition – in closing argument. The district court committed an error by permitting the government to provide discovery on a terminal element of the charge – testing results of alleged prohibited substance – after voir dire and jury selection. In the same light, the district court committed error by not

granting a continuance for defense to have timely access to discovery to provide adequate opportunity to review and prepare for trial considering forthcoming discovery as well as seeking competency of Mr. Ayala-Alas's intellectual ability.

The district court committed error by imposing an unreasonable sentence due to incorrect interpretation of the U.S. Sentencing guidelines. Inherently therein, the district court violated Ayala-Alas' Due Process rights by permitting the enhancements without government meeting the preponderance of the evidence standard for the enhancement to be applied. Lastly, the district court commit error by concluding USSG 2D1.1(b)(16), USSG § 3C1.1, and USSG § 3B.1.1(b) were applicable. Finally, the district court committed error by not granting Ayala-Alas' safety value reduction and duress reduction.

ARGUMENT

Failure to Provide Interpreter: The district court abused its discretion by proceeding with a criminal case against Mr. Ayala-Alas without sufficient interpretation for Mr. Ayala-Alas to understand the proceedings against him. Because the record shows Mr. Ayala-Alas did not understand these proceedings against him evidenced by the

testimony of a qualified language expert articulating under oath Mr. Ayala-Alas comprehends Spanish at a second-grade level, the error was obvious.

This 5th Circuit has held a district court decision regarding an interpreter will be overturned with the district court abuses its discretion. *United States v. Paz*, 981 F.2d 199, 200 (5th Cir. 1992). "An abuse of discretion occurs whether the ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Tollet v. City of Kemah*, 285 F.3d 357, 363 (5th Cir. 2002).

Mr. Ayala-Alas had a constitutional and statutory right to interpretation sufficient for him to fully comprehend the nature of the proceedings against him as a matter of due process. Moreover, the Court Interpreters Act of 1978 places a requirement on the court to utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise qualified interpreter, in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officers own motion or n the motion of party that such party speaks only or primarily a language other than the

English language so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer. When the Act requires the appointment of an interpreter, the court must appoint one, regardless of the fact it may be troublesome or time consuming. *United States v. Coskun*, 623 Fed App'x 663, 666-667 (5th Cir. 2015).

In this case, the district court with the 5th having no issue, failed to provide Mr. Ayala-Alas an interpreter who spoke a language he could adequately understand, prohibiting Mr. Ayala-Alas from understanding the proceedings against him despite receiving expert testimony regarding the Spanish proficiency of Mr. Ayala-Alas. Plain error is error, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of the judicial proceedings. *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991). It is well known that the district court has wide discretion in matters regarding the selection of an interpreter. *United States v. Bell*, 367 F.3d 452, 463 (5th Cir. 2004); *United States v. Pas*, 981 F.2d 199, 200 (5th Cir. 1992); *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1981); *United States v. Martinez*, 616

F.2d 185, 188 (5th Cir. 1980). Moreover, as previously stated, the Court Interpreters Act (CIA) of 1978 places a requirement on the court to use a court interpreter when a defendant speaks a language other than English. 28 U.S.C. § 1872(d). The CIA also provides that a court "shall utilize" an interpreter if it finds that the defendant speaks only a primarily a language other than the English language to inhibit comprehension of the proceedings or communication with counsel or presiding judicial official. 28 U.S.C. § 1827(d)(1)(A). The issue is ultimately whether the use of the interpreter made the trial fundamentally unfair. With all these contentions, we do not disagree, except that the Court Interpreters Act of 1978 makes it incumbent upon a trial Court to make certain findings on the record, which are lacking in this case."

Again, in this case, the district court and inherently the 5th abused its discretion by not providing Mr. Ayala-Alas with interpretation in a language he sufficiently understood to understand the proceedings against him. The court's failure to provide him with this interpreter without sufficient findings as required by the CIA also affected Mr. Ayala-Alas's substantial rights. In assessing a claim of constitutional

error, an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. A constitutional error is harmless if it can be shown, beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. *Mendoza v. United States*, 755 F.3d 821, 824. How, when one is examined by an expert, is it harmless to ignore this testimony that Mr. Ayala-Alas understands Spanish at a 2nd grade level yet have a trial court, an untrained linguist, supplanted their untrained language ability and concluded Mr. Ayala-Alas sufficiently understands the proceedings against him.

In this case, in the first proceedings before the trial court with Mr. Ayala-Alas physically present, counsel raised the concerns by the fact Mr. Ayala-Alas was not understanding Spanish. These concerns were immediately raised to the trial court with the court dismissing these concerns with little interest. Any indication to the presiding judicial officer that a criminal defendant speaks only or primarily a language other than the English language should trigger the application of

Sections (d) and (f)(1) of the Court Interpreters Act. *United States v. Tapia*, 631 F.2d 1207, 1209.

Giving the court the benefit of the doubt, surely though after hearing from a qualified language expert and one who serves as a court-interpreter for this trial court, that Mr. Ayala-Alas understood Spanish at a 2nd level, it is an obvious abuse of discretion to continue while ignoring the due process concerns of the defendant.

This abuse affected Mr. Ayala's constitutional rights to due process evidenced by the fact Mr. Ayala-Alas struggled to understand simple questions regarding testifying. Mr. Ayala-Alas didn't even understand requirements regarding reporting should subsequent his release from confinement. A "defendant's 5th and 6th Amendment rights to confrontation and due process" may demand interpretation of criminal proceedings. *United States v. Martinez* 616 F.2d 185, 188 (5th Cir. 1980). The 5th Circuit's decision clearly creates a conflict between existing law, now permitting a district court from providing an interpreter in a language the defendant understands rather than only one reasonably available to the court.

Sufficiency of the Evidence: The evidence was insufficient to support the conviction of Mr. Ayala-Alas.

In this case, the only evidence that Mr. Ayala-Alas was guilty of the alleged offense was a non-recorded alleged confession of aiding and abetting regarding the importation of a controlled substance, to wit, marijuana, and aiding and abetting to possess with the intent to distribute a controlled substance, to wit, marijuana. In this case, the statements of a supposed confession of Mr. Ayala-Alas — someone interviewed and reported by an expert of having a second-grade level of Spanish, were not corroborated by any witness offered by Government. In this case, when Mr. Ayala-Alas was asked in open court regarding knowingly traveling to the United States, Mr. Ayala-Alas stated in response to a question of being told he was going to the "frontera" he did not know he was going to the United States. When asked whether he knew whether marijuana "mota" was illegal, he did not understand the term "illegal," responding they don't plant "mota" from where he is from. When asked if he wanted to partake in this venture, Mr. Ayala-Alas provided "no. I was scared because I didn't know what to do. I didn't know what to do. And I told them two times to give me an opportunity to pay them back the money. That I didn't want to come. That I knew that there was a lot of suffering...and I was scared because I knew people

died of thirst or got lost.” “I imaged the frontera as a field where there’s no water.”

A jury is free to choose among reasonable construction of evidence, the jury may not pile inferences upon inferences and must limit itself to reasonable construction of the evidence. *United States v. Onick*, 889 F.2d 1425, 1429 (5th Cir. 1989). Here, again, government provided nothing more than the alleged confession of Mr. Ayala-Alas, and yet when questioned in open court, Mr. Alaya-Alas didn’t even know what Texas or Odessa was and stated he didn’t understand the questions from law enforcement. The Government provided no corroborating evidence, rather attempted to suggest guilt by association with its inappropriate closing argument. To permit this outcome would jeopardize future criminal cases.

