

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

RODNEY JEROME,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN 00792137
Attorney for Petitioner

Issues Presented

1. Whether a federal court taking a guilty plea, violates a defendant's right to due process, if the court invites the defendant to waive the reading of the indictment and fails to have the factual basis read, thereby precluding the court from subjectively establishing the existence of a factual basis to support the plea.
2. Whether the above-referenced error requires a defendant to show, under plain error review, that he would not have entered the guilty plea but for the error, in order to obtain reversal.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rodney Jerome (“Jerome”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit, affirming Jerome’s conviction and sentence is styled: *United States v. Rodney Jerome*, 707 Fed. Appx. 853 (5th Cir. 2018).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the Petitioner’s conviction was announced on January 5, 2018 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of the judgment. This Court’s jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Federal Rule of Criminal Procedure

Fed. R .Crim. P. 11(b)(3)

Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

Fed. R .Crim. P. 11(b)(3).

Statement of the Case

Jerome was charged with and pleaded guilty to conspiracy to possess with intent to distribute methamphetamine. The district court sentenced Jerome to 108 months in prison, three years of supervised release and a \$1,000 fine.

Jerome argued (among other things) on appeal that the district judge taking his guilty plea could not possibly have *subjectively* established the existence of a factual basis to support the plea because (1) the judge hadn't read the indictment or the factual basis, and (2) the judge implicitly encouraged the pleading defendants to waive the reading of the indictment¹ (which they all did), and (3) the judge did not have the factual basis read in open court. Jerome further argued (1) that this sort of error was structural in nature because it is impossible to quantify the effects of the error on Jerome's decision to enter a guilty plea, and (2) because this error was not merely a Rule 11 "failure to admonish" error, but instead a due process violation, Jerome did not have to satisfy the *United States v. Dominguez Benitez* plain error

¹ "Okay. Reading of the charges. Anybody need the indictment or charge read to them?"

standard of showing “that he would not have pleaded guilty if the violation had not occurred.” The Fifth Circuit held that “Jerome’s attempt to recast his Rule 11 claim as a due process claim is invalid,” and that he had not shown that his substantial rights were affected.

The jurisdiction of the federal district court was invoked pursuant to Title 18 U.S.C. § 3231 (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”). Jerome was convicted of violating Title 21 United States Code §§ 841(a)(1), 841(b)(1)(C), and 846.

First Reason for Granting the Writ

If it is not reversible plain error for a court taking a guilty plea to subjectively satisfy itself that a factual basis exists for the plea, then the 1966 amendment to Rule 11 requiring such, is a nullity.

Rule 11 of the Federal Rules of Criminal Procedure was amended in 1966. One amendment: “A new sentence is added at the end of the

rule to *impose a duty* on the court in cases where the defendant pleads guilty to *satisfy itself* that there is a factual basis for the plea before entering judgment.” Fed. R. Crim. P. 11 advisory committee notes (1966); 39 F.R.D. 69, 171-72. One of the cases cited in the advisory committee notes as an illustration of the concern the amendment was designed to address was *People v. Barrows*, 99 N.W.2d 347 (Mich. 1959). *Id.* Ten years after being placed on three years’ probation (and after subsequently being incarcerated on a manslaughter conviction in the state of New York), the defendant therein sought to withdraw his original guilty plea. *Id.* at 348. At the time he was placed on probation, Michigan law included the following statutory requirement:

If the accused pleads guilty, after such plea and before sentence the court shall inform the accused of the nature of the accusation and the consequence of his plea; and regardless of whether he is represented by counsel, the court shall examine the accused, not necessarily under oath, and as a condition of accepting the plea of guilty and imposing sentence shall ascertain that the plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. Unless the court determines that the plea of guilty was so made, it shall not be accepted.

Id. at 349. The defendant argued that this statute had not been complied with during his plea colloquy. The Michigan Supreme Court agreed and

ordered a new trial and leave to withdraw the guilty plea. The relevant exchange from the plea colloquy was as follows:

Court: Mr. VanKouvering, the Information is amended by adding a second count. (Reading second count.)

Defense Counsel: There is no objection to the amendment.

Prosecutor: It is in the form of a second count and upon a plea of guilty the People will move to nolle prosequere the first count in the information.

Court: Have you explained that to the young man?

Defense Counsel: Yes, sir.

Court: That is the second count, charged with attempt.

Defense Counsel: We make a plea of guilty. He has been in the county jail for several weeks awaiting disposition of this matter, and I also like to state his father lives in New York and he has made arrangements, with the court's approval, to leave the State, go to New York and start in night school there. His mother is here, if the court wishes to talk with her.

Court: How old are you, young man?

