NO._____

IN THE SUPREME COURT OF THE UNITED STATES

ALESIHA O. GRAY
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I. Is there insufficient evidence to warrant a finding of guilty for conspiracy to transport undocumented aliens and for transporting undocumented aliens by means of a motor vehicle?

II. Whether two points should have been assessed in determining the guideline range for obstruction of justice?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

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## PRAYER

Petitioner Aleisha O. Gray respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on July 16, 2019.

## OPINION BELOW

On July 16, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

## JURISDICTION

On July 16, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. This petition is filed within 90 days after that date and thus is timely. See Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Due Process Clauses of the Fifth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 90 S.Ct. 1068 (1970).

The Fifth Amendment to the United States Constitution provides:

> No person shall be *** deprived of life, liberty, or property, without due process of law;***

U.S. Const. amend. V.

## STATEMENT OF THE CASE

A. Course of proceedings.

On January 24, 2018, a federal grand jury in the Corpus Christi Division of the Southern District of Texas returned a five-count indictment charging in Count 1 co-defendant Nicole Veal and Defendant-Appellant Aleisha O. Gray ("*Ms. Gray*") with conspiring to transport an undocumented alien within the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(ii), (a)(1)(A)(v)(I) and (a)(1)(B)(i); and charging Ms. Gray in Counts 4 and 5 with transporting an undocumented alien within the United States in violation of Title 8, U.S.C. § 1324(a)(1)(A)(ii), (a)(1)(A)(v)(II) and (a)(1)(B)(ii).

The evidence presented at trial showed the following facts. U.S. Border Patrol Agent Vanessa Prado testified she was working on January 4, 2018 about 7:04 p.m. at the Falfurrias checkpoint in Texas when Ms. Gray drove her rental vehicle, which was very clean, through the primary lane, and Ms. Gray appeared nervous. ROA.187-190. She testified a canine alerted to the vehicle and two undocumented aliens were found in the trunk. ROA.191-192. She acknowledged the checkpoint contained many agents and five canines, and that she herself was nervous because it was her first time testifying. ROA.192-193.

U.S. Border Patrol Agent Ricardo Gonzalez testified he was working as a canine handler just after seven on January 4, 2018 when his dog alerted to the trunk area of the vehicle driven by Ms. Gray, and in secondary two persons were found hiding in the trunk. ROA.196-198. He acknowledged his canine weighed 55 pounds and that he was nervous because it was his first time testifying. ROA.199, 201.

U.S. Border Patrol Agent Ricardo Ramirez testified he was working primary inspection at the Falfurrias checkpoint on January 4, 2018 about 8:00 p.m. when he noticed one female driver, Ms. Gray, enter the inspection lane driving a Ford Fusion. ROA.202-203. He testified Ms. Gray answered she was a U.S. citizen, she was headed to Houston from McAllen and had nothing in the back of her vehicle, and Ms. Gray appeared nervous because she was grabbing her thighs and would not make eye contact. ROA.203-204. He testified a canine alerted to Ms. Gray's vehicle, she was then referred to secondary, and he subsequently interviewed the two individuals found in the trunk of Ms. Gray's vehicle, who were determined to be undocumented aliens. ROA. 204-205. He testified he collected a driver's license and credit card from Ms. Gray's person, as well as a plane ticket receipt (found inside the vehicle) and rental paperwork for the vehicle Ms. Gray was driving and a separate vehicle operated by Ms. Veal (the co-defendant), and the cell phones of Ms. Gray and Ms. Veal. ROA. 206-208. He testified he included all evidence that stood out in his report, he was not sure if Ms. Gray had luggage and it would not surprise him if she did, he did not find a large sum of cash, Ms. Gray answered questions although he was not sure why they were not recorded, people can appear nervous even when not committing a crime, and he did not know whether Ms. Gray had given permission to search her cell phone. ROA.209-215.

U.S. Border Patrol Agent Jose Martinez testified he was on duty as a canine handler at the Falfurrias checkpoint about eight o'clock on January 4, 2018 when his dog alerted to the trunk area of a Ford Fusion in the primary inspection lane and

once again in secondary, and two individuals were found in the trunk. ROA.220-221. He acknowledged his canine was a German Shepherd weighing more than 79 pounds, he kept him on a short leash and he had to shut the trunk as a preventive measure so the dog would not bite someone while seeking a toy. ROA.222-223.