Jury Instruction: Trial judges are prohibited from directing the jury to come forward with a guilty verdict, regardless of how overwhelming the evidence may be *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) Before the 5th Circuit, a jury instruction must: (1) correctly state the law, (2) clearly instruct the jurors, and (3) be factually supportable.” *United States v. Fairley*, 880 F.3d 198, 208 (5th Cir. 2018). Specific jury

instructions should be "considered in the context of the instructions as a whole and the trial record" and "not in isolation." *Id.* District courts are "afforded substantial latitude in formulating instructions." *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994). When reviewing a district court's "refusal to include a requested instruction in the jury charge," the Court applies an abuse of discretion standard. *Id.*

On appeal, the 5th views "the evidence in the light most favorable to [the defendant] in determining if there [wa]s sufficient evidentiary foundation for a requested instruction." *United States v. Giraldi*, 86 F.3d 1368, 1376 (5th Cir. 1996). Because duress is an affirmative defense, Mr. Ayala-Alas had to "present evidence of each of the elements of the defense before it [could] be presented to the jury." *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998).

Mr. Ayala-Alas presented evidence of the four elements of duress. He testified regarding wanting to leave but not sure how "narcos" work. He provided testimony on how they put a mask on his face. He discussed the desire to call his sister but was concerned what would happen to his sister if she called the police. Mr. Ayala-Alas at one time attempted to contact family only to be told by a cartel member to turn off his phone.

Counsel also notes for the record other individuals within this case observed weapons and were fearful for their safety. Mr. Ayala-Alas wanted to leave but was told by these individuals "that wasn't possible." Lastly, as admitted, was the Government Travel Advisory for Mexico, attesting to the well-known dangers of traveling and large amount of criminal activity occurring in Mexico. Based on the testimony and offered evidence, there was sufficient evidence to warrant the trial court providing the duress instruction and the failure to do so was an abuse of discretion and compromised future criminal defense cases.

Motion to Continue: This Court reviews a district court's denial of a motion to continue for abuse of discretion. In reviewing the denial of a continuance, the 5th Circuit Court looks to the totality of the circumstances, including the amount of time available, the defendant's role in shortening the time needed, the likelihood of prejudice from denial, the availability of discovery from the prosecution, the complexity of the case, the adequacy of the defense actually provided at trial, and the experience of the attorney with the accused.

Here the denial of the requested Motion to Continue for further evaluation of Mr. Ayala-Alas's understanding of Spanish based on

information provided by the court interpreter and the request for a Motion to Continue in order to review discovery not yet provided on the day of jury selection was an abuse of discretion.

In review of the request for a continuance in order to address language competency, said request should be viewed through the lens as to how our courts determine competency as to one suffering from mental disease or defect, making one incompetent to participate in their own defense. As in our instant case as in mental competency cases, the court must determine by a preponderance of the evidence whether the defendant is suffering from mental disease or defect rendering him incompetent and unable to understand the proceedings — having a lacking mental ability to understand a particulate language.

A district court can consider several factors in evaluating competency, including, but not limited to, its own observations of the defendant's demeanor and behavior; medical testimony; and the observations of other individuals that have interacted with the defendant. A defendant is competent where he has the present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the

proceeding against him. This Court reviews a district court's competency determination a species of clear error review and only reverses if the finding was clearly arbitrary and unwarranted.

Counsel, who reported desiring to show good faith to the court in working through difficulty in language ability, immediately brought to the attention of the district court the fact the court interpreter stated he was having trouble communicating with the Mr. Ayala-Alas. This court interpreter was later qualified as an expert and testified regarding the Spanish ability of the defendant. Was the lack of comprehension solely language or mental ability?

"[T]he [government] must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" *McWilliams v. Dunn*, 137 S. Ct. 1790, 1793, 198 L. Ed. 2d 341 (2017) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)). Mr. Ayala-Alas received no evaluation – rather received an evaluation from the district court with questions posed to Mr. Ayala-Alas regarding a jury

with Mr. Ayala-Alas responded, "what is a jury?" and "will I understand you? You speak English."

As for the requested continuance to evaluate and review discovery as to terminal element of the alleged offenses – whether the suspected bundles of marijuana were indeed marijuana, is a clear abuse of discretion. Again, in reviewing the denial of a continuance, this Court looks to the totality of the circumstances, including the amount of time available, the defendant's role in shortening the time needed, the likelihood of prejudice from denial, the availability of discovery from the prosecution, the complexity of the case, the adequacy of the defense actually provided at trial, and the experience of the attorney with the accused.

Here, Mr. Ayala-Alas did not cause the delay, the prejudice from denial was evident given the fact counsel was unable to evaluate any the evidence prior to trial beginning resulting in a lack of cross-examination. Government simply did not provide the discovery, nor did it comply with the district court order regarding discovery. Again, Government didn't abide by discovery deadlines and provided discovery depriving Mr. Ayala-Alas access to discovery and the ability to participate in this defense.

What is Mr. Ayala-Alas supposed to do – the government doesn't abide by discovery orders and requests to exclude are denied given the late discovery, yet motions to continue are also denied. It is apparent this trial court is abusing its discretion.

Motion to Compel Discovery: This Court reviews a district court's discovery rulings for an abuse of discretion. If the district court elects to admit the evidence without sanctions, a new trial must be ordered based on alleged discovery error when a defendant demonstrates prejudice to his substantial rights. *United States v. Cuellar*, 478 F.3d 282, 284 (5th Cir. 2007).

In this case, Mr. Ayala-Alas requested the trial court provide access to the cellular phone taken from him by law enforcement. The plain reading of Federal Rule of Criminal Procedure Rule 16(a)(1)(E)(iii) is very clear – the Government must permit the defendant to inspect and copy or photograph books, papers, documents, *data*, photographs.....if the item is within the government's possession, custody, or control and the item *was obtained from or belongs to the defendant*.

Mr. Ayala-Alas attempted to obtain this evidence first from the government before filing any motion. The denial of this motion was again

another abuse of discretion. The district court provided no rational, opinion, or the like as to the legal framework to its decision. Here, the evidence was material to the defendant, evidence by the questioning regarding by both defense and government as to the phone, contact by an individual named Luis, and the like, and Government's inappropriate closing argument. Additionally, evidence is material for *Brady* purposes only if there is a reasonable probability that, had the evidence been disclosed to defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). Permitting the inspection of Mr. Ayala-Alas phone to obtain discovery favorable to the Accused would without question affect the overall proceedings. It is again without question if there were derogatory findings on this phone, Government would use it to their benefit, yet Mr. Ayala-Alas is being precluded from inspecting, review, and conduct investigation into property of his own. Again, the trial court abused its discretion – or are we to assume Mr. Ayala-Alas was lying. Then Government argued we were not entitled to this discovery, during closing stated “where are those Facebook messages? If you got a text right now,

someone threatening... Facebook messages....he could have brought those messages in.”

Here, the plain reading of the discovery statute provides a defendant’s access to his property. The district court’s failure and 5th Circuit’s affirmation of this failure causes great conflict in the plain reading of the law and mandates review.

Sentencing: The Supreme Court reviews sentencing decisions through the lenses of an abuse of discretion. This Court in *Booker* also instructed courts to apply ordinary prudential doctrines and determine whether the issue was raised below and whether it fails the plain error test and whether resentencing is warranted. The 5th Circuit Court reviews a challenged sentence for reasonableness under a two-part test. First it reviews a sentence to ensure the sentencing court did not commit a procedural error, such as failing to calculate the U.S. Sentencing Guideline range correctly, failing to consider 18 U.S.C.S. § 3553(a) factors, or other factors. Second, this court determines whether the challenged sentence was unreasonable, including the extent of any variance from the guideline range.