Defendant: Nineteen.

Court: What is your address?

Defendant's Mother: 419 Brenner Street, Grand Rapids, N.E.

Court: Placed on probation for a period of 3 years. One of the conditions of probation will be that he is to go from here to the city of New York and he will be under the supervision of his father, whom I understand lives there, is that right?

Defendant's Mother: That is correct.

Id. at 348–49. The Michigan Supreme Court's comments are instructive:

I[t] is plain . . . that in this case the mandatory provisions . . . were not complied with. The direct questioning of a defendant by the trial judge on plea of guilty is required by the rule *for the purpose of establishing the crime and the participation therein of the person pleading guilty*. This is a precaution against involuntary or induced false pleas of guilty, and against subsequent false claims of innocence. (emphasis added)

Id. at 350.

We have little doubt that the entry of the plea by his attorney was made with defendant's agreement. But Michigan's rule on acceptance of pleas requires that the court ascertain more about the plea than that the defendant agrees that it is expedient to so plead. *The rule is designed to require reasonable ascertainment of the truth of the plea*. (emphasis added)

Id.

At the time Jerome finished entering his guilty plea, the district judge taking the plea knew no more about the specific facts forming the basis of Jerome's charge than the judge in *Barrows* knew about the facts forming the basis of the defendant's charge therein. When courts take

group guilty pleas², as they often do, and the court invites the defendants to waive reading of the indictment and does not ask for the factual basis to be read, as the court did in the instant case, the implicit communication to the parties is that the court doesn't want those documents read in court. The likelihood that defense attorneys who appear regularly in front of a judge who engages in this practice, will object, is therefore low. If this sort of error can never be reversible plain error, the net effect is that the above-referenced 1966 amendment to Rule 11 becomes a nullity. Stated another way, a court can know nothing about the specific facts forming the basis of a charge – which of course makes it impossible for the court to “satisfy itself” that a sufficient factual basis exists – and yet accept a guilty plea, knowing full well that this will never be reversible error. This is a direct affront to the integrity of the judicial proceedings.

² Jerome entered his plea along with nine other individuals.

Second Reason for Granting the Writ

The Fifth Circuit's holding is inconsistent with Supreme Court holdings in United States v. Dominguez Benitez, United States v. Davila, and McCarthy v. United States.

In *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), the district court committed Rule 11 error in failing to advise the defendant he could not withdraw his plea if the court did not accept the government's sentencing recommendations. *Id.* at 78. When things went south at the sentencing hearing (all parties apparently operating under the misapprehension that the defendant was eligible for safety-valve mitigation), the defendant told the district court that he "never had any knowledge about . . . the safety valve,"- an assertion not believed by the court. *Id.* at 78-79. On appeal, the defendant/appellant argued that the district court's Rule 11 error required reversal. *Id.* at 79. The Supreme Court eventually held that this error did not require reversal because appellant was unable to establish "that he would not have pleaded guilty if the violation had not occurred" – the new plain error standard. *Id.* at 80, 85-86. The Court was very careful however to note situations where this general plain error standard rule would not apply:

[I]n this case, th[e] . . . violation claimed was of Rule 11, *not due process*. (emphasis added).

Id. at 83.

This is another point of contrast with the constitutional question whether a defendant's guilty plea was knowing and voluntary. We have held, for example, that when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed. Boykin v. Alabama, 395 U.S. 238, 243 . . . (1969). We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless. (emphasis added)

Id. at 84 n. 10.

The *Dominguez Benitez* Court cited *United States v. Timreck*, 441 U.S. 780 (1979) as an example of “[t]he omission of a single Rule 11 warning without more.” *Dominguez Benitez*, 542 U.S. 81 at n. 6. In *Timreck*, the trial court violated Rule 11 by failing to inform the pleading defendant of a mandatory special parole term. *Timreck*, 441 U.S. at 782. The Court characterized the violation thusly: “Such a violation is neither constitutional nor jurisdictional[.] . . . His only claim is of a technical violation of the Rule.” *Timreck*, 441 U.S. at 783-84. Additionally, the *Dominguez Benitez* Court distinguished between ordinary Rule 11 claims and Rule 11 constitutional claims that may be

raised in a postconviction proceeding, noting that the plain error would “apply in many cases” (not all cases) on direct appeal involving Rule 11 violations. *Dominguez Benitez*, 542 U.S. 83 at n. 9.

