IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 16-11204

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JESUS JIMENEZ,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

INITIAL BRIEF OF APPELLANT
CRIMINAL APPEAL

Jason D. Hawkins
Federal Public Defender

By:_____
Kevin Joel Page
Assistant Federal Public Defender
525 Griffin Street, Suite 629
Dallas, Texas 75202
214.767.2746 (Tel)
214.767.2886 (Fax)
Texas State Bar No. 24042691
Attorney for Appellant/Defendant

CERTIFICATE OF INTERESTED PERSONS

I certify that the following individuals may have an interest in the outcome of this case. I make these representations in order that the members of this Court may evaluate possible disqualifications or recusal.

District Judge:	Honorable Judge Reed O'Connor
Appellant:	Jesus Jimenez
Federal Public Defender for the Northern District of Texas:	Jason D. Hawkins
Assistant Federal Public Defenders:	Erin Brennan (Trial) Kevin Joel Page (Appeal)
United States Attorney for The Northern District of Texas	John Parker
Assistant U.S. Attorney for The Northern District of Texas:	Shawn Smith (Trial) J. Wesley Hendrix (Appeal)

s/Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender

STATEMENT REGARDING ORAL ARGUMENT

The present case involves at least one question of first impression meriting argument: whether the district court may rely on "the difficulty with obtaining the chemicals in this country to make methamphetamine here" to find that the defendant trafficked in imported methamphetamine under USSG §2D1.1(b)(5), where such a rationale would effectively reverse the burden of proof at sentencing?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

UNITED STATES SENTENCING GUIDELINES MANUAL

MISCELLANEOUS

SUBJECT MATTER AND APPELLATE JURISDICTION

1. Subject Matter Jurisdiction in the District Court. This case arose from the prosecution of an offense against the laws of the United States of America. The district court had jurisdiction of this case under 18 U.S.C. § 3231.

2. Jurisdiction in the Court of Appeals. This is a direct appeal from a final decision of the U.S. District Court for the Northern District of Texas, Fort Worth Division, entering judgment of conviction and imposing a criminal sentence. This Court has jurisdiction of the appeal under 28 U.S.C. §1291 and 18 U.S.C. §3742.

The district court entered written judgment imposing a 300 month term of imprisonment on July 20, 2016, and Appellant filed notice of appeal August 2, 2016, which complies with Fed. R. App. P. 4.[1]

[1] *See* (ROA.50-54).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court committed reversible factual or legal error as it applied USSG §2D1.1(b)(5)?

STATEMENT OF THE CASE

I. Facts and Proceedings Below

A. The offense

In December of 2015, confidential informants told a drug task force that Appellant Jesus Jimenez was distributing methamphetamine.[2] The task force conducted traffic stops outside his home and encountered people carrying that drug.[3] In January, authorities conducted a SWAT raid on the home and found about three quarters of a kilogram, as well as a firearm.[4] Most of the methamphetamine obtained from the search and traffic stops exceeded 90% purity.[5]

After the search, Mr. Jimenez cooperated with the authorities. He voluntarily submitted to an interview, and made statements implicating himself in much larger quantities of methamphetamine than were seized.[6] As a consequence of this uncounseled conversation, the Presentence Report (PSR) would ultimately find the defendant liable for more than 159 kilograms of methamphetamine.[7] The unseized quantity was thus 21,200% of the seized quantity.

---

[2] *See* (ROA.88).

[3] *See* (ROA.88).

[4] *See* (ROA.89).

[5] *See* (ROA.88-89).

[6] *See* (ROA.89-90).

[7] *See* (ROA.90-91).

B. The Presentence Report and Objections

Mr. Jimenez pleaded guilty to possessing a detectable amount of methamphetamine with intent to distribute it.[8] The PSR concluded that his Guideline sentence would be 480 months imprisonment, the product of an offense level of 43 and a criminal history category of IV, adjusted for his 40 year statutory maximum.[9] Probation applied Guideline enhancements for possessing a firearm, distributing imported methamphetamine, maintaining a drug-involved premises, and the defendant's ostensibly aggravated role.[10] The district court would ultimately apply the enhancements for trafficking imported methamphetamine and maintaining a drug-involved premises.[11] But it would sustain objections to the firearm and role enhancements.[12]

The defense filed an objection to several of these enhancement, including the one for trafficking in imported methamphetamine under USSG §2D1.1(b)(5).[13] The objection to the importation adjustment was multi-faceted. The defense contended that Mr. Jimenez's suppliers were in Fort Worth, and it questioned whether a single

---

[8] *See* (ROA.28).