This 5th reviews the district court's interpretation and application of the Sentencing Guidelines de novo and the district court's findings of fact for clear error. *United States v. Ramos-Delgado*, 763 F.3d 398, 400 (5th Cir. 2014). In deciding whether an enhancement applies, a district court is permitted to draw reasonable inferences and said inferences are reviewed for clear error. *United States v. Caldwell*, 448 F.3d 287, 290 (5th Cir. 2006).

Additionally, the government must prove sentencing enhancements by a preponderance of the evidence. *United States v. Juarez*, 626 F.3d 246, 251 (5th Cir. 2010). The Guidelines state that it is appropriate that facts relevant to sentencing be proven by a preponderance of the evidence and this Court has held that application of the preponderance standard at sentencing generally satisfies due process. *McMillian v. Pennsylvania*, 477 U.S. 79, 91-92, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986). A district court abuses its sentencing discretion when it makes a significant procedural error, orders a substantively unreasonable sentence, or imposes a sentence in a manner inconsistent with a defendant's right to due process. *United States v. Windless*, 719 F.3d 415, 419-20 (5th Cir. 2013).

Here, the trial court held applicable the following enhancements, USSG 2D1.1 (b)(16) due to Mr. Ayala-Alas supposedly being a leader named by "Rio-Molina", an enhancement under USSG 3B.1(b) for being a leader as supposedly stated by "Rio-Molina" and an enhancement for alleged obstruction of justice by Mr. Ayala-Alas. The trial court did not provide a sentencing reduction due to duress nor did it consider safety valve given the sentencing findings of the trial court.

As stated during sentencing Mr. Rio-Molina never testified that Mr. Ayala-Alas recruited him. Mr. Rio-Molina went as far as saying in response to who is Mr. Ayala-Alas "I don't know him well", "no" in response to do you know this man and "no" in response to do you know his name. Then any suggestion a Gonzalez-Terraz testified the Mr. Ayala-Alas recruited him would also be false (ROA 713) as that's clearly not in the record. As Mr. Ayala-Alas provided evidence supporting this position, the district court stated... "we will just do this all day" Mr. Ayala-Alas provided to the trial court was law enforcement reports articulating the lack of any statements regarding Mr. Ayala-Alas recruiting and/or being leader/organizer/supervisor.

During sentencing the trial court took judicial notice of the transcripts of applicable hearings and also accepted law enforcement reports of which both articulated either through law enforcement reports and/or testimony of individuals *under oath*, that Mr. Ayala-Alas never recruited and/or supervised any individuals. Even the reports government suggests articulated Mr. Ayala-Alas was a leader didn't contain any said information regarding Mr. Ayala-Alas being a leader. Government wholly fails to satisfy the preponderance standard of showing Mr. Ayala-Alas was either an organizer and/or leader/supervisor.

Additionally, the U.S. Sentencing Guidelines Manual ("USSG") § 3C1.1 directs district courts to increase a defendant's offense level by two levels if he "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense. . . ." A defendant obstructs justice by means of perjury when he "gives false testimony concerning a material matter with the willful intent to provide false testimony." *US v. Dunnigan*, 507 U.S. 87, 95-96, 122 L. Ed. 2d 445, 113 S. Ct. 1111 (1993); see also USSG § 3C1.1, comment., n.4(b) ("committing,

suborning, or attempting to suborn perjury"); id. § 3C1.1, comment., n.4(f) ("providing materially false information to a judge"). "Not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice." Id. § 3C1.1, comment., n.2; see also *Dunnigan*, 507 U.S. 87, 95-96, 122 L. Ed. 2d 445, 113 S. Ct. 1111 (1993). When a defendant gives false testimony due only to confusion, mistake, or a bad memory, he has not obstructed justice. Id. Rather, "willful" obstruction of justice by a defendant is "conscious, deliberate, voluntary, and intentional." *Greer*, 158 F.3d at 239.

Moreover, the district court failed to make specific findings regarding his intent, saying rather regarding the testimony of Mr. Ayala-Alas was "that doesn't mean that there are both true or both false." Also, what is telling, is the fact the testimony of Mr. Ayala-Alas regarding fear was corroborated by testimony of government

If a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition the Supreme Court has set out. In determining what

constitutes perjury, courts rely upon the definition that has gained general acceptance and common understanding under the federal criminal perjury statute, 18 U.S.C.S. § 1621. *United States v. Altamirano-Argeta*, 464 Fed. Appx. 311, 312 (5th Cir. 2012). Here again, the trial court simply stated, "the jury didn't believe it."

As for duress, under USSG § 5K2.12, it permits downward departure if the defendant acted "because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense." *United States v. Harris*, 104 F.3d 1465, 1477 (5th Cir. 1997). Here, as cited to within this brief, Mr. Ayala-Alas was scared, was being forced to do what he was doing, and even others involved provided what was considered truthful safety valve statements regarding individuals having weapons and being scared for his life.

Given the incorrect findings by both the district court and 5th circuit, review should be granted with re-sentencing being ordered vacating the prior sentence.

Closing Argument: The government's closing statements were inappropriate and warrant vacation of the findings of guilty. The arguments of Government created unfair prejudice and caused the jury

to reach a verdict based on improper factors rather than a fair evaluation of the evidence. The 5th reviews preserved issues for abuse of discretion, *see United States v. Griffin*, 324 F.3d 330, 361 (5th Cir. 2003), and the unpreserved issues for plain error. *United States v. Vargas*, 580 F.3d 274, 278 (5th Cir. 2009). “A criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone,” and “[t]he determinative question is whether the prosecutor’s remarks cast serious doubt on the correctness of the jury’s verdict.” *United States v. Iredia*, 866 F.2d 114, 117 (5th Cir.1989). “A prosecutor’s argument is reversible error only when so improper as to affect a defendant’s substantial rights.” *United States v. Vaccaro*, 115 F.3d 1211, 1215 (5th Cir.1997).

In this case, statements went outside the evidence presented at trial and comments shifted the burden of proof onto the defendant. First, Government argued regarding other co-defendant’s being found guilty of the alleged crime suggesting guilt by association. Specifically, during discussions on Motions in Limine, the district court directed Government not to suggest guilty by one party is guilt by another – yet this is precisely what they did in closing.

Second, burden shifting – government was aware of their desire not to provide Defense full and complete access to this phone, hence the Defense request to compel discovery. Then they failed to complete a full digital exam, something Government acknowledge, yet, despite all of this, they argued it was the duty of the Mr. Ayala-Alas to produce these messages. This is the hallmark of improper argument and argument that shifts the burden to the defendant absolutely defying defendant's substantial rights. Deny discovery yet then argue it hasn't been produced.

The closing argument affected the due process protections of Mr. Ayala-Alas and should be vacated.

CONCLUSION

For the reasons stated above, Mr. Ayala-Alas requests this Court reverse and vacate the conviction.

Very Respectfully,

S/Matthew James Kozik
Matthew James, P.L.L.C.
310 N. Mesa Street
El Paso, TX 79901

PROOF OF SERVICE

I, Matthew James Kozik, do swear or declare that on June 27, 2025, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR WRIT OF CERTIORARI and MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS on each party to the above proceeding or that party's counsel, and on every other person required to be served, by delivering a copy to:

Solicitor General of the United States

Room 5616

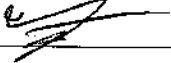
Department of Justice

950 Pennsylvania Ave., N.W.

Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 22, 2025

Signature: 

Matthew James Kozik

CERTIFICATE OF SERVICE

I certify that on 26 November 2024, this document was mailed to the Supreme Court as well as Government legal office.