U.S. Border Patrol Agent Paulino Munoz testified he assisted the case agent with Ms. Gray at the Falfurrias checkpoint around "eightish, seven" on January 4, 2018, and that shortly after she was taken into the checkpoint, Ms. Gray was placed in a cell, told she was under arrest and read her rights. ROA. 231. He testified she was belligerent, he had to explain several times to her why she was under arrest and she kept saying, "Why am I here? Why am I here? You-all need to let me go. I don't know why I'm here." ROA.231-232. He testified Ms. Gray told Agents she was headed to Houston, she flew from Chicago to Harlingen because it was cheaper and was seeing some friends, specifically "Joe." ROA.232-234. He testified it was not cheaper to travel to Houston, via a flight to Harlingen, because flights to Harlingen always connect in Houston plus it required over five hours travel in a rental vehicle. ROA.234. He testified Ms. Gray told agents, although she was very brief in her answers, that once she arrived in Harlingen, she rented the car and went to eat, and she had no explanation as to how the undocumented aliens ended up in her trunk. ROA.234-235. He testified he calmed Ms. Gray down, he did not record the interview or take notes, it was possible he had "misremembered" some of the details of the conversation, he did not "look into "Joe,'" and possibly she was belligerent because she had been set up. ROA.241-243, 247.

U.S. Border Patrol Agent Roberto Cortez testified he interviewed Ms. Gray, who "spoke a lot" the morning of January 5, 2018 in the holding facility near the Falfurrias checkpoint. ROA. 248-249. He testified Ms. Gray told him she and another friend, Nicole Veal (the co-defendant) flew on separate flights to the Harlingen airport to visit new friends and meet new people, and upon arriving, "Joe" picked her up, took her to rent a vehicle, told her he wanted her to smuggle aliens and she refused stating she was a criminal justice student who worked in law enforcement in different capacities the past ten years. ROA. 249-251, 254. He said Ms. Gray told him that after she refused, Joe took her to a restaurant to eat tacos and Joe told her Nicole (Veal) was already smuggling two people north, and she called "Aleisha" (/sic/ Nicole) who acknowledged, "Yes, I am doing this, and I'm already driving north to Houston." ROA.251-252, 254.

Christa Garza, an employee of Enterprise Rent-A-Car at the Harlingen Airport, testified Ms. Gray came in on January 4, 2018 with a man and rented two vehicles in her name with her debit card, preferably full size because "she had people flying in on the next flight for a party she was throwing for her daughter down in the Valley." .ROA. 265-266. She testified she discussed birthday cakes with Ms. Gray and the man. ROA 276.

L.S.N., minor child, testified she was a citizen of Mexico without legal right to enter or remain in the United States, agreed to pay $7000 to be smuggled to Houston, Texas, jumped a fence at the border, stayed in a house for days, and then was directed by a man to enter a car, crawl from the backseat into the trunk and to not make any

noise, the car was driven for ten minutes, stopped ("we just knew that he would turn us over to the person who was going to drive the car") and then traveled to the checkpoint where they were apprehended in the trunk. ROA.282-285. She testified she did not know anything about the person who was driving the car and understood she would be crawling back into the backseat once they crossed the checkpoint and riding in a passenger seat for the remainder of the trip to Houston. ROA.284-285. She did not testify that she ever saw Ms. Gray.

Rony Perez-Posadas testified he was a citizen of Honduras without legal right to enter or remain in the United States, agreed to pay $8000 to be smuggled to Houston, Texas, $3000 of which would be paid once he arrived in Houston, came into the U.S. via a guide, with minor child, L.S.N, was picked up from a house in Harlingen and instructed by an unknown man to crawl from the backseat into the trunk, he could not have gotten out of the trunk by himself, and the vehicle then traveled to the checkpoint where he was apprehended. ROA.291-295. He did not testify that he ever saw Ms. Gray.

