No. 10-40502

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

v.

JUAN CONTRERAS
Defendant–Appellant.

On Appeal from the United States District Court for the Southern District of Texas, Brownsville Division No. 1:02-CR-562(4), Hon. Hilda Tagle, Judge Presiding

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BRIEF OF APPELLANT JUAN CONTRERAS

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CERTIFICATE OF INTERESTED PARTIES

NO. 10-40502

UNITED STATES OF AMERICA,
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Defendant–Appellant.

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

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3. Honorable Hilda Tagle – United States District Judge for the Southern District of Texas.

Seth H. Kretzer

STATEMENT REGARDING ORAL ARGUMENT

Appellant Juan Contreras requests oral argument. Contreras's sentencing was contaminated with procedural error. Oral argument could assist the Court in determining whether the exacting standards of plain error review are met when a sentencing court fails to enunciate a defendant's Base Offense Level, fails to rule on two different pending written motions for role reduction, fails to rule on a pending written motion for downward departure, and then affords a variance in the absence of any written explanation whatsoever in violation of §3553(c)(2)'s "specificity" requirement.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. Following Contreras's successful Motion to Vacate, Set Aside, or Correct Sentence brought pursuant to 28 U.S.C. § 2255, the district court announced the revised sentence on May 27, 2010, RE.7.550-51, and entered its amended final judgment on June 4, 2010, RE.4.506-11.[1] Contreras filed a Notice of Appeal on May 29, 2010. RE.2.418; FED. R. APP. P. 4(b)(1)(A), 4(b)(2). This Court has jurisdiction over Contreras's appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[1] Docket entries 1-501 were part of the record from the trial. With the exception of the indictment, found at Tab 3 of the Record Excerpts, no documents are cited from that portion of the record. The pagination of the record containing documents 548-772 begins again at page 1. Documents 548-772 are referred to herein as R. [Bates number]. Cites to the record excerpts are in the form RE.[tab number].[Bates number].

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court committed procedural error in its failure to enunciate Contreras's base offense level.

2. Whether the "Law of the Case" doctrine bars reconsideration of relevant conduct involving an uncharged quantity of cocaine (when such argument was rejected in an earlier opinion by the Fifth Circuit) yet the quantity assessed was reduced for codefendants upon their resentencing.

3. Whether the District Court committed procedural error in failing to consider and rule upon Contreras's motions for role reduction under U.S.S.G. §3B1.1 at resentencing.

4. Whether the District Court committed procedural error in failing to explain its reasons for the sentence imposed at the hearing as required by 18 U.S.C. §3553(c).

5. Whether the District Court committed procedural error in failing to state with specificity its reasons for the variance imposed as required by 18 U.S.C. §3553(c)(2).

6. Whether the District Court committed procedural error in failing to rule on a motion for downward departure at resentencing.

7. Whether this litany of procedural errors rose to the level of plain error affecting Contreras's substantial rights such that failure to remedy the situation would affect the integrity of the judicial proceedings.

8. Whether a downward variance afforded was substantively unreasonable in light of the 400% disparity between Contreras's new aggregate sentence and that meted out to codefendant Villareal (480 months versus 120 months).

STATEMENT OF THE CASE

I. INDICTMENT

On October 8, 2002, Cameron County Constable Juan Contreras and five co-defendants were charged by Indictment with three counts of smuggling marijuana in violation of 21 U.S.C. §§ 841 and 846 and two counts of carrying a handgun in furtherance of the narcotics offenses in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2. RE.3. Count 1 charged conspiracy with intent to distribute a quantity exceeding 1,000 kilograms of marijuana, a Schedule I controlled substance, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). RE.3.50. Count 4 charged possession with intent to distribute 500 kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2. RE.3.51-52. Similarly, Count 5 charged possession with intent to distribute 132.8 kilograms of marijuana in violation of the same statutes as did the predecessor count. RE.3.52. Counts 6 and 7 each charged use and carry of Contreras's service handgun in the commission of Counts 1 and 4-7 in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2. RE.3.53.

II. TRIAL AND SENTENCING

A. Unlike the First PSR, the Revised PSR Urged a Consecutive 300 Month Sentence on Count Seven

Contreras's trial began on June 24, 2003. Following fifteen days of trial before U.S. District Judge Hilda Tagle and one day of deliberation, the jury returned a guilty verdict on August 13, 2003. With regards to the two 924(c) counts, the PSR only urged a consecutive sentence of 5 years for *both*. PSR ¶91. On October 2, 2003, the prosecutor stated that he had "no objections" to the PSR. (Doc. No. 289). However, Contreras's court-appointed lawyer, Larry Warner, who would subsequently be found to have rendered ineffective assistance of counsel, filed lengthy and discursive objections. In response, an amended PSR was issued recommending a consecutive 300 month sentence for the second 924(c) offense, Count 7. (Doc. No. 318).

B. Uncharged Cocaine Added 6 Levels to the Base Offense Level

Pursuant to U.S.S.G. 2D1.1(c)(1) the PSR calculated the base offense level at 38 based upon 30,000 kilograms or more of marijuana. "The loads of marijuana totaled 1,280.36 kilograms of marijuana and the load of cocaine consisted of approximately 150 kilograms, for guidelines computation purposes this equates to 30,000 kilograms of marijuana for a

total of 31,280.56 kilograms of marijuana." PSR ¶43. Without the addition of the mammoth drug quantity for the uncharged cocaine, Contreras's base offense level would have been assessed at 32 based only on the raw marijuana amounts. *See* U.S.S.G. 2D1.1 (c)(4).

C. U.S.S.G. § 3B1.3

The PSR assigned an additional two points for abuse of position of trust under U.S.S.G. § 3B1.3. A total offense level of 40 corresponds to a Guidelines Range of 292-365 months.