[9] *See* (ROA.103).

[10] *See* (ROA.92-93).

[11] *See* (ROA.75-76).

[12] *See* (ROA.75-76).

[13] *See* (ROA.108-113).

Mexican phone number in the drug organization adequately proved the Mexican origin of his methamphetamine.[14] The objection also questioned the PSR's assumption that purity and quantity proved the methamphetamine's foreign origin, noting that it is still manufactured in the United States.[15] Further, the defense noted the absence of any statement about the drug's origin from someone with direct knowledge, in spite of a lengthy post-arrest interview of the defendant, and access to multiple confidential informants.[16] Finally, the defense contended for further review (because the claim is currently foreclosed in this Circuit[17]) that the enhancement requires knowledge of the drug's foreign origin.[18]

C. The Addendum to the PSR and the Objections to the Addendum

The Addendum to the PSR (Addendum) rejected the objection, and included the following clarification regarding the content of the defendant's post-arrest interview:

> TFO Verrett asked, "So are you calling Mexico?" to which the defendant responded, "He's calling me." This would indicate an admission that at one time, the defendant was in contact with someone in Mexico in regards to ordering a resupply of methamphetamine. By his own admission, someone from Mexico called him to discuss a

---

[14] *See* (ROA.108-109).

[15] *See* (ROA.109).

[16] *See* (ROA.109-110).

[17] *United States v. Foulks*, 747 F.3d 914, 915 (5th Cir. 2014).

[18] *See* (ROA.110-113).

> resupply of methamphetamine, which lends weight to the preponderance that at some point, the defendant obtained a supply of methamphetamine that was illegally imported from Mexico. Even if the defendant received only one resupply from his connection in Mexico, it would account for a portion of the methamphetarnine the defendant is being held accountable for.[19]

The Addendum also relied on a particular text message to the defendant's drug supplier as evidence of foreign origin.[20] Specifically, Probation believed the methamphetamine most likely to be from Mexico because Mr. Jimenez requested more than ten thousand dollars worth of the drug at a time.[21]

Defense counsel responded with objections to the Addendum.[22] These noted discrepancies between the Drug Enforcement Agency summary of Mr. Jimenez's interview and the interview itself.[23] Counsel included phone records showing that the text message referenced by the Addendum was actually to a local number.[24]

The objections to the Addendum did acknowledge one statement made by Mr. Jimenez in his post-arrest interview: Mr. Jimenez did say that someone in Mexico

---

[19] (ROA.126).

[20] *See* (ROA.126).

[21] *See* (ROA.126).

[22] *See* (ROA.131-138).

[23] *See* (ROA.131-132).

[24] (ROA.140).

called him to provide drugs.[25] But counsel noted that this "admission" was simply contradicted by the phone records. Those records show a single missed phone call from a Mexican number, no outgoing calls, no successful incoming calls, and no texts to or from Mexico:

> Regarding Mr. Jimenez's statement that Mexico is calling him, counsel has reviewed the call logs, both incoming and outgoing, on Mr. Jimenez's phone and there is not one incoming or outgoing call from Mexico. There is one missed call from a Mexican phone number (call #64), however, Mr. Jimenez never returned the phone call. If someone from Mexico was calling Mr. Jimenez, there should be evidence of this in his call log. However, there is not. Moreover, counsel would add that not one of the 4,244 text messages in Mr. Jimenez's phone was with a Mexican phone number or someone from Mexico. Mr. Jimenez had numerous incriminating text messages wherein he is ordering methamphetamine, but not one of those texts/orders was with Mexico. Instead, those 4,244 text messages were with numbers here in the United States and every single order of dope from Mr. Jimenez was with a phone number in the United States, which would further indicate that the methamphetamine was not imported from Mexico.[26]

The phone records thus showed that the interview involved some "puffing": an effort by Mr. Jimenez to convince the officers that his information could be valuable to them.

Finally, the objection argued – contrary to the claims of the PSR – that Probation may not have blinded itself to information obtained from a protected

---

[25] *See* (ROA.133).

[26] (ROA.133).

proffer interview in deciding whether to apply the importation adjustment.[27]

D. The sentencing hearing and Judgment

The court overruled the defendant's objection to the importation enhancement at sentencing.[28] It reached this conclusion based on Mr. Jimenez's statement that "he is contacting Mexico."[29] In deciding how to rule on this objection, it also relied on the purity and quantity and "the difficulty with obtaining the chemicals in this country to make methamphetamine here."[30] After the court sustained objections to the firearm and aggravating role adjustments, it found an offense level of 41, a criminal history category of IV, and a Guideline range of 360 to 480 months imprisonment.[31]

Defense counsel urged a large downward variance based on the defendant's early uncounseled cooperation, and on statements by the officers during that interview suggesting a better outcome.[32] "Based upon [this] argument," the court imposed a sentence of 300 months.[33] It did not say that the sentence would have been

---

[27] (ROA.134-135).

