No. 15-41676

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PATRICIO ESCOBAR, III,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

REPLY BRIEF FOR APPELLANT

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STATEMENT OF THE REPLY ISSUES

REPLY ISSUE ONE: Whether the district court abused its discretion when it declined to apply a mitigating-role adjustment under USSG § 3B1.2 based on its policy disagreement with the Sentencing Commission's requirements for that adjustment, and without evaluating Mr. Escobar's role in the offense in light of the enumerated factors.

REPLY ISSUE TWO: Whether the district court reversibly erred when it determined that Mr. Escobar's "release[] to a halfway house" following the revocation of his parole for a 1991 Texas burglary-of-a-vehicle offense qualified as "imprisonment" under USSG § 4A1.2(e)(1) and (k).

ARGUMENT

> REPLY ISSUE ONE RESTATED: The district court abused its discretion when it declined to apply a mitigating-role adjustment under USSG § 3B1.2 based on its policy disagreement with the Sentencing Commission's requirements for that adjustment, and without evaluating Mr. Escobar's role in the offense in light of the enumerated factors.

In his opening brief, Mr. Escobar argued that the district court abused its discretion when it declined to apply a mitigating-role adjustment under USSG § 3B1.2 based on its policy disagreement with the Sentencing Commission's requirements for that adjustment (i.e., its preconceived notion that persons who "mov[e] the drugs" for a fee are always "average participants"), and without evaluating his role in the offense in light of the enumerated factors set forth in USSG § 3B1.2, comment. (n.3(C)). See Opening Br. 15-23.

In its responsive brief, the government argues that the district court denied the adjustment based on "the totality of circumstances of the facts presented to it" and therefore did not abuse its discretion. Gov't Br. 26. The government claims the district court found that Mr. Escobar "was an active participant in the movement of a large quantity of marijuana smuggled into the United States" and that, "by his actions," he showed that he "understood the scope and structure of the criminal activity in which he was actively involved." Gov't Br. 27. It also claims the court made an "implicit finding" that Mr. Escobar "exercised discretion in performing those

acts," as shown by (1) "the large quantity of marijuana that his conspirators placed into his possession for movement into the United States," and (2) his statement to an agent who was pursuing him, "We are waiting for you in here [i.e., in the brush]." Gov't Br. 27-28.

The government's argument is unconvincing. The record does not reflect that the district court made any of those particular findings. Nor are they "implicit."

The best evidence of the court's reason for denying the mitigating-role adjustment is what the court actually said about it at sentencing. The court said specifically: "[T]he average participant is the person loading the drugs, packaging the drugs, moving the drugs, you know, storing the drugs. Those are the average participants." ROA.153. In other words, persons like Mr. Escobar who move drugs for a fee are always "average participants."

This was a per se rule of the court's own creation.[1] And, in applying that per se rule to Mr. Escobar, the court avoided its responsibility to "ponder whether [he] is 'substantially less culpable than the average participant in the criminal activity.'" United States v. Castro, – F.3d –, 2016 WL 7209690, at *3 (5th Cir. 2016).[2] The

[1] The government calls the district court's statement a "fact-based observation" (Gov't Br. 25), but cannot point to any evidence in the record supporting it.

[2] As the district court clearly understood, this offense necessarily involved other criminally responsible participants, e.g., "the person[s] loading the drugs, packaging the drugs . . . [and] storing the drugs." ROA.153. The government does not dispute this. See, e.g., Gov't Br. 28 (stating that

court, in effect, pretermitted consideration of the issue. This was an abuse of discretion that warrants a remand for resentencing.[3]

"his conspirators placed into his possession" a "large quantity of marijuana . . . for movement into the United States").

[3] The government has not argued that the error here was harmless. The government thus has waived the argument by failing adequately to brief it. See, e.g., United States v. Green, 508 F.3d 195, 203 (5th Cir. 2007); United States v. Luciano-Rodriguez, 442 F.3d 320, 322 n.5 (5th Cir. 2006).

REPLY ISSUE TWO RESTATED: The district court reversibly erred when it determined that Mr. Escobar's "release[] to a halfway house" following the revocation of his parole for a 1991 Texas burglary-of-a-vehicle offense qualified as "imprisonment" under USSG § 4A1.2(e)(1) and (k).