D. Sentencing: 652 months

On February 11, 2004, Contreras was sentenced pre-*Booker* to three concurrent terms of 292 months in prison and a five-year term of supervised release as to Counts 1, 4, and 5. (Doc. No. 347). Contreras was also sentenced to a 60 month term in prison and a three-year term of supervised release with supervision on Count 6. *Id.* Furthermore, Contreras was sentenced to 300 months in prison and a three-year term of supervised release with supervision as to Count 7. *Id.* In the aggregate, Contreras was sentenced to a total of 652 months in prison.

III. ONLY CONTRERAS'S COUNSEL FAILED TO BRIEF *BOOKER*

Subsequent to sentencing, but before the prosecution of Contreras's appeal in the Fifth Circuit, the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005). Contreras's court-appointed attorney, Larry Warner, continued his representation for prosecution of the appeal. Even though *Booker* was decided long before Contreras's appeal, Warner failed to raise this issue. *Id.* This was especially surprising since all of the other co-defendants raised a *Booker* issue. This Court vacated and remanded the sentences of all of Contreras's codefendants for resentencing. *United States v. Jimenez*, 509 F.3d 682 (5th Cir. 2007). But the Court specifically noted that Contreras's sentence could not be vacated because he failed to raise a *Booker* issue. *Id*. at 694 n.11.

IV. JIMENEZ AND VILLAREAL ENJOYED SENTENCING RELIEF BECAUSE OF A REDUCTION IN THE AMOUNT OF THE UNCHARGED COCAINE

Thereafter, the sentences for codefendants Constable Jimenez and Sergeant Villareal were substantially reduced because the Government acknowledged that the PSR had overstated the quantity of cocaine fairly attributable as relevant conduct. More specifically, in April 2008 the Government filed a detailed sentencing memorandum acknowledging that the Confidential Informant, Juan Guerra, whose debrief originally made the

agents aware of the uncharged cocaine transportation, overstated the amount involved by 50%:

> In late 2007 and again in March 2008, the cooperating defendant was debriefed at the Beaumont FCI recently about his participation in the narcotics operation that he and Jose Morales conducted. Of particular note for the Court is his information regarding an approximately 150 kilo of cocaine load that was delivered to cooperator Juan Guerra's home in February 2001. Previously, Juan Guerra had told law enforcement that he received large bundles of cocaine from Richard Casas who, in turn, had received them from the Constable's Office led by Jose Jimenez.
>
> Guerra estimated that the cocaine weighed [sic] approximately 150 kilos. He did not weigh the cocaine and estimated the weight by picking the sacks up and giving them to a cooperating defendant.
>
> The cooperating defendant has told law enforcement that the actual weight of this large cocaine load was 100 kilos.
>
> R.120-121.

The Government's sentencing memorandum volunteered the mitigating effect the lower weight amount could have on the defendants' sentences:

> If the Court accepts the cooperating defendant's debriefing as reasonably reliable, the practical effect of this evidence is that it will result in a different relevant conduct assessment than the original relevant conduct assessment…
>
> R.121.

At resentencing, the court afforded sentence reductions redounding to the lessened weight of the unindicted cocaine shipments. Jimenez's sentence was reduced from life to 420 months. Doc. No. 647, p. 3. Villareal's sentence was reduced from 132 months to 120 months. Doc. No. 633, p. 2.[2] It is particularly salient that the PSR does not tether Contreras to the conspiracy for transporting uncharged cocaine in any greater capacity or role than was ascribed to co-defendants Jimenez, Montoya, Morales or Villarreal. (PSR Paragraphs 32, 43, and 54).

Contreras was situated differently from his codefendants on the 924(c) counts; Contreras was named in Counts 6 and 7 but Jimenez and Villareal were named in only one count, Count 6 and Count 7 respectively. Furthermore, unlike Contreras, Villareal was acquitted on his 924(c) count, Count 7. *Jimenez*, at 688-689. For these two reasons, Villareal's aggregate sentence was significantly smaller than that of any other codefendant.

V. WARNER IS SUBSEQUENTLY FOUND CONSTITUTIONALLY INEFFECTIVE

Unsurprisingly, Contreras filed for habeas relief under § 2255 claiming that Warner rendered ineffective assistance of counsel for failing to

[2] Morales's sentence remained unchanged at 360 months. Doc. No. 631, p. 3. Nevertheless, this Court subsequently modified a term of supervised release. *United States v. Morales*, 2011 U.S. App. LEXIS 5804, *5 (5th Cir. 2011).

raise *Booker* or at least incorporate the arguments of his codefendants. R.168. On January 11, 2010, United States Magistrate Judge Felix Recio filed an Amended Magistrate Judge's Report and Recommendation, recommending that Contreras be granted habeas relief and resentenced. RE.5. The District Court adopted this Report and Recommendation and the matter was set for resentencing. RE.6.

VI. RESENTENCING

Contreras stated no objections to the PSR (Doc. No. 749). Contreras simultaneously filed three interrelated sealed motions urging a reduced sentence. The first two sealed motions urged reductions for minimal-or-minor participant roles, respectively, under U.S.S.G. § 3B1.2(a) and (b) (Doc. Nos. 750 and 751). The third sealed motion advocated downward departure under U.S.S.G. § 5K2.0 (Doc. No. 752).

The resentencing hearing was held on May 27, 2010. RE.7. The 60 month and 300 month sentences on Counts 6 and 7, respectively, were not reduced. However, the concurrent sentences on Counts 1, 4, and 5 were dropped from 292 months to 120 months by way of variance. RE.4.508; RE.7.548. In other words, the aggregate sentences were reduced from 54 years (652 months) to 40 years (480 months). *Id.*

Unfortunately, the district court did not state on the record any reasons animating the new sentence imposed. Nor did the district court rule on either of Contreras's two motions for role reduction or his separate motion for downward departure. Nor did the written Statement of Reasons provide any explanation for the variance: in response to this form's prompt, "Explain the facts justifying a sentence outside the guideline system. (Use page 4 if necessary.)", the District Court did not write a single word. (Doc. No. 767, p. 3).