In *United States v. Davila*, 569 U.S. 597 (2013), the appellant complained of the magistrate court’s improper participation in plea discussions (conceded by the government as a violation of Rule 11(c)(1)). *Id.* at 608. The appellant attempted to distinguish this sort of violation from those complained of in *Vonn* and *Dominguez Benitez*, characterizing those errors as “procedural” and contrasting the Rule 11(c)(1) violation as “central to the proper functioning of the criminal process.” *Id.* at 608-09. The Supreme Court disagreed, noting that the violation was not a due process violation:

Rule 11(c)(1) was adopted as a prophylactic measure, . . . *not one impelled by the Due Process Clause or any other constitutional requirement.* (emphasis added)

Id. at 610-11.

Dominguez Benitez and *Davila* stand for the proposition that where a Rule 11 error constitutes a due process violation, an appellant can establish plain error without a showing that he would not have pled guilty but for the errors.

McCarthy v. United States, 394 U.S. 459 (1969) is also instructive at this point. The defendant was charged with three counts of willfully and knowingly attempting to evade tax payments, and eventually pled guilty to the second count in exchange for the government agreeing to dismiss the other two counts. 394 U.S. at 461. At sentencing, the defendant “asserted that his failure to pay was ‘not deliberate’ and that they would have been paid if he had not been in poor health.” *Id.* Defense counsel asserted that defendant’s failure to pay his taxes was a result of his “neglectful” and “inadvertent” method of bookkeeping. *Id.* at 462. The Supreme Court ultimately reversed the conviction because the district court failed to comply with Rule 11 by failing to ensure defendant understood the nature of the charge to which he was pleading:

The judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. (internal quotation marks omitted) Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. (emphasis added)

Id. at 466-67.

[S]ince the elements of the offense were not explained to petitioner, *and since the specific acts of tax evasion do not appear of record*, it is also possible that if petitioner had been adequately informed he would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors. (emphasis added)

Id. at 471.

We thus conclude that prejudice inheres[.]

Id.

It is significant that nowhere in *McCarthy* is there a suggestion that the defendant would have withdrawn his guilty plea if the district court had properly explained the elements of the charged offense. The Supreme Court simply noted “It is . . . possible that if petitioner had been adequately informed he would have concluded he was guilty of . . . misdemeanors.” And *McCarthy* is still good law. In *United States v. Vonn*, 535 U.S. 55 (2002) the Supreme Court spoke to the continued vitality of *McCarthy*:

There was no question that the trial judge had failed to observe Rule 11, and *the failing was obvious. So was the prejudice to McCarthy. Having had no explanation from the judge of the knowing and willful state of mind charged as of the time of the tax violation, he pleaded guilty* and was later sentenced at a hearing in which his lawyer repeatedly represented that McCarthy had been guilty of nothing but sloppiness. The contradiction between the plea and the denial

of the mental state alleged bespoke the prejudice of an unknowing plea, to which the judge's indifference was an affront to the integrity of the judicial system. (emphasis added)

Vonn, 535 U.S. at 68-69.

Third Reason for Granting the Writ

There is a division among the Circuits as to how to treat Rule 11 violations that are not merely failures to warn, but instead constitute due process violations.

Rule 10 of the Supreme Court Rules provides that one of the considerations in granting a petition for writ of certiorari is when a United States Court of Appeals “has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” Sup. Ct. R. 10(a).

The Tenth Circuit, in *United States v. Landeros-Lopez*, 615 F.3d 1260 (10th Cir. 2010), citing *Dominguez Benitez*, made a distinction between omitted Rule 11 warnings and due process factual basis errors:

In *United States v. Dominguez Benitez*, the Supreme Court held that “a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court

committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea.” . . . However, the *Dominguez Benitez* rule is limited to evaluating “the effect of [an] omitted warning on a defendant's decision” to enter a guilty plea—that is, an error affecting the knowing and voluntary nature of a defendant's plea. . . . Rule 11(b)(3) errors are distinct from the type of error addressed in *Dominguez Benitez*. A district court must reject a defendant's plea if it lacks a factual basis, even if the plea is knowingly and voluntarily made. *See Libretti v. United States*, 516 U.S. 29, 42, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995) (whether there is a factual basis for a plea “is a distinct inquiry” from whether a plea was knowingly and voluntarily made). Thus, whether Landeros would have plead guilty in spite of any Rule 11(b)(3) error is irrelevant; the issue is whether the district court's alleged error in *accepting* the plea had a substantial effect on his rights. *Accordingly, the Dominguez Benitez rule does not apply.* (emphasis added)

Landeros-Lopez, 615 F.3d at 1264 n. 3; *see also United States v. Carillo*, 860 F.3d 1293, 1301 (10th Cir. 2017) (same).³ The Eleventh Circuit also