[28] *See* (ROA.75-76).

[29] (ROA.75-76).

[30] (ROA.75-76).

[31] *See* (ROA.76).

[32] *See* (ROA.78-79).

[33] *See* (ROA.80).

the same had it sustained the defendant's Guideline objections.[34] That claim was not made until the written Statement of Reasons – issued outside the defendant's presence – in which the court stated that 300 months would be the sentence imposed "[e]ven if the guideline calculations are not correct..."[35]

[34] *See* (ROA.80).

[35] (ROA.146)

II. Summary of Argument

The district court's decision to impose an enhancement for trafficking in imported methamphetamine stemmed from multiple factual and legal errors.

First, the court found that the defendant called a supplier in Mexico, even though phone records showed just one missed incoming phone call from Mexico, and no other contact.[36]

Second, the court misapplied the burden of proof. Specifically, it relied on the likelihood that an abstract quantity of highly pure methamphetamine came from Mexico.[37] The government's burden of proof should instead have required it to produce information about ***the defendant's*** supply chain, not about bare probabilities.

Worse, the court effectively reversed the burden of proof by treating the drug's mere existence as evidence of its likely importation "given ... the difficulty with obtaining the chemicals in this country to make methamphetamine here."[38] To treat the mere existence of methamphetamine as evidence of its importation is to require the defendant to disprove the enhancement, rather than allocating the burden of production to the government.

---

[36] See (ROA.75-76, 133).

[37] (ROA.75-76).

[38] (ROA.75-76).

Finally, the court didn't even rule on the defense's contention that the importation adjustment had been imposed as a consequence of protected information under USSG §1B1.8. This is error.[39]

Each and every one of those errors merits remand.

[39] *See* Fed. R. Crim. P. 32(i)(3).

ARGUMENT AND AUTHORITIES

I. In deciding whether to apply USSG §2D1.1(b)(5) – the enhancement for trafficking imported methamphetamine – the district court committed multiple factual and legal errors, any or all of which are reversible.

A. Standard of Review

This Court "review(s) the application of the Guidelines *de novo* and factual findings for clear error."[40] Here, the defense objected to the application of USSG §2D1.1(b)(5), and called the court's attention to each of the specific factual and legal issues discussed below.[41] Specifically, the defense contested the district court's conclusion that Mr. Jimenez called a number in Mexico to request a drug delivery.[42] The defense also gave the court notice of several legal errors. These include: 1) the impropriety of using drug purity to show importation, in the absence of more particular evidence about the defendant's supply chain,[43] 2) the impropriety of

---

[40] *United States v. Foulks*, 747 F.3d 914, 914 (5th Cir. 2014).

[41] (ROA.107-113, 131-135).

[42] *See* (ROA.108)("...while Mr. Jimenez stated that he *could* call a number in Mexico, there is no evidence that the meth he obtained actually came from Mexico.")(emphasis in original).

[43] *See* (ROA.109-110)("Moreover, the idea that methamphetamine of a certain purity usually comes from Mexico is not evidence that this particular methamphetamine came from Mexico."); (ROA.132)("it appears from the Addendum that because Mr. Jimenez ordered a large quantity of methamphetamine from his source-of-supply (SOS) ($10,600 worth), that somehow means that the methamphetamine was imported from Mexico. Without citing to any authority or relevant case law, the Addendum makes that assumption when the facts actually show that this text message was with an individual here in the United States.").

assuming that most methamphetamine in the United States is manufactured in Mexico,[44] 3) the need for a ruling on the defendant's objection under USSG §1B1.8,[45] and 4) the requirement of a mental state with respect to importation.[46] Error is therefore fully preserved.

B. Discussion

Guideline 2D1.1(b)(5) calls for a two level adjustment if the defendant's drug offense "involved the importation of amphetamine or methamphetamine."[47]

The proponent of a Guideline adjustment bears the burden to show its applicability by a preponderance of the evidence.[48] Like other factual issues relevant to sentencing, Guideline enhancements may not be imposed on the basis of clearly erroneous facts.[49] The factual findings made by the district court must be premised on information possessing "sufficient indicia of reliability to support its probable

---

[44] *See* (ROA.109)("According to the PSR's rationale, all of the methamphetamine in the United States must have been imported from Mexico. This cannot possibly be true. In addition, to state that because someone possesses a certain quantity of methamphetamine (752 grams), that is indicative that the methamphetamine was imported from Mexico, is simply not accurate.")