Amended Judgment was entered on June 4, 2010. RE.4. Contreras had earlier filed his Notice of Appeal on May 29, 2010. RE.2. The Brownsville lawyer appointed for the resentencing moved to withdraw concomitant with the filing of the Notice of Appeal. RE.2. On June 1, new counsel was appointed to prosecute the instant appeal. R.505.

STATEMENT OF THE FACTS

Contreras's convictions arose out of a complex drug-trafficking ring that operated in South Texas. RE.5.270. Contreras was one of three Cameron County Precinct Seven Constables convicted as a result of that drug trafficking ring. *Id.* Also convicted was Jose A. Morales who, although not a constable, worked with the indicted constables to ensure successful drug-trafficking into the United States. *Id.* Morales made arrangements for narcotics to be placed at the Rio Grande River's edge, on the side belonging to the United States, where constables, including Contreras, would retrieve it and give it safe transport to stash houses located in the area. *Id.*

In July 2000, Border Patrol Agents began to notice a pattern of constables appearing along the river's edge. *Id.* The constables often claimed to be working on drug interdiction. *Id.* Yet the constables' duty ledger would later show no such activity. RE.5.271. The constables were also monitoring Border Patrol radio traffic and trying to elicit information involving drug interdiction, in otherwise casual conversations, from Border Patrol agents supervising the area. *Id.*

On February 22, 2001, Contreras approached the Rio Grande River in full uniform in a marked patrol unit, which immediately raised the suspicion

of the Border Patrol agents. *Id.* As Contreras left the riverbanks, he pulled his patrol unit parallel to a Border Patrol agent's vehicle and began to make small talk with that agent. *Id.* Relatively soon into the conversation Contreras boasted that he had just seized a rather large quantity of marijuana. *Id.*

The Border Patrol agent asked whether he could see the marijuana; Contreras allowed the agent to so do. *Id.* The agent called his supervisor as soon as he identified the marijuana bundles. *Id.* Contreras followed suit and also called his supervisor, Deputy Constable Villareal. *Id.* Contreras claimed to have seized the marijuana and loaded it into the trunk himself, yet his clothes were clean and showed no trace of lifting 300 pounds of wet, muddy marijuana bundles. *Id.* Soon after, several Border Patrol agents arrived and all present agreed that the marijuana should be transported to the Cameron County Sheriff's Office. *Id.*

As soon as the constables left to deliver the drugs to the Sheriff's Office, Border Patrol agents arrived at the scene of Contreras's alleged river-front seizure. *Id.* Border Patrol agents discovered an additional 400 pounds of marijuana as well as five or six individuals who upon seeing the agents swam back across the river to the Mexico side. *Id.* Contreras claimed to have seized the drugs found in his patrol unit only minutes before at the

same location. *Id.* Additionally, the markings, packaging, and size of the newly-located bundles matched the markings, packaging, and sizes of the bundles found in Contreras's patrol unit. *Id.*

Upon arriving at the Sheriff's office, Contreras and Villareal were questioned by DEA special agents. Both interviews produced inconsistencies. *Id.* These inconsistencies coupled with suspicion led to indictments being returned on October 8, 2002. *Id.* Following trial presided over by United States District Judge Hilda Tagle, Contreras was convicted on counts 1, 4, 5, 6, and 7. RE.4.506-07. The Indictment only alleged the transportation of marijuana; there was no mention of cocaine.

SUMMARY OF THE ARGUMENT

The district court likely would have afforded the same variance rationale and percentage reduction, but starting from a substantially lower point of embarkation, had the Guidelines range been properly computed.

I. MANIFOLD PROCEDURAL ERRORS

A. No Computation of Base Offense Level

Contreras's resentencing was contaminated with procedural error. As an initial matter, the district court did not compute Contreras's Base Offense Level at any point during the resentencing hearing. It was far from clear that the Base Offense from the original sentencing could, or should, be imported for purposes of the resentencing.

The PSR calculated the base offense level at 38 based upon 30,000 kilograms or more of marijuana. Without the addition of the mammoth drug quantity for the uncharged cocaine, Contreras's base offense level would have been assessed at 32 based only on the raw marijuana amounts. *See* U.S.S.G. 2D1.1 (c)(4). The Law of the Case doctrine did not bar the district court from *reconsidering* this relevant conduct issue notwithstanding this Court's conclusion that "the district court properly *could* have found the uncharged cocaine to be relevant conduct" in *United States v. Jimenez*, 509 F.3d 682, 693 (5th Cir. 2007) (emphasis added).

B. No Ruling on Either of these Two Motions for Role Reduction Under U.S.S.G. § 3B1.2(a) or (b)

The district court did not rule on either of Contreras's two motions for role reduction under U.S.S.G. § 3B1.2(a) or (b). (Doc. Nos. 750 and 751). However, the district court spoke at length about Contreras's relatively minimal or minor role vis-à-vis his other codefendants. RE.7.549. For this reason, it is likely that the district court would have afforded at least a two-level reduction had these motions actually been considered.

C. No Ruling on the Motion for Downward Departure

The district court did not say anything about (much less rule on) Contreras's Motion for Downward Departure (Doc. No. 752). Similarly, the explanatory section of the Statement of Reasons addressing "departures" was left blank. (Doc. No. 767, p. 2). This omission is particularly salient because Contreras advanced four main arguments in his motion for downward departure: 1) sentencing disparities between Contreras and his co-defendants, *Id*. at 4-5; 2) post-offense rehabilitation, *Id*. at 6-10; 3) low chance of recidivism, *Id*. at 9-10; and 4) military service. *Id*. at 10. The district judge credited Contreras with each of these positive attributes, RE.7.548, but expressly stated at resentencing that it did not rely on any of these facts in its sentence determination. *Id*.