In his opening brief, Mr. Escobar argued that the district court erred in assessing three criminal history points for the sentence that he received for his 1991 Texas burglary-of-a-vehicle offense. See Opening Br. 26-30. In particular, he argued that the district court erroneously concluded that his "release[] to a halfway house" in July of 1999, following the revocation of his parole for that 1991 Texas burglary-of-a-vehicle offense, qualified as "imprisonment" under USSG § 4A1.2(e)(1) and (k). See Opening Br. 28-30.

In its responsive brief, the government does not argue that Mr. Escobar's residency in a halfway house in July of 1999 qualified as "imprisonment" (or as incarceration on a "sentence of imprisonment") for the 1991 Texas burglary-of-a-vehicle offense. Instead, the government argues that Mr. Escobar's time in jail between October 2000 (when he was encountered at the Hidalgo County jail and a parole violator's warrant was executed)[4] and January 5, 2001 (when his parole for the 1991 Texas burglary-of-a-vehicle offense was revoked and he was discharged) is time

[4] Mr. Escobar had been arrested on suspicion of committing a string of "carjacking" offenses in the Rio Grande Valley area in October of 2000. See ROA.59-60 (PSR ¶ 30).

that qualifies as "incarceration" on a "sentence of imprisonment" under USSG § 4A1.2(k)(2)(A) and, therefore, as a qualifying period of "incarceration" for purposes of USSG §§ 4A1.1(a) and 4A1.2(e)(1). See Gov't Br. 29-35.

The government is wrong. As Mr. Escobar explained in his opening brief, q.v. at 29 n.15, Mr. Escobar's time in jail between October 2000, and January 5, 2001, when a parole violator's warrant had been executed but his parole had not yet been revoked, does not count as "imprisonment imposed upon revocation" under USSG § 4A1.2(k)(1). As the Fourth Circuit has held, "the Guidelines, for purposes of calculating a 'sentence of imprisonment' under sections 4A1.1(a) or (b), contemplate the addition only of the time a defendant is imprisoned ***upon*** revocation of parole, and does not make any provision for adding time during which a defendant, who is not imprisoned after hearing, is only detained pending a revocation hearing." United States v. Stewart, 49 F.3d 121, 124 (4th Cir.1995) (citing USSG § 4A1.2(k)(1)) (emphasis in the original); see also United States v. Galaviz, 645 F.3d 347, 361 (6th Cir. 2011) ("The parolee must have been incarcerated due to a revocation of parole, rather than merely have been incarcerated pending determination whether a parole violation occurred in the first place.").

The subsequent parole revocation (on January 5, 2001) did not result in the imposition of an additional "term of imprisonment" in the 1991 burglary-of-a-vehicle

case; on the contrary, he was "discharged" and released to a federal detainer at that time. ROA.57 (PSR ¶ 27); see also ROA.75. Thus, as explained in the opening brief, the district court erred in assessing three criminal history points for the sentence that Mr. Escobar received for his 1991 Texas burglary-of-a-vehicle offense.[5]

[5] The government has not argued that the error was harmless. The government thus has waived the argument. See supra n.3.

CONCLUSION

For these reasons, and for the reasons stated in Mr. Escobar's opening brief, this Court should vacate Mr. Escobar's sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that today, December 21, 2016, the foregoing reply brief for appellant was served upon Assistant United States Attorneys Paula C. Offenhauser and Renata A. Gowie, counsel for appellee, by notice of electronic filing with the Fifth Circuit CM/ECF system. A courtesy hard copy of this document will be hand-delivered to Ms. Offenhauser at the United States Attorney's Office, 1000 Louisiana Street, Suite 2300, Houston, Texas 77002.

s/ Scott A. Martin
SCOTT A. MARTIN

CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,285 words, excluding the parts of the reply brief exempted by Fed. R. App. P. 32(f).

2. This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect X5 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

3. This reply brief was filed electronically, in native Portable Document File (PDF) format, via the Fifth Circuit's CM/ECF system.

s/ Scott A. Martin
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