S/Matthew James Kozik



**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

JARRETT B. PERLOW
CLERK OF COURT

CLERK'S OFFICE
202-275-8000

Information Sheet

Filing a Petition for a Writ of Certiorari

There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. Instead, a party must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons. See Supreme Court Rule 10.

Time. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. The time does not run from the issuance of the mandate. See Supreme Court Rule 13.

Fees. Either the \$300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. See Supreme Court Rules 38 and 39.

Authorized Filer. The petition must be filed by a member of the bar of the Supreme Court of the United States or by the petitioner as a self-represented individual.

Format of a Petition. The Supreme Court Rules are very specific about the content and formatting of petitions. See Supreme Court Rules 14, 33, 34. Additional information is available at https://www.supremecourt.gov/filingandrules/rules_guidance.aspx.

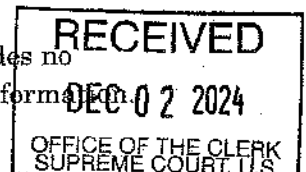
Number of Copies. Forty copies of a petition must be filed unless the petitioner is proceeding in forma pauperis, in which case an original and ten copies of both the petition for writ of certiorari and the motion for leave to proceed in forma pauperis must be filed. See Supreme Court Rule 12.

Filing. Petitions are filed in paper at Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543.

Effective November 13, 2017, electronic filing is also required for filings submitted by parties represented by counsel. See Supreme Court Rule 29.7. **Additional information about electronic filing at the Supreme Court is available at** <https://www.supremecourt.gov/filingandrules/electronicfiling.aspx>.

No documents are filed at the Federal Circuit and the Federal Circuit provides no information to the Supreme Court unless the Supreme Court asks for the information.

Revised July 1, 2023





United States Court of Appeals
for the Fifth Circuit

A True Copy

Certified order issued Aug 26, 2024

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 23-50226

United States Court of Appeals
Fifth Circuit

FILED
August 26, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE MANUEL AYALA-ALAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:22-CR-533-3

ON PETITION FOR REHEARING

Before JONES, SMITH, and DENNIS, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-318-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 26, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-50226 USA v. Ayala-Alas
USDC No. 4:22-CR-533-3

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By:

Casey A. Sullivan, Deputy Clerk
504-310-7642

Ms. Lauren Tanner Bradley
Mr. Philip Devlin
Mr. Joseph H. Gay Jr.
Mr. Matthew James Kozik

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

July 10, 2024

Lyle W. Cayce
Clerk

No. 23-50226
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE MANUEL AYALA-ALAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:22-CR-533-3

Before JONES, SMITH, and DENNIS, *Circuit Judges.*

PER CURIAM:*

Jose Manuel Ayala-Alas was convicted, following a jury trial, of aiding and abetting the importation of 100 kilograms or more of marijuana in violation of 21 U.S.C. §§ 952 & 960(b) and 18 U.S.C. § 2, and aiding and abetting possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B)(vii) and 18 U.S.C. § 2. He was sentenced

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

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within the guidelines range to a 135-month term of imprisonment on each count, to run concurrently, followed by a five-year term of supervised release.

On appeal, Ayala-Alas first argues that the district court erred by failing to provide him with a Tepehuan interpreter and that it abused its discretion by denying Ayala-Alas's motion to continue trial based on his lack of Spanish comprehension. A court's decision whether to provide an interpreter is reviewed for abuse of discretion. *See United States v. Bell*, 367 F.3d 452, 463 (5th Cir. 2004). "The basic inquiry on whether or not the failure to provide an interpreter was error [is] whether such failure made the trial fundamentally unfair." *United States v. Tapia*, 631 F.2d 1207, 1210 (5th Cir. 1980).

Ayala-Alas did not raise issues of language competency of Spanish comprehension until the first day of trial when his counsel brought a motion to continue, urging that the defense was not ready to proceed based on Ayala-Alas's inability to understand the court interpreter. The district court questioned Ayala-Alas at the bench using a Spanish interpreter before denying the motion. Defense counsel did not object to the use of the Spanish language interpreter or indicate that the interpreter was inadequate during the proceedings. Ayala-Alas testified in his own defense and indicated that he was able to understand the trial using the Spanish interpreter. Accordingly, Ayala-Alas has not shown that the district court abused its discretion in failing to provide a Tepehuan interpreter. *See United States v. Perez*, 918 F.2d 488, 490-91 (5th Cir. 1990) (finding no error in failing to provide the defendant with an interpreter during a plea hearing where numerous proceedings had been conducted in English with no objection or request for an interpreter by the defendant). Additionally, although Ayala-Alas claims that he did not waive his right to a Tepehuan interpreter, without a judicial finding that Ayala-Alas could not comprehend the proceedings, Ayala-Alas had "no right to an interpreter to waive." *Id.* at 491.

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We will reverse a denial of a motion to continue only where the district court has abused its discretion and the defendant can show that he suffered serious prejudice. *United States v. Sheperd*, 27 F.4th 1075, 1085 (5th Cir. 2022). When reviewing the denial of a continuance, this court considers the “totality of the circumstances,” which include: (1) the amount of time available; (2) the defendant’s role in shortening the time needed; (3) the likelihood of prejudice from a denial of the motion; (4) the availability of discovery from the prosecution; (5) the complexity of the case; (6) the adequacy of the defense actually provided at trial; (7) the experience of the attorney with the accused; and (8) the timeliness of the motion. *Id.*

Because Ayala-Alas did not raise the issue of language comprehension until the first day of trial and has not alleged any prejudice resulting from the denial of his motion to continue on these grounds, he fails to show that he suffered serious prejudice from the denial of his motion to continue based on his lack of Spanish comprehension. *See id.* at 1085.

Ayala-Alas also urges that the district court erred by denying his motion to continue trial in order to receive outstanding discovery, to wit, the Government’s Drug Enforcement Administration (DEA) laboratory results of the marijuana seized. He claims that he was prejudiced by the denial of the motion because he was deprived of the ability to consult with outside experts to verify the results of the substance seized and to conduct scientific review. A defendant has a right to inspect evidence within the possession, custody, or control of the Government, and which are material to the preparation of the defendant’s defense or intended to be used by the Government as evidence in chief at the trial. FED. R. CRIM. P. 16(a)(1)(C). This includes the right of the defendant to have an independent chemical analysis performed on a seized substance. *United States v. Butler*, 988 F.2d 537, 543 (5th Cir. 1993).

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Ayala-Alas does not explain why he failed to conduct his own analysis on the seized substance and by failing to do so he contributed to the discovery delay. Further, defense counsel did not object to the Government's report when it was introduced at trial, and he declined to cross-examine the Government's expert. Accordingly, he cannot show serious prejudice. *See Shepherd*, 27 F.4th at 1085. He thus cannot show that the district court abused its discretion by denying his motion to continue. *See id.*

Ayala-Alas also argues that the evidence was insufficient to support his convictions. Because Ayala-Alas did not renew his Rule 29 motion at the close of all evidence, he failed to preserve his sufficiency of the evidence challenge. *See United States v. Cabello*, 33 F.4th 281, 285 (5th Cir. 2022). Thus, in order to prevail on his claim, Ayala-Alas must show that the record is devoid of any evidence pointing to his guilt or that the evidence is so tenuous that his conviction is shocking. *Id.* at 288. This court will reverse only if there is a manifest miscarriage of justice. *Id.*

In order to support a conviction of importation of marijuana, the jury had to find that the Government established that Ayala-Alas (1) played a role in bringing a quantity of marijuana into the United States from outside of the country; (2) knew the substance was marijuana; and (3) knew the marijuana would enter the United States. *See United States v. Zamora-Salazar*, 860 F.3d 826, 832 (5th Cir. 2017). To sustain a conviction of possession with intent to distribute marijuana, the jury needed to find that the Government established that Ayala-Alas knowingly possessed marijuana with the intent to distribute it. *United States v. Vinagre-Hernandez*, 925 F.3d 761, 764 (5th Cir. 2019). Aiding and abetting can be established by showing that Ayala-Alas (1) associated with the criminal enterprise; (2) participated in the venture; and (3) sought to make it successful. *Id.* at 765; *Zamora-Salazar*, 860 F.3d at 832. To prove that he participated in the venture, the Government needed to

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prove that Ayala-Alas committed an overt act that assisted in the success of the venture. *Vinagre-Hernandez*, 925 F.3d at 765.