[45] *See* (ROA.134-135).

[46] *See* (ROA.110-113).

[47] USSG §2D1.1(b)(5).

[48] *See United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990); *United States v. Ayala*, 47 F.3d 688, 690 (5th Cir. 1995).

[49] *See Gall v. United States*, 552 U.S. 38, 51 (2007).

accuracy."[50] This standard does not merely require that the evidence be credible – it also forbids drawing inferences in favor of an enhancement where the evidence is tenuous or equivocal.[51] This Court "do[es] not tolerate inferences based on inferences."[52]

Here, the decision to apply the importation enhancement was infected by one factual error and multiple legal errors. The government cannot show that the enhancement would have been applied without these errors. Nor can it show that the sentence would have been the same but for the enhancement.

The district court gave the following commentary when it imposed the importation enhancement:

With respect to objection number two, I think that it is a reasonable

---

[50] USSG §6A1.3.

[51] *See United States v. Leal*, 74 F.3d 600, 610-611, at n.1 (5th Cir. 1996), *appeal following remand United States v. Becerra*, 155 F.3d 740 (5th Cir. 1998), *abrogated on other grounds by United States v. Booker*, 543 U.S. 220 (2005)(rejecting as "supposition" government's claim that shed full of marijuana after defendants visited it had been empty before they arrived, notwithstanding government's argument that complex planning would be incompatible with a smaller volume shipment); *United States v. Whittington*, 269 Fed. Appx. 388, 403 (5th Cir. 2008)(district court not permitted to presume that drug deliveries occurred after defendant entered the conspiracy where record was silent as to their date); *United States v. Jobe*, 101 F.3d 1046, 1065 (5th Cir. 1996)(evidence that defendant acted as a bank manager did not adequately support district court's inference that the defendant directed others in check kiting at his bank); *United States v. Mergerson*, 4 F.3d 337, 347 (5th Cir. 1993)(district court erred in increasing defendant's sentence on the basis of an ambiguous piece of paper that might have referred to grams of heroin, but could have "just as easily" referred to dollar amounts or other drugs).

[52] *United States v. Evbuomwan*, 992 F.2d 70, 74 (5th Cir. 1993).

> inference that when contacting -- when he says he is contacting Mexico that the methamphetamine comes from Mexico, particularly given the purity level and the difficulty with obtaining the chemicals in this country to make methamphetamine here. I believe that this objection should be overruled, because I believe that the evidence is sufficient such that the enhancement should apply.[53]

This explanation reflects at least one unsupportable factual finding, namely that Mr. Jimenez called Mexico to request a drug delivery. It also relies on at least three propositions that are legally infirm: 1) that drug purity can be used to show importation, in the absence of more particular evidence about the origin of the defendant's supply chain, 2) that importation may be inferred from the mere fact that most methamphetamine in the United States is manufactured in Mexico, 3) and that Probation's importation conclusion could accepted without ruling on USSG §1B1.8. To preserve the matter for further, and conceding that is foreclosed, Appellant also submits that the enhancement may not apply in the absence of evidence that Mr. Jimenez knew of the methamphetamine's foreign origin.

1. Application of the enhancement is infected by factual error.

The district court found that Mr. Jimenez "was contacting" Mexico to receive methamphetamine. This is not at all supported by the record. True, the Presentence Report (PSR) does say as much: it says Mr. Jimenez "called a number in Mexico to

[53] (ROA.76).

obtain a re-supply."[54] But after the defense objected to this statement, Probation corrected it. According to the Addendum, Mr. Jimenez admitted not that he called Mexico, but that someone in Mexico called him.[55]

Mr. Jimenez's statement that "he (someone in Mexico) is calling me" does not render this factual error harmless, because it is contradicted by the phone records. As counsel noted in the objection to the Addendum,[56] the phone records reflected a single missed call from a Mexican number. No texts or successful phone calls came to or from Mexico.[57] Indeed, the particular call noted in the Addendum – ordering $10,600 worth of methamphetamine – unquestionably came from a Fort Worth number, as defense Exhibit 1 showed.[58]

Ordinarily, of course, a defendant's admission would be sufficient basis for a factual finding. But here the admission is conclusively rebutted by more reliable documentary evidence: the phone records. A district court commits clear error where its findings are contradicted by clear and conclusive documentary evidence, such as

---

[54] (ROA.91).