U.S. Border Patrol Agent Juan Rojas testified as the case agent, he investigated the two rental car agreements, and determined Ms. Gray's debit card, which was seized by border patrol agents at the checkpoint on January 4, 2018, and her license were on the rental agreements for the two rental cars. ROA.296-297. He testified Ms. Gray signed a consent to search her cell phone and, utilizing an extraction program, he determined there were 15 calls between Nicole Veal and Ms. Gray on January 4, 2018, and also extracted text messages making references to bill

collectors promising to pay in full by Friday or Saturday, another text to "Raymond," stating "I'm flying to Texas in the morning. Please don't ask why," and a text stating Ms. Gray was in the airport in Houston and would be back "tomorrow night" and it was "nothing but business; no fun." ROA.296-301. He acknowledged the extractor did not find any hidden or deleted files, that he never investigated any further the texts referencing bill collectors and that Ms. Gray's return ticket was not until January 7, 2018. ROA.304-307.

After the Government rested, the defense asked the Court to grant a Directed Verdict (Judgment of Acquittal) because none of the material witnesses had identified Ms. Gray, and were not able to say that she organized or helped them get into the trunk, and the Government had failed to prove Ms. Gray was in an agreement to commit a conspiracy. ROA.308. The Court denied the Motion. ROA. 308.

Ms. Gray testified that she was 40 years old, born and raised in Chicago, a full-time Criminal Justice student at Rend Lake College and she had a daughter who was attending Texas Southern University in Houston, Texas. ROA. 310-313. She testified she initially believed she was being hired in Texas to assist with transportation following the hurricane for two days for $1500, and then planned on spending the remainder of her four day Texas trip (January 4-7, 2018) visiting her daughter in Houston. ROA.313-314, 347, 358-359. She testified the text message on her phone concerned a car she had rented with Enterprise since October 19, 2017 in Mount Vernon (where her school was located) which she would pay monthly. ROA. 315-317. She testified she did pack luggage- one big bag and a small shoulder bag

and she brought her "daughter's things that she wanted." ROA.314. She testified Joe approached her immediately when her flight arrived at the airport, and she proceeded to rent two vehicles at Enterprise. ROA.317-319. She then followed Joe about an hour out of Harlingen in her rental vehicle to an area that looked dangerous with an abandoned warehouse and taco stand, where three other men were present. ROA 320-321. Ms. Gray testified Joe disclosed the job was alien smuggling "in the trunk," she became enraged, refused, was concerned for her friend and one of the men lifted his shirt and showed his gun. ROA. 322-323. She testified Joe then calmed her down, took her around the corner out of sight of the vehicle to get tacos at the taco stand, which he said was his business, and she waited on the food for about twenty minutes while trying to call Nicole (co-defendant)and stayed for forty-five minutes to one hour. ROA. 323-326, 329, 350-351. Ms. Gray testified it was a keyless car so she left her key in the cubby inside the car while she was at the taco stand. ROA. 345. Ms. Gray testified she had never been to the Valley (this far South in Texas) before, did not look at the map before flying to Harlingen and had no idea that alien smuggling was a crime ("not the type of crime you see in Chicago") or that people were smuggled in the trunk of a car. ROA.326-327, 349. She testified Joe then walked her back to her car, told her to think about it tomorrow, she said "okay," "just blew him off" and offered to reimburse him the price of the ticket, and set her GPS for her daughter's school. ROA.328-329, 354-355. She testified she drove for about an hour until she arrived at the checkpoint, and she was stunned because she had never been at an immigration checkpoint before, it was dark with a lot of lights and she saw dogs,

guards and guns. ROA. 330. She testified she did not suspect people were loaded in the back and when she saw the two people in her trunk, she went into a rage because they "used" her, and it "didn't seem real." ROA.331-332. She testified she could not calm down because she had never before been arrested and she told the Agents she had been set up. ROA.332, 335. She testified she later suspected after her arrest that the Enterprise lady knew Joe because she remembered telling Joe she did not think Enterprise would rent to her since she already owed money and Joe said they would. ROA.334. She testified there were three or four other places to rent cars but Joe chose Enterprise. ROA.361. She testified the text to Raymond (her brother) regarding flying to Texas tomorrow stating "Please don't ask why" was taken out of context and her older brother is "really nosey," the text regarding Houston was to let another family member know where she would be, and the text about "just business" referred to her belief she was coming to Texas to do a legitimate job which involved dressing in business attire. ROA.335-336. She testified as soon as she learned of what "they wanted" her to do, she did not accept the agreement and immediately declined. ROA.337. She testified her co-defendant offered her the job, and had described it as a transportation job in Texas. ROA.357-358.