A review of the record reveals that there was sufficient evidence to support Ayala-Alas's convictions. United States Border Patrol (USBP) agents testified that Ayala-Alas admitted that he received marijuana in Mexico, that he knew it was marijuana, and that he was carrying it across the border to the United States. Moreover, Ayala-Alas admitted that he traveled with the group carrying marijuana. Federal agents testified that 273.8 kilograms of marijuana were recovered. *See United States v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994) (intent to distribute may be inferred from the quantity of drugs involved). Thus, Ayala-Alas cannot show that the facts were insufficient to support his conviction where the record is not devoid of evidence pointing to his guilt and the Government's case was not so tenuous that his conviction is shocking. *See Cabello*, 33 F.4th at 288.

Ayala-Alas also claims that he presented sufficient evidence at trial to support a duress jury instruction and that it was error to fail to include the instruction in the ultimate jury charge. The denial of a requested jury instruction is reviewed for abuse of discretion, considering the evidence in the light most favorable to the defendant. *United States v. Mora-Carrillo*, 80 F.4th 712, 715 (5th Cir. 2023). This court will reverse only where (1) the requested instruction is substantially correct; (2) the charge given to the jury did not substantially cover the contents of the proposed instruction; and (3) the omission of the proposed instruction seriously impaired the defendant's ability to present his defense. *Id.* The defense of duress only arises if there is a real emergency that leaves the defendant with no time to pursue any legal alternative and where he is in serious danger at the moment that he commits the offense. *Id.* at 715-16.

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Even considering this evidence in the light most favorable to Ayala-Alas, it is not sufficient to satisfy the elements of duress. *See Mora-Carrillo*, 80 F.4th at 715. Ayala-Alas presented no evidence that he was under present or imminent threat at the moment of the offense. *See id.* at 715-16. Accordingly, the district court did not abuse its discretion in denying the request for a duress instruction. *See id.* at 716 (“Because [the defendant] was obliged to present evidence of each element of duress, yet failed as to the first element, we need go no further.”).

Ayala-Alas argues that the district court abused its discretion by denying his request that the trial court provide access to the cell phone taken from him at arrest. This court reviews challenges to discovery rulings for abuse of discretion and will order a new trial only where a defendant demonstrates prejudice to his substantial rights. *United States v. Garcia*, 567 F.3d 721, 734 (5th Cir. 2009).

He cannot demonstrate that the district court abused its discretion by denying his motion to compel. The Government provided Ayala-Alas with access to all the information it had from the cell phone and the district court allowed defense counsel to inspect the cell phone with the Government, yet the defense declined to do so. Additionally, any claim of resulting prejudice fails given the trial evidence supporting Ayala-Alas’s guilt. *See United States v. Cochran*, 697 F.2d 600, 606-07 (5th Cir. 1983) (finding no reversible error resulting from the Government’s failure to produce during discovery copies of tape-recorded conversations between the defendant and others given the independent evidence of the defendant’s guilt). Thus, Ayala-Alas has not shown that the district court abused its discretion in denying the motion to compel. *See Garcia*, 567 F.3d at 734. To the extent that Ayala-Alas alleges a *Brady v. Maryland*, 373 U.S. 83 (1963) violation, he fails to identify any specific evidence that was suppressed or evidence favorable to his defense or material to his guilt, *see Garcia*, 567 F.3d at 735, and he makes no arguments

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in support of his claim and has thus waived any argument, *see United States v. Reagan*, 596 F.3d 251, 254-55 (5th Cir. 2010) (stating that inadequately briefed arguments in counseled briefs are deemed waived); *Beasley v. McCotter*, 798 F.2d 116, 118 (5th Cir. 1986) (holding that litigants represented by counsel are not entitled to liberal construction of their pleadings).

With regard to sentencing, Ayala-Alas argues that the district court improperly calculated his sentencing guidelines range, by imposing adjustments under U.S.S.G. § 3C1.1, U.S.S.G. § 3B1.1(b), U.S.S.G. § 2D1.1(b)(16), and by failing to apply a downward adjustment under U.S.S.G. § 2D1.1(b)(18) (“safety valve”) and a downward departure as allowed by U.S.S.G. § 5K1.12.

This court reviews preserved challenges to the application of the Guidelines *de novo* and the district court’s factual findings for clear error. *United States v. Hawkins*, 866 F.3d 344, 346-47 (5th Cir. 2017). When making factual findings, a district court may consider any information bearing sufficient indicia of reliability and its factual findings are not clearly erroneous if they are plausible in light of the record as a whole. *Id.* at 347. Under this “deferential” standard, factual findings are deemed clearly erroneous only where a review of the evidence leaves this court with a definite and firm conviction that a mistake has been made. *United States v. Torres-Magana*, 938 F.3d 213, 216 (5th Cir. 2019). “At sentencing, the defendant bears the burden of rebutting the evidence used against him for purposes of sentencing by proving that it is materially untrue, inaccurate or unreliable.” *United States v. Solis*, 299 F.3d 420, 455 (5th Cir. 2002).

Section 3C1.1 provides for a two-level enhancement if, among other things, “the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of

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conviction.” U.S.S.G. § 3C1.1. Examples of covered conduct include “committing, suborning, or attempting to suborn perjury,” and providing materially false information to a judge or magistrate judge, probation officer, or to a law enforcement officer that significantly obstructed or impeded the investigation or prosecution of the offense. § 3C1.1, comment. (n.4).

A district court need not address each element of the alleged perjury in a separate and clear finding if it makes a finding of an obstruction of justice that encompasses all the factual predicates for a perjury finding. *United States v. Perez-Solis*, 709 F.3d 453, 470 (5th Cir. 2013). The district court found that the § 3C1.1 enhancement was warranted based on the discrepancy between Ayala-Alas’s post-arrest statements and testimony at trial, determining that Ayala-Alas committed perjury at trial. This finding was supported by statements in the presentence report (PSR) and the testimony of USBP agents at trial. Ayala-Alas presented no evidence to rebut the testimony of the agents and failed to demonstrate that any of the information considered by the district court was “materially untrue.” *Solis*, 299 F.3d at 455. Accordingly, Ayala-Alas cannot show that the district court erred in applying the obstruction of justice adjustment. *See Perez-Solis*, 709 F.3d at 470-71.

Section 3B1.1(b) provides for a three-level adjustment if a defendant was a manager or supervisor (but not an organizer or leader) of a criminal venture and the criminal activity involved at least five participants or was otherwise extensive. § 3B1.1(b). Whether a defendant occupied a role as a manager or supervisor is a finding of fact that is reviewed for clear error and will be upheld if it is plausible based on the entire record. *United States v. Ochoa-Gomez*, 777 F.3d 278, 281-82 (5th Cir. 2015).