[55] *See* (ROA.126).

[56] (ROA.133)

[57] *See* (ROA.133).

[58] *See* (ROA.140).

a video,[59] or, in this case, a phone record.

The defendant admitted receiving phone calls from Mexico – the records show that he missed a single phone call from Mexico. A single missed phone call is obviously not a sufficient basis to find that the defendant trafficked Mexican methamphetamine. It does not even show that the defendant knew someone in Mexico, much less that this person sent him methamphetamine from Mexico.

2. The enhancement is infected by multiple legal errors.

a. The lower court's inference from purity and quantity is a misapplication of the burden of proof.

The district unsupportably found that the Mexican origin of Mr. Jimenez's methamphetamine could be inferred from purity and quantity. According to the PSR, "the experience and knowledge of agents involved in the investigation" attests that "the high purity and large quantity of methamphetamine is indicative that the methamphetamine was imported from Mexico."[60] But this fact tells us nearly nothing about the probability that ***Mr. Jimenez's*** methamphetamine came from Mexico. The bare probability that a batch of hypothetical methamphetamine sharing characteristics with the defendant's methamphetamine comes from Mexico cannot

---

[59] *See United States v. Wallen*, 388 F.3d 161, 164 (5th Cir. 2004)("Findings that are in plain contradiction of the videotape evidence constitute clear error.")(citing *United States v. Jones*, 234 F.3d 234, 237 n.1, 241-43 (5th Cir. 2000)).

[60] (ROA.91).

be a basis to apply the importation enhancement.

As the proponent of adjustment, the government had the burden of proof to show that drugs were imported.[61] A burden of proof is the duty to demonstrate facts about the particular case before the court, not simply to show what is true of most similar cases.[62] A plaintiff seeking to show diversity jurisdiction, for example, does not discharge her burden of proof by showing that most of the country is not from her state – some level of investigation into the facts of the particular case is necessary.[63]

A party seeking to discharge a burden of proof must have something in addition to the probabilities associated with broadly analogous cases. That is especially true in the case of the drug Guidelines. In that context, the defendant already receives a radically enhanced sentence on the basis of the facts – purity and quantity – from which the district court inferred importation.[64] The importation

---

[61] *See Ayala*, 47 F.3d at 690.

[62] *See Krim v. PCOrder.com*, 402 F.3d 489, 497 & n.40 (5th Cir. 2005)(citing Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1378-79 (1985) (footnotes omitted), Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1349 (1971), *Smith v. Rapid Transit, Inc.*, 317 Mass. 469, 58 N.E.2d 754 (Mass. 1945)(the "Blue Bus Case"), and *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 359-60 (7th Cir. 1998) (Posner, C.J.)).

[63] *See Krim*, 402 F.3d at 497 & n.40.

[64] *See* USSG §2D1.1(c).

enhancement was not intended as a disguised aggravator for methamphetamine purity and quantity. The district court's logic was legally infirm.

b. The lower court's inference of importation from the methamphetamine's mere presence in the United States shifts the burden of proof to the defendant.

The district court stated that it was choosing to find importation "given ... the difficulty with obtaining the chemicals in this country to make methamphetamine here...."[65] By this rationale, the government will have carried its burden of proof to show importation literally any time the defendant traffics methamphetamine in the United States. Had the Commission intended to presume importation in all cases, subject to rebuttal by the defense, it could have added two levels to the base offense level and created a reduction when the defendant shows that methamphetamine is domestic in origin. Instead, it placed the burden of proof on the government to show importation.[66] If that burden is carried by the mere "difficulty with obtaining the chemicals in this country to make methamphetamine here," as the district court said, the burden will be effectively reversed.[67] The district court's reliance on the mere

---

[65] (ROA.76).

[66] *See Alfaro*, 919 F.2d at 965; *Ayala*, 47 F.3d at 690.

[67] *Cf. United States v. Hickman*, 151 F.3d 446, 461-462 (5th Cir. 1998), *same results reached by unanimous en banc court at* 179 F.3d 230 (5th Cir. 1999)(*en banc*)(concluding that "physical restraint" enhancement should be construed to avoid its application in the mine run of bank robbery cases.

existence of the methamphetamine was legal error.

c. The lower court erred in failing to rule on the defense's objection under USSG §1B1.8.

