UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60590
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN PINALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(91-CR-110-1)

August 3, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Juan Pinalez appeals his sentence for conspiracy and possession with intent to distribute marijuana, contending that the district court committed plain error by its *ex post facto* application of § 2D1.1(b)(2) of the Sentencing Guidelines. We **VACATE** the sentence and **REMAND** for resentencing.

I.

Pinalez was convicted by a jury for conspiracy to possess with

---

[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

intent to distribute in excess of 100 kilograms of marijuana, in violation of 21 U.S.C. § 846, and for possession with intent to distribute 725 pounds of marijuana, in violation of 21 U.S.C. § 841(a)(1). Although the offenses were committed in November 1988, the Presentence Investigation Report (PSR) applied the 1993 edition of the Guidelines, which were in effect at the time of Pinalez's sentencing in August 1994, stating that a "review of the 1988 guidelines in effect [in November 1988 when the offenses were committed] reveals that there is no difference in the offense level". The PSR recommended that Pinalez' base offense level of 26 be increased by two levels, pursuant to U.S.S.G. § 2D1.1(b)(2). The 1993 version of that guideline provides for a two-level increase in the offense level

> [i]f the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance ....

U.S.S.G. § 2D1.1(b)(2) (1993). The PSR recommended the increase because the offenses involved the use of an aircraft to import marijuana, and because Pinalez had served as a copilot.

In his written objections to the PSR, Pinalez stated that the adjustment was inapplicable because he did not act as copilot of the aircraft. At the sentencing hearing, he re-urged that objection, and also asserted that the adjustment was inapplicable because he was not convicted for importation of controlled

substances.

The district court found that § 2D1.1(b)(2) was applicable because Pinalez had imported the marijuana into the United States in a private aircraft and because he served as a copilot. However, in response to the Government's motion for a downward departure, the district court decreased Pinalez's base offense level by two levels, and sentenced him to, *inter alia*, concurrent 75-month terms of imprisonment.

II.

Pinalez contends that, because § 2D1.1(b)(2) did not take effect until after the offenses were committed, its application violates the *ex post facto* clause, U.S. Const. art. I § 9, cl. 3.[2] This issue was raised for the first time in the Government's brief, to which Pinalez responded in his reply brief. *See* ***Stephens v. C.I.T. Group/Equipment Financing, Inc.***, 955 F.2d 1023, 1026 (5th Cir. 1992) (citation omitted) ("an appellant cannot raise new issues in a reply brief; he can only respond to arguments raised for the first time in the appellee's brief"). Accordingly, Pinalez must demonstrate plain error. *See* Fed. R. Crim. P. 52(b); ***United States v. Calverley***, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (if appellant shows clear or obvious error that affects his substantial rights, appellate court has discretion to correct

[2] Pinalez asserts erroneously that the 1989 version of the Guidelines is applicable. That version did not become effective until November 1, 1989, almost a year after the offenses were committed.

errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1266 (1995).

As the Government concedes, § 2D1.1(b)(2) was not in effect when Pinalez committed the offenses in November 1988.[3] Accordingly, the district court's *ex post facto* application of the guideline, which resulted in an increase in Pinalez's sentencing range, was error; and the error was obvious. *See* ***United States v. Suarez***, 911 F.2d 1016, 1021 (5th Cir. 1990) (an increase in sentence based on an amendment to the guidelines effective after the offense was committed "would obviously violate the *ex post facto* clause").

The Government asserts that Pinalez has not demonstrated that the erroneous application of § 2D1.1(b)(2) increased his sentence. We disagree. Based on the amount of marijuana involved in the offenses, Pinalez's base offense level was 26. U.S.S.G. § 2D1.1 Drug Quantity Table (1988). The two-level adjustment under § 2D1.1(b)(2) resulted in an offense level of 28, which was reduced to level 26 as a result of the district court's granting the Government's motion for a downward departure. The guideline range for Pinalez at level 26, with a criminal history category of II, was 70-87 months. U.S.S.G. Sentencing Table (1988). Pinalez was

---

[3] Section 2D1.1(b)(2) was added to the Guidelines effective November 1, 1989, and expressly applied only to persons convicted for importation of controlled substances, in violation of 21 U.S.C. § 960(a). U.S.S.G. App. C (amend. 134) (1989). It was amended effective November 1, 1992, to delete the requirement that the defendant be convicted under 21 U.S.C. § 960(a). U.S.S.G. App. C. (amend. 446) (1992).

sentenced at the lower end of that range, to concurrent 75-month terms. If the § 2D1.1(b)(2) adjustment had not been available, Pinalez's offense level would have been 26, and the district court's two-level downward departure would have resulted in an offense level of 24, with a sentencing range of 57-71 months. U.S.S.G. Sentencing Table (1988).

The Government maintains, however, that even without the application of § 2D1.1(b)(2), Pinalez *could* have received the same sentence, because a two-level upward departure would have been permissible under the 1988 Guidelines on the grounds that the Sentencing Commission failed to consider, or inadequately considered, Pinalez's participation in a clandestine air smuggling and drug importation operation. *See* 18 U.S.C.A. § 3553(b) (Supp. 1995) (district court may depart upward from Guidelines sentencing range if it "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described").

Because it erroneously applied § 2D1.1(b)(2), the district court had no occasion to consider whether to exercise its discretion to depart upward. And, because we do not know whether the court would have chosen to depart from the Guidelines and, if so, the extent of any departure, there is no basis for us to conclude that the same sentence *would* have been imposed in the absence of the erroneous application of § 2D1.1(b)(2). *Cf*.

Williams v. United States, 503 U.S. 193, 112 S. Ct. 1112, 1121 (1992) (error preserved for review; remand for resentencing is appropriate unless reviewing court concludes that error was "harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed"). We therefore exercise our discretion to vacate Pinalez's sentence and remand for resentencing.[4]

III.

For the foregoing reasons, the sentence is **VACATED**, and the case is **REMANDED** for resentencing.

VACATED and REMANDED

[4] Our decision to remand for resentencing makes it unnecessary for us to address Pinalez's contentions that (1) the district court erred by failing to specify the basis for applying § 2D1.1(b)(2), *i.e.*, whether it found that he used an aircraft to import marijuana or found that he served as copilot; and (2) § 2D1.1(b)(2) applies only to defendants who are convicted for importing controlled substances.