The district court imposed the enhancement under § 3B1.1(b) after finding that Ayala-Alas was a manager and a supervisor of the marijuana

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smuggling venture. At the sentencing hearing, a DEA agent testified that during debrief, a co-defendant stated that Ayala-Alas had recruited him and hired him to backpack marijuana into the United States. Ayala-Alas did not offer any evidence to rebut this testimony. Accordingly, the district court's finding is plausible considering the entire record and Ayala-Alas has not shown that the district court clearly erred in applying the enhancement. *See Ochoa-Gomez*, 777 F.3d at 281-83.

Ayala-Alas briefs no argument challenging the corresponding two-level aggravate role adjustment under U.S.S.G. § 2D1.1(b)(16) and provides only conclusory statements that the district court erred by applying the enhancement. Accordingly, because he has made no arguments in support of his claim and because counsel's brief is not entitled to liberal construction, he has waived any argument. *See Reagan*, 596 F.3d at 254-55; *Beasley*, 798 F.2d at 118.

As to the safety valve reduction, Ayala-Alas devotes one sentence, without citation to the record, to the district court's determination that he was ineligible under § 2D1.1(b)(18). Thus, he has waived any argument on this issue. *See Reagan*, 596 F.3d at 254-55.

Regarding Ayala-Alas's challenge to the denial of a downward departure under § 5K2.12, this court lacks jurisdiction to review a sentencing court's refusal to grant a downward departure unless the court based its decision upon an erroneous belief that it lacked the authority to depart from the Guidelines. *United States v. Alaniz*, 726 F.3d 586, 627 (5th Cir. 2013). Nothing in the record indicates that the district court erroneously believed that it lacked the authority to grant a departure and in fact, the district court expressly explained why it determined that a departure was not warranted. Thus, this court lacks jurisdiction to consider the challenge. *See id.*

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Finally, Ayala-Alas argues that the Government's closing statements suggested his guilt by association by referencing the co-defendants' convictions and that the Government improperly claimed that it was Ayala-Alas's duty to produce Facebook messages allegedly on his cell phone. This court applies a two-step analysis to claims of prosecutorial misconduct. *United States v. Bolton*, 908 F.3d 75, 93 (5th Cir. 2018). First, it determines de novo whether the prosecutor made an improper remark, and if so, it then reviews for an abuse of discretion whether the remark affected the defendant's substantial rights, *i.e.*, whether the remark affected the outcome of the proceedings. *Id.* The determinative question is whether the remarks "cast serious doubt on the correctness of the jury's verdict." *United States v. Holmes*, 406 F.3d 337, 356 (5th Cir. 2005) (internal quotation marks and citation omitted).

Ayala-Alas does not specify the improper remark that he claims suggested his guilt by association nor does he provide any citations to the record. He likewise makes no argument that any remark by the Government suggesting guilt by association affected his substantial rights. Thus, he has waived any argument on this issue. *See Reagan*, 596 F.3d at 254-55.

To the extent that Ayala-Alas claims that the Government improperly shifted the burden of proof at trial by commenting on his failure to present Facebook messages in support of his defense, "[i]t is not error for a prosecutor to comment on the defendant's failure to produce evidence on a phase of the defense upon which he seeks to rely." *United States v. Mackay*, 33 F.3d 489, 496 (5th Cir. 1994) (internal quotation marks and citation omitted). Here, the defense theory was that Ayala-Alas was contacted under false pretenses through Facebook and ultimately forced into smuggling marijuana into the United States. It was thus not improper for the prosecutor to point out that the defense offered no direct evidence to prove that theory. *See id.* Moreover, the district court provided a curative instruction following

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the defense objection to the comments, the court reminded the jurors that the Government has the burden of proof and that the defendant is not required to prove his innocence or produce any evidence. Accordingly, he fails to show prosecutorial misconduct. *See Bolton*, 908 F.3d at 93-94.

The judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 10, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 23-50226 USA v. Ayala-Alas
USDC No. 4:22-CR-533-3

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you **MUST** confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By:

Lisa E. Ferrara, Deputy Clerk

Enclosure(s)

Ms. Lauren Tanner Bradley
Mr. Joseph H. Gay Jr.
Mr. Matthew James Kozik



**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

JARRETT B. PERLOW
CLERK OF COURT

CLERK'S OFFICE
202-275-8000

Information Sheet

Filing a Petition for a Writ of Certiorari

There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. Instead, a party must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons. See Supreme Court Rule 10.

Time. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. The time does not run from the issuance of the mandate. See Supreme Court Rule 13.

Fees. Either the \$300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. See Supreme Court Rules 38 and 39.

Authorized Filer. The petition must be filed by a member of the bar of the Supreme Court of the United States or by the petitioner as a self-represented individual.

Format of a Petition. The Supreme Court Rules are very specific about the content and formatting of petitions. See Supreme Court Rules 14, 33, 34. Additional information is available at https://www.supremecourt.gov/filingandrules/rules_guidance.aspx.

Number of Copies. Forty copies of a petition must be filed unless the petitioner is proceeding in forma pauperis, in which case an original and ten copies of both the petition for writ of certiorari and the motion for leave to proceed in forma pauperis must be filed. See Supreme Court Rule 12.

Filing. Petitions are filed in paper at *Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543.*

Effective November 13, 2017, electronic filing is also required for filings submitted by parties represented by counsel. See Supreme Court Rule 29.7. **Additional information about electronic filing at the Supreme Court is available at** <https://www.supremecourt.gov/filingandrules/electronicfiling.aspx>.

No documents are filed at the Federal Circuit and the Federal Circuit provides no information to the Supreme Court unless the Supreme Court asks for the information.



United States Court of Appeals
for the Fifth Circuit

A True Copy

Certified order issued Aug 26, 2024

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 23-50226

United States Court of Appeals
Fifth Circuit

FILED

August 26, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE MANUEL AYALA-ALAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:22-CR-533-3

ON PETITION FOR REHEARING

Before JONES, SMITH, and DENNIS, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 26, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-50226 USA v. Ayala-Alas
USDC No. 4:22-CR-533-3

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Casey A. Sullivan, Deputy Clerk
504-310-7642

Ms. Lauren Tanner Bradley
Mr. Philip Devlin
Mr. Joseph H. Gay Jr.
Mr. Matthew James Kozik

United States Court of Appeals
for the Fifth Circuit

No. 23-50226
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

July 10, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE MANUEL AYALA-ALAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:22-CR-533-3

Before JONES, SMITH, and DENNIS, *Circuit Judges.*

PER CURIAM:*

Jose Manuel Ayala-Alas was convicted, following a jury trial, of aiding and abetting the importation of 100 kilograms or more of marijuana in violation of 21 U.S.C. §§ 952 & 960(b) and 18 U.S.C. § 2, and aiding and abetting possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B)(vii) and 18 U.S.C. § 2. He was sentenced

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

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within the guidelines range to a 135-month term of imprisonment on each count, to run concurrently, followed by a five-year term of supervised release.

On appeal, Ayala-Alas first argues that the district court erred by failing to provide him with a Tepehuan interpreter and that it abused its discretion by denying Ayala-Alas's motion to continue trial based on his lack of Spanish comprehension. A court's decision whether to provide an interpreter is reviewed for abuse of discretion. *See United States v. Bell*, 367 F.3d 452, 463 (5th Cir. 2004). "The basic inquiry on whether or not the failure to provide an interpreter was error [is] whether such failure made the trial fundamentally unfair." *United States v. Tapia*, 631 F.2d 1207, 1210 (5th Cir. 1980).