Guideline 1B1.8 forbids the use of information taken from the defendant in a cooperation agreement.[68] As the Addendum notes, the defendant provided some information pursuant to a cooperation agreement.[69] Probation disclaimed any use of the material, but defense counsel laid out a circumstantial case that some of it had been used in connection with the importation enhancement.[70]

The district court did not rule on this contention. It simply overruled the enhancement generally.[71] It did not make a factual finding that Probation's recitation was free of protected information. Federal Rule of Criminal Procedure 32 requires the district court to rule on all disputed matters, or to state that the outcome of the dispute is not material.[72] The failure of the district court to make factual findings essential to the Guideline determination merits remand.[73] Such is the case here.

---

[68] *See* USSG §1B1.8(a).

[69] *See* (ROA.134-135).

[70] *See* (ROA.134-135).

[71] (ROA.76).

[72] *See* Fed. R. Crim. P. 32(i)(3)

[73] *See United States v. Hooten*, 942 F.2d 878, 881 (5th Cir. 1991).

d. The lower court erred in applying the importation adjustment without evidence that the defendant knew his methamphetamine was imported. {Foreclosed}.

Mr. Jimenez submits for further review that mere distribution of methamphetamine that happened to come from Mexico is insufficient to merit the enhancement. He acknowledges this Court's contrary holding in *Foulks.*[74] He submits for further review, however, that *Foulks* is wrongly decided for two reasons.

First, nothing in USSG §2D1.1(b)(5) suggests an intent to displace the demands of USSG §1B1.3, which would require that the importation be in furtherance of jointly undertaken activity and that it be at least foreseeable to the defendant.[75] Neither of these findings were made or supportable on this record.

Second, the plain language of §2D1.1(b)(5) requires that the defendant possess actual knowledge of the drug's foreign origin. The adjustment applies if the offense involved "the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully." USSG §2D1.1(b)(5). *Foulks* and *United States v. Serfass*, 684 F.3d 548, 550 (5th Cir. 2012), the case upon which *Foulks* was based, reason chiefly that the plural verb "were" does not agree with "amphetamine or

---

[74] *See Foulks*, 747 F.3d at 914.

[75] *See Evbuomwan*, 992 F.2d at 74.

methamphetamine," because the latter phrase is a disjunctive combination of singular nouns.[76] From this premise, this Court has concluded that the adjectival phrase "that the defendant knew were imported unlawfully" modifies only "listed chemicals" and not "methamphetamine."[77] But the verb "were" might agree with "amphetamine or methamphetamine ... or ... listed chemicals," taken as a whole:

> If the subject consists of two or more singular words that are connected by or, either, .. or, neither. , . nor, or not only . . . but also, the subject is singular and requires a singular verb . . . . If the subject consists of two or more plural words that are connected by or, either . . . or, neither . . . nor, or not only . . . but also, the subject is plural and requires a plural verb . . . . If the subject is made up of both singular and plural words connected by or, either . . . or, neither . . . nor, or not only ... but also, the verb agrees with the nearer part of the subject. Since sentences with singular and plural subjects usually sound better with plural verbs, try to locate the plural subject closer to the verb whenever this can be done without sacrificing the emphasis desired.[78]

Accordingly, the language of the adjustment does in fact require actual knowledge that the methamphetamine be something "that the defendant knew were imported unlawfully." Because the record contains no evidence that the defendant knew of the drug's foreign origin, and in any case no finding to this effect, the Guidelines were wrongly enhanced, and the sentence should be vacated.

---

[76] *See Serfass*, 684 F.3d at 551.

[77] *See id.*

[78] GREGG REFERENCE MANUAL: A MANUAL OF STYLE, GRAMMAR, USAGE, AND FORMATTING 297-298 (William A. Sabin ed., 11th ed., 2011)).

3. None of the errors are harmless

In cases of preserved error, the party supporting the sentence bears the burden of persuasion – it must show that the outcome would have been the same even if the error had not been committed.[79] A district court must be reversed if one of its legal errors "may well have influenced its ultimate determination" of a factual issue.[80] Put another way, when "a ruling was influenced by an incorrect view of the law[, the district court's] factual findings on this issue are due no deference."[81]

a. The district court's errors may have affected the decision to apply USSG §2D1.1(b)(5).

The government cannot show that the district court would have applied the importation enhancement under a correct view of the facts and law. The defendant has the right to have the district court make the necessary factual findings in the first instance.[82] Accordingly, this Court cannot find harmlessness merely by concluding

---

[79] *See United States v. Olano*, 507 U.S. 725, 734-735 (1993).

[80] *United States v. Corral-Franco*, 848 F.2d 536, 541 (5th Cir. 1988)(reversing where district court's erroneous understanding of the factors that give rise to a fourth amendment seizure may have affected its ultimate factual determination as to the moment the defendant was seized).