Section 1B1.1 requires sentencing courts to follow a three-step approach, in which the court first computes the Guidelines Range and then considers whether to depart before determining whether a *Booker* variance is appropriate. A recent amendment to §1B1.1, Amendment 741, reiterates the concrete necessity of each sequential step required in this order of operations. "A 'variance'…is considered by the court ***only after*** departures have been considered." 18 U.S.C. Appx, Amend 741 (effective November 1, 2010) (emphasis added). There is no indication that the district court "considered" Contreras's motion for downward departure, much less ruled on it, before proceeding to its variance analysis.

D. No Explanation for the Variance, Much Less "With Specificity"

Section 3553(c)(2) requires a sentencing judge to state its reasons for variance "with specificity" in the written order of judgment. By contrast, in response to the prompt, "Explain the facts justifying a sentence outside the guideline system. (Use page 4 if necessary.)", the district court did not write a single word. (Doc. No. 767, p. 3).

E. These Procedural Errors Are Far From Harmless

A procedural error is harmless only if it did not affect the district court's choice of sentence. *United States v. Delgado-Martinez*, 564 F.3d

750, 753 (5th Cir. 2009). In the Statement of Reasons, the resentencing district court notes (without explanation) for the first time that it again assessed the Total Offense Level of 40, as it did in the original sentencing. (Doc. No. 767, p. 1). The fact that the district court granted Contreras a substantial variance (120 months from a low-end range of 292 months) makes plain the fact that had the district court granted a downward departure, and/or granted a 2-4 point reduction for role under U.S.S.G. § 3B1.2(a) or (b), the district court could have afforded the same variance rationale and percentage reduction but starting from a much lower point of embarkation.

II. SUBSTANTIVELY UNREASONABLE

Because of the numerous and multifaceted procedural errors which were not harmless, this Court does not need to proceed to an examination for substantive reasonableness. But even if this Court found no reversible procedural error or that these errors did not rise to the plain error threshold, this Court must nevertheless find Contreras's sentence substantively unreasonable since a larger variance was necessarily appropriate.

The district court was clear that the factor militating most strongly in support of the variance afforded to Contreras was §3553(a)(6), unwarranted sentence disparities among defendants. Contreras's new aggregate sentence

was 480 months, whereas codefendant Villareal received an aggregate sentence of only 120 months.

STANDARDS OF REVIEW

Sentencing Guidelines

"We review a district court's interpretation or application of the Guidelines *de novo* and its factual findings for clear error." *United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008).

Plain Error

"When a defendant fails to raise a procedural objection below, appellate review is for plain error only." *United States v. Lopez-Velasquez,* 526 F.3d 804, 806 (5th Cir.); *see also United States v. Peltier*, 505 F.3d 389, 391-94 (5th Cir. 2007) (applying plain error standard to claims of substantive and procedural unreasonableness when defendant failed to object to his sentence).

This Court remedies forfeited error only when it is plain and affects a defendant's substantial rights. *United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005). Even when these elements are met, this Court has discretion to correct the forfeited error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted).

Procedural Error

This court first determines whether the district court committed any procedural error. *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009). A procedural error is harmless only if it did not affect the district court's choice of sentence. *Id*. In proving harmless error, the proponent of the sentence "must point to evidence in the record that will convince us that the district court had a particular sentence in mind and would have imposed it, notwithstanding the error made in arriving at the defendant's guideline range." *Id*. If a procedural error is significant, i.e., not harmless, it usually requires reversal. *Id*.

Significant procedural errors are those such as failing to calculate the Guideline range correctly, failing to adequately explain the chosen sentence including deviations, or failing to calculate a Guideline range at all. *Id*.

Substantive Reasonableness

Substantive reasonableness review entails consideration of the totality of the circumstances surrounding the offense. *Gall v. United States*, 552 U.S. 38 (2007); *accord United States v. Peltier*, 505 F.3d 389, 391-94 (5th Cir. 2007), cert. denied, 128 S. Ct. 2959, 171 L. Ed. 2d 892 (2008) (applying plain error standard to claims of substantive unreasonableness when defendant failed to object to his sentence).

ARGUMENT

I. CONTRERAS CONCEDES PLAIN ERROR REVIEW

Contreras concedes that he did not object to the substance of his sentence, the manner in which it was explained, or the procedural steps by which it was meted out, so review is for plain error rather than abuse of discretion. *United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007) (applying plain error to claims of substantive and procedural unreasonableness when defendant failed to object to his sentence). As such, Contreras recognizes that he must establish that 1) error, 2) that is plain, and 3) that affects substantial rights. *United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005). Contreras also recognizes that he must further demonstrate that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *United States v. Duarte-Juarez*, 442 F.3d 336 (5th Cir. 2006). Unfortunately, the district court's manifold procedural errors in this case are so egregious that each of these hurdles is cleared by a wide margin.

Parts II-VIII., *infra*, address the numerous procedural plain errors contaminating Contreras's sentencing. Part IX., *infra*, explains how these procedural errors singularly and collectively affected Contreras' substantial rights.

II. THE DISTRICT COURT DID NOT CALCULATE CONTRERAS'S BASE OFFENSE LEVEL OR STATE HIS GUIDELINES RANGE

A. A Properly Calculated Guidelines Range is A Prerequisite to A Reasonable Sentence

Nevertheless, *Gall* establishes that "a properly calculated guidelines range is a prerequisite to a reasonable sentence." *United States v. Bonilla*, 524 F.3d 647, 659 (5th Cir. 2008) (Garza, J., dissenting). "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 50 (2007); *see also United States v. Reyes-Lugo*, 238 F.3d 305, 310 (5th Cir. 2001) (holding the requirement is satisfied when the court indicates the range and how it was chosen).