Ayala-Alas did not raise issues of language competency of Spanish comprehension until the first day of trial when his counsel brought a motion to continue, urging that the defense was not ready to proceed based on Ayala-Alas's inability to understand the court interpreter. The district court questioned Ayala-Alas at the bench using a Spanish interpreter before denying the motion. Defense counsel did not object to the use of the Spanish language interpreter or indicate that the interpreter was inadequate during the proceedings. Ayala-Alas testified in his own defense and indicated that he was able to understand the trial using the Spanish interpreter. Accordingly, Ayala-Alas has not shown that the district court abused its discretion in failing to provide a Tepehuan interpreter. *See United States v. Perez*, 918 F.2d 488, 490-91 (5th Cir. 1990) (finding no error in failing to provide the defendant with an interpreter during a plea hearing where numerous proceedings had been conducted in English with no objection or request for an interpreter by the defendant). Additionally, although Ayala-Alas claims that he did not waive his right to a Tepehuan interpreter, without a judicial finding that Ayala-Alas could not comprehend the proceedings, Ayala-Alas had "no right to an interpreter to waive." *Id.* at 491.

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We will reverse a denial of a motion to continue only where the district court has abused its discretion and the defendant can show that he suffered serious prejudice. *United States v. Sheperd*, 27 F.4th 1075, 1085 (5th Cir. 2022). When reviewing the denial of a continuance, this court considers the “totality of the circumstances,” which include: (1) the amount of time available; (2) the defendant’s role in shortening the time needed; (3) the likelihood of prejudice from a denial of the motion; (4) the availability of discovery from the prosecution; (5) the complexity of the case; (6) the adequacy of the defense actually provided at trial; (7) the experience of the attorney with the accused; and (8) the timeliness of the motion. *Id.*

Because Ayala-Alas did not raise the issue of language comprehension until the first day of trial and has not alleged any prejudice resulting from the denial of his motion to continue on these grounds, he fails to show that he suffered serious prejudice from the denial of his motion to continue based on his lack of Spanish comprehension. *See id.* at 1085.

Ayala-Alas also urges that the district court erred by denying his motion to continue trial in order to receive outstanding discovery, to wit, the Government’s Drug Enforcement Administration (DEA) laboratory results of the marijuana seized. He claims that he was prejudiced by the denial of the motion because he was deprived of the ability to consult with outside experts to verify the results of the substance seized and to conduct scientific review. A defendant has a right to inspect evidence within the possession, custody, or control of the Government, and which are material to the preparation of the defendant’s defense or intended to be used by the Government as evidence in chief at the trial. FED. R. CRIM. P. 16(a)(1)(C). This includes the right of the defendant to have an independent chemical analysis performed on a seized substance. *United States v. Butler*, 988 F.2d 537, 543 (5th Cir. 1993).

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Ayala-Alas does not explain why he failed to conduct his own analysis on the seized substance and by failing to do so he contributed to the discovery delay. Further, defense counsel did not object to the Government's report when it was introduced at trial, and he declined to cross-examine the Government's expert. Accordingly, he cannot show serious prejudice. *See Shepherd*, 27 F.4th at 1085. He thus cannot show that the district court abused its discretion by denying his motion to continue. *See id.*

Ayala-Alas also argues that the evidence was insufficient to support his convictions. Because Ayala-Alas did not renew his Rule 29 motion at the close of all evidence, he failed to preserve his sufficiency of the evidence challenge. *See United States v. Cabello*, 33 F.4th 281, 285 (5th Cir. 2022). Thus, in order to prevail on his claim, Ayala-Alas must show that the record is devoid of any evidence pointing to his guilt or that the evidence is so tenuous that his conviction is shocking. *Id.* at 288. This court will reverse only if there is a manifest miscarriage of justice. *Id.*

In order to support a conviction of importation of marijuana, the jury had to find that the Government established that Ayala-Alas (1) played a role in bringing a quantity of marijuana into the United States from outside of the country; (2) knew the substance was marijuana; and (3) knew the marijuana would enter the United States. *See United States v. Zamora-Salazar*, 860 F.3d 826, 832 (5th Cir. 2017). To sustain a conviction of possession with intent to distribute marijuana, the jury needed to find that the Government established that Ayala-Alas knowingly possessed marijuana with the intent to distribute it. *United States v. Vinagre-Hernandez*, 925 F.3d 761, 764 (5th Cir. 2019). Aiding and abetting can be established by showing that Ayala-Alas (1) associated with the criminal enterprise; (2) participated in the venture; and (3) sought to make it successful. *Id.* at 765; *Zamora-Salazar*, 860 F.3d at 832. To prove that he participated in the venture, the Government needed to

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prove that Ayala-Alas committed an overt act that assisted in the success of the venture. *Vinagre-Hernandez*, 925 F.3d at 765.

A review of the record reveals that there was sufficient evidence to support Ayala-Alas's convictions. United States Border Patrol (USBP) agents testified that Ayala-Alas admitted that he received marijuana in Mexico, that he knew it was marijuana, and that he was carrying it across the border to the United States. Moreover, Ayala-Alas admitted that he traveled with the group carrying marijuana. Federal agents testified that 273.8 kilograms of marijuana were recovered. *See United States v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994) (intent to distribute may be inferred from the quantity of drugs involved). Thus, Ayala-Alas cannot show that the facts were insufficient to support his conviction where the record is not devoid of evidence pointing to his guilt and the Government's case was not so tenuous that his conviction is shocking. *See Cabello*, 33 F.4th at 288.

Ayala-Alas also claims that he presented sufficient evidence at trial to support a duress jury instruction and that it was error to fail to include the instruction in the ultimate jury charge. The denial of a requested jury instruction is reviewed for abuse of discretion, considering the evidence in the light most favorable to the defendant. *United States v. Mora-Carrillo*, 80 F.4th 712, 715 (5th Cir. 2023). This court will reverse only where (1) the requested instruction is substantially correct; (2) the charge given to the jury did not substantially cover the contents of the proposed instruction; and (3) the omission of the proposed instruction seriously impaired the defendant's ability to present his defense. *Id.* The defense of duress only arises if there is a real emergency that leaves the defendant with no time to pursue any legal alternative and where he is in serious danger at the moment that he commits the offense. *Id.* at 715-16.

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Even considering this evidence in the light most favorable to Ayala-Alas, it is not sufficient to satisfy the elements of duress. *See Mora-Carrillo*, 80 F.4th at 715. Ayala-Alas presented no evidence that he was under present or imminent threat at the moment of the offense. *See id.* at 715-16. Accordingly, the district court did not abuse its discretion in denying the request for a duress instruction. *See id.* at 716 (“Because [the defendant] was obliged to present evidence of each element of duress, yet failed as to the first element, we need go no further.”).

Ayala-Alas argues that the district court abused its discretion by denying his request that the trial court provide access to the cell phone taken from him at arrest. This court reviews challenges to discovery rulings for abuse of discretion and will order a new trial only where a defendant demonstrates prejudice to his substantial rights. *United States v. Garcia*, 567 F.3d 721, 734 (5th Cir. 2009).

He cannot demonstrate that the district court abused its discretion by denying his motion to compel. The Government provided Ayala-Alas with access to all the information it had from the cell phone and the district court allowed defense counsel to inspect the cell phone with the Government, yet the defense declined to do so. Additionally, any claim of resulting prejudice fails given the trial evidence supporting Ayala-Alas’s guilt. *See United States v. Cochran*, 697 F.2d 600, 606-07 (5th Cir. 1983) (finding no reversible error resulting from the Government’s failure to produce during discovery copies of tape-recorded conversations between the defendant and others given the independent evidence of the defendant’s guilt). Thus, Ayala-Alas has not shown that the district court abused its discretion in denying the motion to compel. *See Garcia*, 567 F.3d at 734. To the extent that Ayala-Alas alleges a *Brady v. Maryland*, 373 U.S. 83 (1963) violation, he fails to identify any specific evidence that was suppressed or evidence favorable to his defense or material to his guilt, *see Garcia*, 567 F.3d at 735, and he makes no arguments

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in support of his claim and has thus waived any argument, *see United States v. Reagan*, 596 F.3d 251, 254-55 (5th Cir. 2010) (stating that inadequately briefed arguments in counseled briefs are deemed waived); *Beasley v. McCotter*, 798 F.2d 116, 118 (5th Cir. 1986) (holding that litigants represented by counsel are not entitled to liberal construction of their pleadings).