[81] *United States v. Blount*, 98 F.3d 1489, 1495 & n. 16 (5th Cir. 1996), *rev'd en banc on other grounds*, 123 F.3d 831 (5th Cir. 1997); *accord United States v. Mask*, 330 F.3d 330, 335-336 (5th Cir. 2003).

[82] *United States v. Boone*, 67 F.3d 76, 77-78 (5th Cir. 1995)(holding that this Court "do[es] not sit to resolve conflicts in descriptions of events.").

that the district court ***could have*** made the finding of importation on valid grounds.[83]

In explaining its ruling, the district court saw fit to mention each of the problematic rationale discussed above.[84] The logical inference is that each of these reasons therefore played some role in its decision-making process. Further, the court did not say that any one of the rationale discussed above – phantom phone contacts to Mexico, purity, quantity, or the difficulty of obtaining precursors in the United States – would have been an independently sufficient basis for its factual finding.[85] It could have clarified the record in this regard and avoided a possible remand, but simply chose not to.

Finally, if this Court believes that the district court's failure to rule on USSG §1B1.8 represents error, it must remand irrespective of harm.[86]

b. The importation enhancement cannot be dismissed as harmless.

The government cannot show that the sentence would have been the same

---

[83] *See Campo v. Allstate Ins. Co.*, 562 F.3d 751, 758-759 (5th Cir 2009)(acknowledging that appellate court may affirm on any grounds supported by the record, but vacating grant of summary judgment because record created an issue of material fact that could plausibly be resolved in favor of either party); *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987)(same).

[84] *See* (ROA.80).

[85] *See* (ROA.80).

[86] *See United States v. Harper*, 643 F.3d 135, 139 (5th Cir. 2011).

without application of USSG §2D1.1(b)(5). The Guidelines ordinarily affect the sentence imposed, and a Guideline error ordinarily shows an effect on the defendant's substantial rights, even where that error is unpreserved.[87] Here, error is preserved. Accordingly, it is not the defendant that must show harmfulness, but the government that must show harmlessness.[88] In the case of preserved Guideline error, the proponent of the sentence – here, the government – bears a "heavy burden" and must clear a "high hurdle" to show harmlessness.[89]

It is true that the written "Statement of Reasons" says the sentence would have been the same irrespective of the Guideline calculations.[90] The district court thus issued a conditional sentence, applicable in the event of a Guideline error. This Court has previously relied on such statements to show harmless error.[91] But this is anything but a uniform practice – sometimes this Court remands in spite of such a statement.[92] Here, for four reasons, remand is appropriate.

---

[87] *See Molina-Martinez v. United States*, __U.S. __, 136 S.Ct. 1338, 1346 (2016).

[88] *See Olano*, 507 U.S. at 734-735.

[89] *United States v. Ibarra-Luna*, 628 F.3d 712, 714, 717 (5th Cir. 2010).

[90] *See* (ROA.146).

[91] *See United States v. Tzep-Mejia*, 461 F.3d 522 (5th Cir. 2006); *United States v. Bonilla*, 524 F.3d 647 (5th Cir. 2008).

[92] *See United States v. Martinez-Romero*, 817 F.3d 917 (5th Cir. 2016); *United States v. Cardenas*, 598 Fed. Appx. 264, 269 (5th Cir. 2015)(unpublished); *United States v. Vasquez-Tovar*, 420 Fed. Appx. 383, 384 (5th Cir. 2011)(unpublished); *United States v. Leal-Rax*, 594

First, the district court did not state that the sentence would have been the same when it had the opportunity to do so before the parties.[93] The effort to disavow any influence of the Guidelines on the sentence, therefore, has the appearance of afterthought or boilerplate. It does not carry the government's "heavy burden."

Second, the Statement of Reasons does not identify any particular Guideline enhancement the court thought irrelevant to the sentence.[94] Nor did it state that 300 months would be the appropriate sentence given a particular alternative Guideline range.[95] Rather, the Statement on its face asserts that 300 months would be the appropriate sentence given ***any Guideline range at all***.[96]

Respectfully, this claim is difficult to accept, given the district court's conscientious attention to each objection raised by the defense.[97] Empirically, moreover, the Guidelines exert significant influence over the sentence imposed.[98]

Fed. Appx. 844 (5th Cir. 2014)(unpublished); *United States v. Bazemore,* 608 Fed. Appx. 207 (5th Cir. 2015)(unpublished), *appeal after remand at* 839 F.3d 379 (5th Cir. 2016).

[93] *See* (ROA.80).

[94] *See* (ROA.146).