By contrast to *Reyes-Lugo*, the district court did not enunciate Contreras's Guidelines range at any point during the sentencing hearing. Nor did the district court identify any Base Offense Level, discuss any enhancements, rule on (or even mention) Contreras's two motions for role reduction under U.S.S.G. § 3B1.2(a) and (b) (Doc. Nos. 750 and 751), or rule on (or even mention) Contreras's motion for downward departure under U.S.S.G. § 5K2.0 (Doc. No. 752).

B. The Proper Base Offense Level Was Necessarily Lower Than 38

The PSR posited that "the loads of marijuana totaled 1,280.36 kilograms of marijuana and the load of cocaine consisted of approximately 150 kilograms, for guidelines computation purposes this equates to 30,000 kilograms of marijuana for a total of 31,280.56 kilograms of marijuana." (PSR ¶43). Without the addition of the mammoth drug quantity for the uncharged cocaine, Contreras's base offense level would have been assessed at 32 based only on the raw marijuana amounts. *See* U.S.S.G. 2D1.1 (c)(4).

Contreras recognizes that this Court previously explained, "the district court properly could have found the uncharged cocaine to be relevant conduct." *United States v. Jimenez*, 509 F.3d 682, 693-694 (5th Cir. 2007). But this doctrine only establishes that Contreras's Base Offense Level could not be as low as 32 under the pre-*Booker* mandatory framework. The district court, though, at resentencing, in a post-*Booker* advisory framework, gave no indication as to the point from which it began its analysis.

Even the Government's sentencing memorandum concedes that, "[i]f the Court accepts the cooperating defendant's debriefing as reasonably reliable, the practical effect of this evidence is that it will result in a different relevant conduct assessment than the original relevant conduct assessment." R.121. The sentencing memorandum went on to speculate that, "[t]his new

evidence would change the guidelines score for Jimenez from a level 43 (mandatory life), to level 41 (360 months to life). Morales' guideline range could change from a level 42 (360 months to life), to a level 40 (324 to 405 months)." R.121. However, the district court did not state at Contreras's resentencing hearing whether it actually adopted this methodology in arriving at the decision to reduce the sentences for Villareal and Jimenez. Nor does Contreras's Statement of Reasons cross-reference the sentencing determination for any other codefendant.[3]

C. Harmful Error Redounds to the Fact that Without Enunciation of his Base Offense Level, Contreras Cannot Determine the Extent of the Variance

Since the district court did not state the range from which it began its variance analysis, it is impossible to know the extent of that variance. In the Statement of Reasons, the district court notes for the first time that it assessed a Total Offense Level of 40. (Doc. No. 767, p. 1). The fact that the court actually granted Contreras a substantial variance (120 months from a low-end range of 292 months) makes plain the fact that had the district court granted a downward departure, and/or granted a 2-4 point reduction for role under U.S.S.G. § 3B1.2(a) or (b), the district court likely would have

[3] The manifold deficiencies in the Statement of Reasons are addressed at greater length in Part VII, *infra*.

afforded the same variance rationale, and percentage reduction, but starting from a substantially lower point of embarkation.

III. THE LAW OF THE CASE DOCTRINE PRESENTS NO BAR FOR RECONSIDERING THE UNCHARGED COCAINE AS RELEVANT CONDUCT

A. Law of the Case is Inapplicable

The law of the case doctrine posits that ordinarily "'an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on subsequent appeal.'" *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (*Matthews* II). However, the law of the case doctrine is inapplicable to Contreras because his case was not remanded. To the contrary, Contreras was resentenced only pursuant to habeas relief because he successfully established ineffective assistance of counsel on the part of his previous court appointed trial and appellate lawyer, Larry Warner.

Warner's failure to raise a sentencing issue for Contreras not only impinges the reasons for his ineffective assistance, but also limns the fact that such determinations were not at issue in the first appeal. A similar situation involving law of the case doctrine presented itself in *United States v. Elizondo*, 475 F.3d 692, 695 (5th Cir. 2007) ("We review *de novo* a district court's interpretation of our remand order, including whether the law

of the case doctrine or mandate rule forecloses any of the district court's actions on remand."). Elizondo was convicted of mail fraud and successfully appealed on *Booker* grounds. *Id*. at 694. At resentencing, the district court confused the portion of this Court's opinion devoted to sufficiency of the evidence (where facts are construed in the light most favorable to the government) with sentencing factors (where a mere preponderance standard prevails).

> The court erred by considering itself bound by our determination of the facts. In our prior opinion, we determined whether a reasonable jury could have found Elizondo guilty. We did not determine what actually happened; instead, we determined whether the evidence was sufficient to support the verdict. For sentencing, however, a court does not draw every reasonable inference in favor of the government, so our conclusions about the facts being sufficient were not binding at resentencing.

Id. at 696.

> [I]n our prior opinion we determined the sufficiency of the evidence to establish that Elizondo had committed an offense, but sentencing requires evaluating facts beyond the facts required to establish an offense. Even if our prior opinion had established the facts of the case, it established only the facts relating to the criminal liability. The district court still needed to decide other relevant facts.

Id. (citation omitted) (reversing and remanding for second resentencing). *See also United States v. John That Luong,* 627 F.3d 1306, 1309 (9th Cir. 2010)

("A district court should be free to consider any matters relevant to sentencing … as if it were sentencing *de novo*.") (citing *Elizondo*).