With regard to sentencing, Ayala-Alas argues that the district court improperly calculated his sentencing guidelines range, by imposing adjustments under U.S.S.G. § 3C1.1, U.S.S.G. § 3B1.1(b), U.S.S.G. § 2D1.1(b)(16), and by failing to apply a downward adjustment under U.S.S.G. § 2D1.1(b)(18) (“safety valve”) and a downward departure as allowed by U.S.S.G. § 5K1.12.

This court reviews preserved challenges to the application of the Guidelines *de novo* and the district court’s factual findings for clear error. *United States v. Hawkins*, 866 F.3d 344, 346-47 (5th Cir. 2017). When making factual findings, a district court may consider any information bearing sufficient indicia of reliability and its factual findings are not clearly erroneous if they are plausible in light of the record as a whole. *Id.* at 347. Under this “deferential” standard, factual findings are deemed clearly erroneous only where a review of the evidence leaves this court with a definite and firm conviction that a mistake has been made. *United States v. Torres-Magana*, 938 F.3d 213, 216 (5th Cir. 2019). “At sentencing, the defendant bears the burden of rebutting the evidence used against him for purposes of sentencing by proving that it is materially untrue, inaccurate or unreliable.” *United States v. Solis*, 299 F.3d 420, 455 (5th Cir. 2002).

Section 3C1.1 provides for a two-level enhancement if, among other things, “the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of

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conviction.” U.S.S.G. § 3C1.1. Examples of covered conduct include “committing, suborning, or attempting to suborn perjury,” and providing materially false information to a judge or magistrate judge, probation officer, or to a law enforcement officer that significantly obstructed or impeded the investigation or prosecution of the offense. § 3C1.1, comment. (n.4).

A district court need not address each element of the alleged perjury in a separate and clear finding if it makes a finding of an obstruction of justice that encompasses all the factual predicates for a perjury finding. *United States v. Perez-Solis*, 709 F.3d 453, 470 (5th Cir. 2013). The district court found that the § 3C1.1 enhancement was warranted based on the discrepancy between Ayala-Alas’s post-arrest statements and testimony at trial, determining that Ayala-Alas committed perjury at trial. This finding was supported by statements in the presentence report (PSR) and the testimony of USBP agents at trial. Ayala-Alas presented no evidence to rebut the testimony of the agents and failed to demonstrate that any of the information considered by the district court was “materially untrue.” *Solis*, 299 F.3d at 455. Accordingly, Ayala-Alas cannot show that the district court erred in applying the obstruction of justice adjustment. *See Perez-Solis*, 709 F.3d at 470-71.

Section 3B1.1(b) provides for a three-level adjustment if a defendant was a manager or supervisor (but not an organizer or leader) of a criminal venture and the criminal activity involved at least five participants or was otherwise extensive. § 3B1.1(b). Whether a defendant occupied a role as a manager or supervisor is a finding of fact that is reviewed for clear error and will be upheld if it is plausible based on the entire record. *United States v. Ochoa-Gomez*, 777 F.3d 278, 281-82 (5th Cir. 2015).

The district court imposed the enhancement under § 3B1.1(b) after finding that Ayala-Alas was a manager and a supervisor of the marijuana

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smuggling venture. At the sentencing hearing, a DEA agent testified that during debrief, a co-defendant stated that Ayala-Alas had recruited him and hired him to backpack marijuana into the United States. Ayala-Alas did not offer any evidence to rebut this testimony. Accordingly, the district court's finding is plausible considering the entire record and Ayala-Alas has not shown that the district court clearly erred in applying the enhancement. *See Ochoa-Gomez*, 777 F.3d at 281-83.

Ayala-Alas briefs no argument challenging the corresponding two-level aggravate role adjustment under U.S.S.G. § 2D1.1(b)(16) and provides only conclusory statements that the district court erred by applying the enhancement. Accordingly, because he has made no arguments in support of his claim and because counsel's brief is not entitled to liberal construction, he has waived any argument. *See Reagan*, 596 F.3d at 254-55; *Beasley*, 798 F.2d at 118.

As to the safety valve reduction, Ayala-Alas devotes one sentence, without citation to the record, to the district court's determination that he was ineligible under § 2D1.1(b)(18). Thus, he has waived any argument on this issue. *See Reagan*, 596 F.3d at 254-55.

Regarding Ayala-Alas's challenge to the denial of a downward departure under § 5K2.12, this court lacks jurisdiction to review a sentencing court's refusal to grant a downward departure unless the court based its decision upon an erroneous belief that it lacked the authority to depart from the Guidelines. *United States v. Alaniz*, 726 F.3d 586, 627 (5th Cir. 2013). Nothing in the record indicates that the district court erroneously believed that it lacked the authority to grant a departure and in fact, the district court expressly explained why it determined that a departure was not warranted. Thus, this court lacks jurisdiction to consider the challenge. *See id.*

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Finally, Ayala-Alas argues that the Government's closing statements suggested his guilt by association by referencing the co-defendants' convictions and that the Government improperly claimed that it was Ayala-Alas's duty to produce Facebook messages allegedly on his cell phone. This court applies a two-step analysis to claims of prosecutorial misconduct. *United States v. Bolton*, 908 F.3d 75, 93 (5th Cir. 2018). First, it determines de novo whether the prosecutor made an improper remark, and if so, it then reviews for an abuse of discretion whether the remark affected the defendant's substantial rights, *i.e.*, whether the remark affected the outcome of the proceedings. *Id.* The determinative question is whether the remarks "cast serious doubt on the correctness of the jury's verdict." *United States v. Holmes*, 406 F.3d 337, 356 (5th Cir. 2005) (internal quotation marks and citation omitted).

Ayala-Alas does not specify the improper remark that he claims suggested his guilt by association nor does he provide any citations to the record. He likewise makes no argument that any remark by the Government suggesting guilt by association affected his substantial rights. Thus, he has waived any argument on this issue. *See Reagan*, 596 F.3d at 254-55.

To the extent that Ayala-Alas claims that the Government improperly shifted the burden of proof at trial by commenting on his failure to present Facebook messages in support of his defense, "[i]t is not error for a prosecutor to comment on the defendant's failure to produce evidence on a phase of the defense upon which he seeks to rely." *United States v. Mackay*, 33 F.3d 489, 496 (5th Cir. 1994) (internal quotation marks and citation omitted). Here, the defense theory was that Ayala-Alas was contacted under false pretenses through Facebook and ultimately forced into smuggling marijuana into the United States. It was thus not improper for the prosecutor to point out that the defense offered no direct evidence to prove that theory. *See id.* Moreover, the district court provided a curative instruction following

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the defense objection to the comments, the court reminded the jurors that the Government has the burden of proof and that the defendant is not required to prove his innocence or produce any evidence. Accordingly, he fails to show prosecutorial misconduct. *See Bolton*, 908 F.3d at 93-94.

The judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 10, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 23-50226 USA v. Ayala-Alas
USDC No. 4:22-CR-533-3

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

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Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By:

Lisa E. Ferrara, Deputy Clerk

Enclosure(s)

Ms. Lauren Tanner Bradley
Mr. Joseph H. Gay Jr.
Mr. Matthew James Kozik