[95] *See* (ROA.146).

[96] *See* (ROA.146)(stating that the sentence would be the same "[e]ven if the guideline calculations are not correct...").

[97] *See* (ROA.75-76).

[98] *See Molina-Martinez*, 136 S.Ct. at 1346.

And it is questionable whether a statement of this kind – that the sentence would be exactly 300 months whether the Guideline range were the statutory minimum of 60 months, the maximum of 480 months, or anything in between – would comply with 18 U.S.C. §3553(a)(4) and *United States v. Booker*, 544 U.S. 220 (2005). These authorities require the district court to consider the Guidelines among the other factors enumerated at §3553(a).

Third, affirmance on the basis of the Statement of Reasons would contravene the defendant's right to be present. The due process clause "guarantee[s] the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."[99] That right plainly extends to sentencing, as this Court has repeatedly recognized.[100] The defendant also enjoys a right to be heard through counsel before sentence is imposed.[101]

These authorities forbid the imposition of a conditional sentence – 300 months in the event that the Guidelines are wrong – outside the presence of the defendant and counsel. Because there was in fact Guideline error in this case, the conditional

---

[99] *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

[100] *See United States v. Martinez*, 250 F.3d 941, 942 (5th Cir. 2001); *United States v. Vega*, 332 F.3d 849, 852 (5th Cir. 2003); *United States v. Bigelow*, 462 F.3d 378, 381 (5th Cir. 2006).

[101] *See Burns v. United States*, 501 U.S. 129, 132-133 (1991).

sentence ***was*** Mr. Jiminez's sentencing proceeding. The defendant has a right to be present and to be heard through counsel when the sentencing occurs.[102] Further, the determination of a conditional sentence is a proceeding at which the defendant's presence "would contribute to the fairness of the procedure."[103] Had the court announced its intention to impose a 300 month sentence in the event of Guideline error during the live hearing, the defense could have sought to persuade the court that such a sentence would not be reasonable under lesser Guidelines. The Fifth Amendment was not honored.

Fourth, the Statement of Reasons cannot save the sentence from a potential error under USSG §1B1.8. It is well settled that a defendant subject to breach of a plea or cooperation agreement "is entitled to relief even if the Government's breach did not ultimately influence the defendant's sentence."[104] Accordingly, if the district court committed §1B1.8 error, Mr. Jimenez is entitled to remand, even if the error did not change the sentence imposed.[105]

---

[102] *See Martinez*, 250 F.3d at 942; *Burns*, 501 U.S. at 132-133.

[103] *Stincer*, 482 U.S. at 745.

[104] *Harper*, 643 F.3d at139 (citing *Santobello v. New York*, 404 U.S. 257, 263 (1971)); *United States v. Saling*, 205 F.3d 764, 766-767 (5th Cir. 2000); *United States v. Valencia*, 985 F.2d 758, 761 (5th Cir. 1993); *United States v. Grandinetti*, 564 F.2d 723, 726 (5th Cir. 1977)).

[105] *See Harper*, 643 F.3d at 139 (citing *Santobello*, 404 U.S. at 263; *United States v. Gonzalez*, 309 F.3d 882, 886 (5th Cir. 2002)).

CONCLUSION

Appellant prays that this Court vacate his sentence and remand for resentencing, or for such relief as to which he may justly entitled.

Respectfully submitted,

/s Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Northern District of Texas
Texas State Bar No. 24042691
525 Griffin St., Suite 629
Dallas, Texas 75202
(214) 767-2746 (Telephone)
(214) 767-2886 (Fax)

CERTIFICATE OF SERVICE

I, Kevin Joel Page, hereby certify that on this the 29th day of December, 2016, the Appellant's Brief was served via ECF to counsel for the Plaintiff-Appellee, Assistant U. S. Attorney J. Wesley Hendrix at wes.hendrix@usdoj.gov . I further certify that: 1) all privacy redactions have been made pursuant to 5th Cir. Rule 25.2.13; 2) the electronic submission is an exact copy of the paper documents pursuant to 5th Cir. Rule 25.2.1; and 3) the document has been scanned for viruses with the most recent version of Norton Anti-virus and is free of viruses. Further I certify that I sent a paper copy via regular mail to Mr. Jimenez.

/s Kevin Joel Page
Kevin Joel Page

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portion in 5th Cir. R. 32.2.7(b)(3), this brief contains well fewer than 13,000 words.
2. This brief has been prepared in proportionally spaced typeface using Word Perfect 9.0 in Times New Roman typeface and 14 point font size.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s Kevin Joel Page
Kevin Joel Page