B. Even if Law Of the Case Doctrine Were Applicable, Contreras Falls Into An Established Exception

Three exceptions to the law of the case doctrine permit a court to depart from a ruling made in a prior appeal in the same case: "(1) The evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice.'" *Matthews II*, 312 F.3d at 657. Contreras's three codefendants enjoyed a remand because they were sentenced pre-*Booker*. *Jimenez*, at 693. Thereafter, the quantity of uncharged cocaine was reduced from that which controlled the initial sentence determinations. For this reason, even if the Law of the case doctrine were applicable, the third exception is operant and permitted the district court to reconsider the inclusion of cocaine as relevant conduct for Contreras as it had earlier done for his codefendants.

IV. THE DISTRICT COURT DID NOT RULE ON EITHER OF THE TWO MOTIONS FOR ROLE REDUCTION UNDER U.S.S.G. § 3B1.2(A) OR (B)

A. The District Court Was Required to Rule on these Two Motions

Congress requires the sentencing court to state "the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). "Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence . . . the judge will normally go further and explain why he has rejected those arguments." *Rita v. United States*, 127 S. Ct. 2456, 2468 (2007). The district court did not address either of Contreras's two motions for minimal-or-minor participant roles, respectively, under U.S.S.G. § 3B1.2(a) and (b) (Doc. Nos. 750 and 751). Not only were these two motions filed well in advance of the hearing, Contreras specifically mentioned these motions and reiterated their rationale:

> We have also filed a motion for minimal participant, motion for minor role, and in the alternative a motion for a mid-level role. Your Honor, there were multiple codefendants in this case who performed much more active roles than Mr. Contreras did. Constable Jimenez was Mr. Contreras's acting supervisor, and anything Mr. Contreras did was in response to instructions and orders from Constable Jimenez.

RE.7.544-545.

The Statement of Reasons contains no check mark in Part I.B. (Doc. No. 767, p. 1), so it appears that the district court rejected those arguments

without actually denying these motions. *See also* FED. R. CRIM. P. 32(i)(3)(B) (requiring the Court to rule on any disputed portion of a PSR or other controverted matter, or determine that a ruling is not necessary).

B. The District Court's Statements About Contreras's Role Demonstrates A Likelihood That These Motions Would Have Been Favorably Received Had They Been Considered

However, the district court's statements at the hearing provide ample reason to think that these motions might have been favorably received had they been considered. The district court spoke at length about Contreras' relatively minimal or minor role vis-à-vis his other codefendants:

> Both Contreras and Villarreal reported to the elected Cameron County Constable, Jose Alfredo Jimenez. Imposing a greater sentence on Juan Contreras for counts one, four and five than that of -- received by Jose Alfredo Jimenez, whom this Court has found had supervisory and managerial authority over the defendants Villarreal and Contreras in this conspiracy, would appear capricious. Imposing a greater sentence for counts one, four and five on Juan Contreras than that imposed on Jose Alfredo Jimenez would neither promote respect for the law nor act as an adequate deterrent to the commission of future crimes -- of crimes in the future by other law enforcement officials.
>
> RE.7.549.

These statements by the district court make plain that Contreras's minor or minimal role in this conspiracy was obvious to the district court. For this reason, such roles should have been the focus of an actual analysis under the rubric of U.S.S.G. § 3B1.2.

These statements (and the lack of consideration thereof in the relevant legal framework) are particularly relevant to the third prong of the plain error test. A similar situation was presented in *United States v. Monreal-Monreal*, where this Court reversed when the appellant (who had been sentenced at the low end of the Guidelines Range and the district court indicated that it had no latitude to reduce further) was "able to point to a statement from the district court demonstrating a likelihood that he would have received a lesser sentence" under an advisory application of the Guidelines. 134 Fed. App'x 726, 728 (5th Cir. 2005). *Accord United States v. Cruz*, 418 F.3d 481, 485 (5th Cir. 2005) (same) (quoting *Monreal-Monreal*).

V. NO RULING WAS MADE ON THE MOTION FOR DOWNWARD DEPARTURE

A. Contreras Advanced Four Main Arguments in his Motion

Contreras advanced four main arguments in his motion for downward departure: 1) sentencing disparities between Contreras and his co-defendants, Doc. No. 752, at 4-5; 2) post-offense rehabilitation, *Id*. at 6-10; 3) low chance of recidivism, *Id*. at 9-10; and 4) military service. *Id*. at 10.

B. These Arguments Were Well Received, but Not Factored into Sentencing

The district court credited Contreras with each of these positive attributes:

> The defendant has substantial family support, which will lower his odds of recidivism given the factors previously stated that include, you know, that he has no criminal history and he served in the military and was honorably discharged and that he's been a model prisoner.

RE.7.548.

Nevertheless, the district court also stated that:

> The Court notes, ***without relying on this fact*** – these facts in arriving at a sentence, that the defendant has engaged in model behavior while he has been incarcerated.

Id (emphasis added).

In other words, the district court acknowledged the nature of Contreras's arguments but ignored their logic.

C. The District Court Violated the Guidelines' Order of Operations

Although sentences within the Guidelines require "little explanation," *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005), this Court has held that "more is required if the parties present legitimate reasons to depart from the Guidelines…" *United States v. Mondragon-Santiago*, 564 F.3d 357, 362 (5th Cir. 2009). The district court did not say anything about

(much less rule on) Contreras's Motion for Downward Departure (Doc. No. 752). The explanatory section of the Statement of Reasons addressing "departures" was left blank. (Doc. No. 767, p. 2). At a minimum, the failure to rule on pending motions violates FED. R. CRIM. P. 32(i)(3)(B) (requiring the Court to rule on any disputed portion of a PSR or other controverted matter, or determine that a ruling is not necessary).