³ Other Circuit Courts have noted the distinction between due process violations and other errors in guilty plea proceedings. *See Dansberry v. Pfister*, 801 F.3d 863, 868 (7th Cir. 2015) (“In . . . *Dominguez Benitez* . . . the Supreme Court suggested . . . that some due process violations during a plea colloquy might require automatic reversal of a conviction.”); *United States v. Hughes*, 401 F.3d 540, 555 (4th Cir. 2005) (“[I]n view of the fact that the error alleged was not a due process violation, the [*Dominguez Benitez*] Court concluded that a defendant challenging a Rule 11 colloquy on plain error review ‘must show a reasonable probability that, but for the error, he would not have entered the plea.’”); *United States v. Jones*, 266 Fed. Appx. 901, 902 (11th Cir. 2008) (noting the *Dominguez* exception to the general rule); *Tellado v. United States*, 799 F.Supp.2d 156, 175 (D. Conn. 2011) (“In *Dominguez Benitez*, the Supreme Court distinguished a claim of Rule 11 error from the ‘constitutional question whether a defendant’s guilty plea was knowing and voluntary.’”), *aff’d*, 745 F.3d 48 (2d Cir. 2014).

makes a distinction between Rule 11 and due process violations. *See United States v. Palma*, 693 Fed. Appx. 820, 824 (11th Cir. 2017) (“Where a defendant raises both Rule 11 and due process violations, we need not determine whether that defendant has shown there was a “reasonable probability that, but for the error, he would not have entered the plea” if there is no plain error under a traditional due process analysis.”).

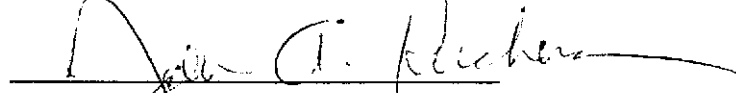
The Fifth Circuit, on the other hand, has held that factual basis complaints are subject to the same “but for the error he would not have pleaded guilty” plain error standard as Rule 11 “failure to warn” violations. *See United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012); *United States v. Castro-Trevino*, 464 F.3d 536, 541 (5th Cir. 2006). The First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits are aligned with the Fifth Circuit as to this issue. *See United States v. Crum*, 625 Fed. Appx. 304, 307–08 (6th Cir. 2015) (Plain error review regarding factual basis complaint required showing of a reasonable probability that, but for the error, defendant would not have entered plea); *United States v. Cramer*, 602 Fed. Appx. 837, 838–39 (2d Cir. 2015) (same); *United States v. Arojojoye*, 753 F.3d 729, 735 (7th Cir. 2014) (same); *United States v. Rosado-Perez*, 605 F.3d 48, 56 (1st Cir.

2010) (same); *United States v. Booker*, 496 F.3d 717, 725–26 (D.C. Cir. 2007) (same), *cert. granted, judgment vacated on other grounds*, 556 U.S. 1218 (2009); *United States v. Sandoval*, 166 Fed. Appx. 876, 877–78 (8th Cir. 2006) (same); *United States v. Murrye*, 596 Fed. Appx. 219, 228–29 (4th Cir. 2015) (Rule 11 factual basis error did not influence appellant’s decision to plead guilty); *United States v. Flesher*, 588 Fed. Appx. 652, 652–53 (9th Cir. 2014) (“Even assuming that the court developed an insufficient factual basis for accepting Defendant’s plea under Federal Rule of Criminal Procedure 11, the error was harmless because the record does not disclose ‘a reasonable probability that, but for the error, he would not have entered the plea.’”).

Conclusion

For the foregoing reasons, Petitioner Jerome respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



JOHN A. KUCHERA

210 N. 6th St.

Waco, Texas 76701

(254) 754-3075

(254) 756-2193 (facsimile)

johnkuchera@210law.com

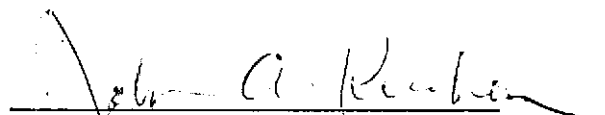
SBN. 00792137

Attorney for Petitioner

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing petition for writ of certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 29th day of March, 2018.



John A. Kuchera, Attorney for
Rodney Jerome

Appendix A

707 Fed.Appx. 853 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee

v.

Rodney JEROME, Defendant-Appellant

No.