B. Verdict.

The jury subsequently found Ms. Gray Guilty of all counts as charged in the indictment. ROA.68, 87.

C. Presentence report and Sentencing.

After Ms. Gray was found guilty, the court ordered that a presentence report

("PSR") be prepared to assist the court in sentencing her. ROA. 500. Using the 2016 edition of the United States Sentencing Guidelines ("USSG"), ROA. 505, the PSR as adopted by the district court calculated Ms. Gray's total offense level as shown in the table below:

| **Calculation** | **Levels** | **USSG §** | **Description** | **Where in record?** |
|---|---|---|---|---|
| Base offense level | 12 | 2L1.1(a)(3) | 8 U.S.C. § 1324(a)(1)(ii) and U.S.S.G. § 2L1.1(b)(4) | ROA.506 (PSR ¶ 26) |
| Enhancement(s) | +4 | U.S.S.G. § 2L1.1(b)(4) | Transporting unaccompanied minor | ROA.506 (PSR ¶ 27) |
| | +2 | U.S.S.G. § 2L1.1(b)(6) | Substantial risk | ROA.506 (PSR ¶ 28) |
| | +2 | U.S.S.G. § 3C1.1 | Obstruction of justice | ROA.506 (PSR ¶ 31) |
| **Total offense level** | 20 | | | ROA.507 (PSR ¶ 35) |

The PSR assessed Ms. Gray a base offense level of 20. ROA.507 (PSR ¶ 35).

The PSR placed Ms. Gray in a criminal history category of I with a total criminal history score of zero. ROA.507 (PSR ¶ 38). Based on a total offense level of 20 and a criminal history category of I, the PSR calculated an advisory Guidelines imprisonment range of 33 to 41 months. ROA.511 (PSR ¶ 57).

Ms. Gray filed an Objection to the PSR on July 2, 2018, challenging her enhancement for Obstruction of Justice, to which the Government responded on July 23, 2018. ROA. 471-475. 494-498.

At sentencing on August 22, 2018, Ms. Gray objected to the *Obstruction of Justice* two point enhancement, which was overruled by the Court. ROA 421-425. After evidence presented and argument, the court sentenced Ms. Gray to a sentence

below the guideline range due to Mr. Gray's lack of prior convictions, to wit: 20 months in the custody of the Bureau of Prisons for Counts 1, 4 & 5 to be served concurrently, to be followed by a 3-year term of supervised release. ROA.87-91. The district court waived imposition of a fine, but the court imposed the mandatory $300 special assessment. ROA.90. 519-521.

On August 23, 2018, Ms. Gray filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. And on July 16, 2019, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. ALEISHA O. GRAY, 2019 WL 3211311 (5th Cir. July 16, 2019) (unpublished) (Appendix A).

## BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court has jurisdiction pursuant to 18 U.S.C. § 3231.

## REASONS FOR GRANTING THE WRIT

I. As to the first question presented, this Court should grant certiorari to address whether the evidence was sufficient to find Ms. Gray guilty of Conspiring to transport undocumented aliens and transporting undocumented aliens. The evidence introduced against Ms. Gray at trial consisted of her arrest at the checkpoint for having two undocumented aliens in the trunk of her rental vehicle, which she was driving, along with rental documentation, a plane ticket receipt and text messages on her phone referencing *bill collectors* and to *not ask why she was traveling to Texas*.

Ms. Gray was convicted under Count 1 of Conspiring to transport undocumented aliens by means of a motor vehicle and under Counts 4 and 5 for Transporting an undocumented alien by means of a motor vehicle. To obtain a conviction for conspiracy to transport an alien under 8 U.S.C. § 1324(a)(1)(A), the government must establish that a defendant agreed with one or more persons to transport or move illegal aliens within the United States in furtherance of such violation of law by means of a motor vehicle, knowingly or in reckless disregard of the fact that such aliens had come to, entered, or remained in the United States in violation of law. And, to transport an alien, the government must likewise establish a defendant knowingly and in reckless disregard of the fact that an individual was an undocumented alien, transport said alien within the United States in furtherance of such violation of law by my means of a motor vehicle.