Further, Section 1B1.1 requires sentencing courts to follow a three-step order of operations, in which the court first computes the Guidelines Range and then considers whether to depart before determining whether a *Booker* variance is appropriate. A recent amendment to §1B1.1, Amendment 741, reiterates the concrete necessity of each sequential step required in this order of operations. "A 'variance'…is considered by the court ***only after*** departures have been considered." 18 U.S.C. Appx, Amend 741 (effective November 1, 2010) (emphasis added). There is no indication that the district court "considered" Contreras's motion for downward departure, much less ruled on it, before proceeding to its variance analysis.

Contreras recognizes that this Court has held that a district court is not required to calculate a departure under §4A1.3 before imposing a non-Guidelines sentence. *United States v. Gutierrez*, 635 F.3d 148 (5th Cir. 2011); *United States v. Mejia-Huerta*, 480 F.3d 713, 724 (5th Cir. 2007).

However, this line of cases only addresses the departure methodology of §4A1.3 and does nothing to change the Guidelines' three-step order of operations. *See, e.g., United States v. Grier*, 585 F.3d 138, 142 (3rd Cir. 2009) ("By making the Guidelines advisory, *Booker* gave district courts discretion at step three--but only after steps one and two have been completed properly.").

VI. ALL ERRORS WERE PLAIN, CLEAR, AND OBVIOUS

A. The District Court's Response to Contreras's Three Motions Fails §3553(c)(2)'s Requirement As These Responses Were Far Less Substantive Than That Found to Be "Minimally Sufficient" in *United States v. Bonilla*

Contreras recognizes that it is not enough to establish error; such error must also be plain. "'Plain' is synonymous with 'clear' or equivalently 'obvious'". *United States v. Olano*, 507 U.S. 725, 734 (1993). The clear and obvious nature of the procedural errors in the district court's failure to calculate a Base Offense Level, to enunciate a Guidelines range, to rule on three pending motions, and to omit any explanation from the Statement of Reasons are demonstrated by a comparison of Contreras's situation to that found to be "minimally sufficient" in *United States v. Bonilla*. 524 F.3d 647 (5th Cir. 2008).

Bonilla made certain arguments prior to the point at which the court announced his sentence. On appeal, Bonilla argued that the district court

committed procedural error by not adequately stating the reasons for the sentence. *Id*. at 658. This Court found that the district court's reasons for imposing the selected sentence were "minimally sufficient." *Id*. at 657.

In its analysis, this Court reviewed the record of the entire sentencing proceeding to determine if the judge had adequately considered Bonilla's arguments. *Id*. at 658. The record showed that the district court stated that it "had considered the arguments made earlier." *Id*. This reference in the context of the record showed that the sentencing judge had considered the arguments made by Bonilla and therefore had provided adequate reasons for its decision. *Id*. But this Court encouraged sentencing judges to make their reasons for the sentences they imposed explicit in the record as required by *Rita*. *Id*.

Contreras recognizes that the district court did note:

> The Court also expressly relies only on the facts found in the written statement of reasons, which accompanied the amended judgment in this case that was entered on March 9th, 2004.

RE.7.548.

However, if Contreras is to be regarded as having advanced an 'earlier argument', *id*., such could only have been propounded in the initial sentencing hearing. But that hearing was prosecuted by a lawyer subsequently found constitutionally ineffective and the outcome of which

discarded so as to necessitate the second resentencing hearing. The bottom line is that Contreras's new lawyer filed three new distinct motions well in advance of the resentencing hearing. Yet all three motions were ignored. These errors are unequivocally plain, clear, and obvious.

VII. THE STATEMENT OF REASONS IS THE ANTITHESIS OF "SPECIFIC"; IT SAYS NOTHING

In response to the prompt, "Explain the facts justifying a sentence outside the guideline system. (Use page 4 if necessary.)", the district court did not write a single word. (Doc. No. 767, p. 3). Section 3553(c)(2) requires a sentencing judge to state in open court the reasons for imposing a particular sentence and, if the sentence is outside the applicable Guidelines range, the district court must state its reasons for deviating from the Guidelines "with specificity" in the written order of judgment. 18 U.S.C. § 3553(c)(2). *See United States v. Blackie,* 548 F.3d 395, 403 (6th Cir. 2008) (reversing upward variance and noting that "Section 3553(c)(2) requires not only a statement of reasons, both stated 'in open court' and written in a judgment and commitment order, but also that those statements be made ***with 'specificity.'***" (emphasis added).

Three cases limn this Court's jurisprudence on the issue of Section 3553(c)(2)'s writing requirement. In *United States v. Zuniga-Peralta*, 442

F.3d 345 (5th Cir. 2006), a defendant appealed when the district court departed upward pursuant to §4A1.3. Rejecting Zuniga-Peralta's 3553(c)(2) argument, the Court observed that "[t]he [district] court's written Statement of Reasons relates that it departed from the Guidelines range pursuant to §4A1.3." *Id*. at 347, and concluded that:

> while the district court might have stated its reasons for the upward departure with a higher degree of specificity in writing, the court's written statement nevertheless was sufficient to inform the parties, aid the reviewing court, and assist the Sentencing Commission.

Id. at 348 (quoting *United States v. Paz*, 411 F.3d 906, 911 (8th Cir. 2005)).

Judge DeMoss dissented, arguing that:

> The requirement that district courts write down factual reasons for an upward departure that greatly increases a defendant's sentence is not overly burdensome. Moreover, allowing district courts to disregard the requirement puts a burden on this Court by requiring us to comb the transcripts for every conceivable reason for the district court's decision.

Id. at 350 (DeMoss, J. dissenting).