17

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50191

Summary Calendar

Filed January 5, 2018

Appeal from the United States District Court for the
Western District of Texas, USDC No. 6:16-CR-68-20

Attorneys and Law Firms

Joseph H. Gay, Jr., Assistant U.S. Attorney, U.S.
Attorney's Office, Western District of Texas, San
Antonio, TX, Zachary Carl Richter, Assistant U.S.
Attorney, U.S. Attorney's Office, Western District of
Texas, Austin, TX, for Plaintiff-Appellee

John Andrew Kuchera, Waco, TX, for Defendant-
Appellant

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

Opinion

PER CURIAM: *

Rodney Jerome appeals his guilty plea conviction and sentence for conspiracy to possess with intent to distribute methamphetamine. In his first assignment of error, he argues that the district court plainly erred by encouraging him to waive reading of the indictment at arraignment, that the court likewise failed to have his factual basis read into the record, and that the court's statements at arraignment demonstrate its unfamiliarity with his

indictment and factual basis. In light of this, Jerome argues that the court failed to satisfy itself "subjectively" that there was a sufficient factual basis to support his plea, violating Federal Rule of Criminal Procedure 11(b)(3) and his due process rights.

Jerome's attempt to recast his Rule 11 claim as a due process claim is invalid. *See United States v. Scott*, 587 Fed.Appx. 201, 202 (5th Cir. 2014). The record indicates that Jerome received his indictment and understood the charges against him and that he reviewed his factual basis with defense counsel, who raised Jerome's concerns with the factual basis at arraignment. Any omission at arraignment was, at best, harmless and did not affect Jerome's substantial rights. *See United States v. Lee*, 694 Fed.Appx. 318, 318-19 (5th Cir.), *cert. denied*, — U.S. —, 138 S.Ct. 404, 199 L.Ed.2d 297 (2017); *see also United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012).

The factual basis, moreover, was sufficiently specific to allow the district court to determine that Jerome's conduct fell within the ambit of a 21 U.S.C. § 846 drug conspiracy. *See United States v. Rodriguez*, 831 F.3d 663, 666 (5th Cir. 2016), *cert. denied*, — U.S. —, 137 S.Ct. 675, 196 L.Ed.2d 557 (2017). Jerome has shown no clear or obvious error. *See Broussard*, 669 F.3d at 546; *Scott*, 587 Fed.Appx. at 202.

In his second assignment of error, Jerome argues that the district court erred in denying a mitigating role adjustment under U.S.S.G. § 3B1.2(a). In support of this claim, Jerome contends that he was substantially less culpable than the average participant and that the district court erred by relying on an outdated version of *854 the Sentencing Guidelines, misunderstanding the law on conspiracy, and erroneously finding at sentencing that he stored drugs for more than one person and hid guns.

Notwithstanding Jerome's arguments, the district court's factual finding that Jerome was not a minimal or minor participant in the conspiracy was plausible in light of the whole record. *See United States v. Sanchez-Villarreal*, 857 F.3d 714, 721 (5th Cir. 2017). At sentencing, the court adopted the factual findings in the presentence report. *See United States v. Alaniz*, 726 F.3d 586, 619 (5th Cir. 2013). In light of Jerome's factual basis, the presentence report, and the arguments of counsel at sentencing, the court weighed the non-exhaustive factors set forth in

the commentary of U.S.S.G. § 3B1.2 and rejected the arguments in favor of a mitigating role adjustment. *See United States v. Torres-Hernandez*, 843 F.3d 203, 209-10 (5th Cir. 2016).

The record further shows that the district court identified the proper standard in considering Jerome's arguments, *see United States v. Castro*, 843 F.3d 608 613 (5th Cir. 2016), and the court's statements do not reference an older version of the Sentencing Guidelines, indicate reliance on an outdated version, or show a misunderstanding of conspiracy law, *see, e.g., United States v. Haines*, 803 F.3d 713, 740 (5th Cir. 2015). Furthermore, even if it is assumed that the court's statements regarding Jerome storing drugs for more than one person and hiding guns constituted clear or obvious error, Jerome has shown no affect on his substantial rights as he observes only that § 3B1.2's commentary permits an adjustment when a defendant has stored drugs. Although the guideline commentary provides that a defendant may be eligible for

a mitigating role adjustment when he is sentenced only on the basis of his own conduct and his participation is limited to transporting or storing drugs, the adjustment is not required. *See* § 3B1.2, comment. (n.3(A)). In any event, the record showed, *inter alia*, that Jerome both delivered and stored drugs.

Finally, Jerome, in his third assignment of error, argues that he should not have received a two-level enhancement of his offense level under U.S.S.G. § 2D1.1(b)(5) because he qualified for a mitigating role adjustment under § 3B1.2. Because we discern no error in the district court's denial of a mitigating role adjustment, Jerome was eligible for the § 2D1.1(b)(5) enhancement.

AFFIRMED.

All Citations

707 Fed.Appx. 853 (Mem)

Footnotes

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