In *United States v. Gonzales*, the Court remanded (but did not reverse) so that the writing requirement could be fulfilled when "[t]he clarity and correctness of the court's reasoning supporting departure leave no room to require resentencing." 192 Fed. App'x 253, 258 (5th Cir. 2006)(quoting *Zuniga-Peralta*). By contrast, in *United States v. Quinn*, the Court reversed

and remanded for resentencing when the district judge provided no "fact specific reasons" whatsoever:

> It is true that sentencing courts are not required to give lengthy, rote explanations when announcing sentences authorized by the guidelines. We also note that the departure in this case is within the range of departures that have been previously upheld under § 4A1.3. For us to exercise appellate review over an upward departure sentence (even one authorized by the guidelines), however, the court must articulate some fact-specific reasons to allow us to conclude that the sentence was fair and reasonable. Where the court fails to provide any fact-specific reasons to support a departure of 42 months from the top of the guideline range, it is an abuse of discretion…

212 Fed. App'x 297, 300-301 (5th Cir. 2007) (citation omitted).

Contreras's situation is far removed from *Zuniga-Peralta*, and is far more egregious than *Gonzales* or even *Quinn*. In all of these cases, the district court actually ruled on the motions for departure. By contrast, Contreras's motion for downward departure was ignored entirely. Furthermore, the logic which impels the specificity requirement ("allow us to conclude that the sentence was fair and reasonable.", 212 Fed. App'x at 301) applies even more straightforwardly in the context of variance than it does in the context of departure. To wit, an upward departure requires pre-hearing notice whereas no notice is required for a variance. *Irizarry v. United States*, 553 U.S. 708 (2008).

VIII. THE PROCEDURAL ERRORS AFFECTED CONTRERAS' SUBSTANTIAL RIGHTS

The third prong of the plain-error test instructs that "the defendant rather than the government bears the burden of persuasion with respect to prejudice." *United States v. Mares*, 402 F.3d 511, 521 (5th Cir. 2005) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). To show that his substantial rights are affected, Contreras must to "point[] to . . . evidence in the record suggesting that the district court would have imposed a lesser sentence…". In other words, Contreras must demonstrate a probability "sufficient to undermine confidence in the outcome." *United States v. Dominguez Benitez*, 542 U.S. 74 (2004).

The district court was clear:

> I mean, the sentences **that you received before under the guidelines** would not be appropriate given the sentencing factors that I've – I've articulated.

RE.7.551 (emphasis added).

Through this statement, the district court made clear that it was not invariably disposed to a Guidelines sentence. This statement also breathes life into Contreras's argument that the court would have imposed a lower sentence had it ruled favorably on either of his two motions for role reduction and/or his motion for downward departure. Contreras's substantial rights were also affected by the glaring reality that the district

court would have afforded the same variance rationale from a lower starting-point of reference but-for its failure to credit Contreras's Guidelines-specific arguments.

IX. SUBSTANTIVE REASONABLENESS

In light of the manifold procedural errors in this case which were not harmless and the error of which is manifest even at the plain error standard of review, this Court should reverse without reaching the issue of substantive reasonableness. Nevertheless, the district court was clear that the factor militating most strongly in support of the variance afforded to Contreras was §3553(a)(6), unwarranted sentence disparities among defendants. Contreras's new aggregate sentence was 480 months, whereas codefendant Villareal received an aggregate sentence of only 120 months.

Contreras recognizes that Villareal was acquitted on his 924(c) count. Nevertheless, Contreras suffers an aggregate sentence of four-times Villareal's in part because his original lawyer, Larry Warner, filed objections to the original PSR which volunteered that Contreras should receive two concurrent 60-month consecutive sentences for both 924(c) counts. Furthermore, the district court noted that Contreras and Villareal were equally situated in a subservient role to Constable Jimenez:

> Both Contreras and Villarreal reported to the elected Cameron County Constable, Jose Alfredo Jimenez.
>
> RE.7.449 (also noting " Jimenez, whom this Court has found had supervisory and managerial authority over the defendants Villarreal and Contreras in this conspiracy….").

The district court committed plain error in not granting a larger variance to Contreras in order to avoid a situation whereby he suffered a 400% greater sentence than that meted out to the identically situated codefendant, Villareal.

X. EXTRAORDINARY CIRCUMSTANCES

Contreras recognizes that he must also satisfy "the even more exacting test required to show the presence of extraordinary circumstances, which requires appellant to show a 'possibility of injustice so grave as to warrant disregard of usual procedural rules.'" *United States v. Duarte-Juarez*, 441 F.3d 336, 340 (5th Cir. 2006). This court looks at "miscalculating or failing to calculate the sentencing range under the Guidelines, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *United States v. Mondragon-Santiago*, 564 F.3d 357, 360 (5th Cir. 2009). It is uncontroverted that the district court failed to discern Contreras's Base Offense level, failed to enunciate the Guidelines range, failed to explain the variance "with specificity" or by any other

manner of writing, and failed to rule on motions for role reduction and for downward departure. Each of these failures calls into question the integrity of the proceedings.

CONCLUSION

At the minimum, Contreras's sentence must be remanded for the preparation of a proper Statement of Reasons. However, this merely ministerial relief would be wholly insufficient. The district court's myriad of various procedural errors compels the conclusion that Contreras's sentence be reversed and remanded for resentencing pursuant to a proper calculation of Base Offense Level, a ruling on his motions for role reduction, and a separate ruling on his motion for downward departure before the variance analysis.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 7,827 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
2. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft® Word 2007 in 14-point Times New Roman type.

Date: May 9, 2011

Seth H. Kretzer

CERTIFICATE OF SERVICE

I certify that the Brief of Appellant was filed with the Court by U.S. Mail, and in electronic format through the ECF system, on the 9th day of May, 2011. An electronic copy of the brief was served on counsel of record through the E.C.F. system, on the same date.

Seth H. Kretzer

CERTIFICATE OF SERVICE

I certify that one copy of the Brief of Appellant was served on Juan Contreras, Register No. 05696-010, on the 9th day of May, 2011, at the address listed below, by U.S. Mail:

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