The language of the Statute makes clear that mere transportation of an illegal alien is not sufficient to support a violation under the statute; rather, the act must be "in furtherance of such violation of law." Section 1324 does not define the phrase "in furtherance of," although courts have found it probative to consider whether: (1) the defendant profited from the transportation; (2) the defendant actively attempted to conceal the passengers; and (3) the passengers were mere "human cargo" (i.e., the passengers were not related to the defendant by blood, friendship, or acquaintance and their movements were guided, dictated, or controlled by the defendant during

the transportation). *See, e.g., United States v. Parmelee,* 42 F.3d 387, 391 (7th Cir.1994), (discussing evidence relevant to an "in furtherance of" inquiry); *United States v.1982 Ford Pick-Up,* 873 F.2d 947, 951 (6th Cir.1989). (same). In general, Courts focus on the defendant's purpose in conducting the transportation, rather than the transportation's logical result or effect. *See United States v. Chavez-Palacios,* 30 F.3d 1290, 1294 (10th Cir.1994) (holding there was sufficient evidence of the defendant's intent to "further the aliens' presence in the U.S.); *United States v. Perez-Gomez,* 638 F.2d 215, 218-19 (10th Cir.1981).

The Tenth Circuit found in *U.S. v. Barajas-Chavez*, 134 F.3d 1444 (10th Cir.-1998) there was insufficient evidence to show the Defendant acted in furtherance of his passengers' illegal presence within the United States, despite the fact the Defendant himself was an illegal alien, had ten other undocumented aliens in the vehicle with himself, an Agent testified alien smugglers frequently used camper shells with darkened windows to conceal their cargo and made their illegal passengers lie down to escape detection, reasoning the Defendant was traveling to Denver to seek employment and the act was merely incidental, too attenuated, and was not committed for profit, among other factors.

The Government failed to prove Ms. Gray had the mens rea necessary to sustain a conviction for conspiring to and/or transporting aliens. It is helpful to look at analysis regarding narcotics transporting cases. The Ninth Circuit found there was insufficient evidence to show the Defendant was involved in a conspiracy to transport narcotics where the only evidence was monitored phone calls between the defendant and a Government informant, as well as another conspirator following that conspirator's arrest. *Gonzales v. U.S.*, 374 F.2d 112 (9th Cir.1967). Almost a century ago, the Eighth Circuit recognized the importance of holding the Government to its burden of proof and found there was insufficient evidence to support a conviction for a felonious

conspiracy to illegally transport liquor where the Defendant accepted an invitation from her codefendant to ride in his car which had whisky in it, a prohibition agent chased them down and the whisky was thrown out the window, because the Government failed to prove she knew of the whisky, *Haning v. U.S.*, 21 F.2d 1927 (8th Cir.1927). Likewise, the Sixth Circuit found in *U.S. v. Sliwo*, 620 F.3d 630 (6th Cir. 2010) the evidence was insufficient to support the defendant's conviction for conspiracy to distribute marihuana, even though the Defendant arranged the transport of a van before it was loaded with drugs and served as a lookout when the drugs were actually loaded into the van, finding there was no evidence presented the Defendant actually set foot in the van or that he had any substantive discussions with the three people who actually saw the marihuana loaded into the van.

In *U.S. v. Rosas-Fuentes*, 970 F.2d 1379 (5th Cir.1992), the Fifth Circuit held there was insufficient evidence the defendant knew of marijuana in the gas tank of the vehicle in which he was a passenger to support his conviction by a bench trial for conspiracy to possess with intent to distribute marijuana hidden in the vehicle's spare tank, despite his nervous demeanor at the checkpoint, Agents' testimony on prior occasions he did not act nervous when he went through the checkpoint, his implausible explanation for riding with the driver to the destination given, and his statement to the Agent, "well, yes," when asked if they had found anything in the tank. Similarly, in *U.S. v. Jackson*, 700 F.2d 181 (5th Cir.1983), the 5th Circuit found the evidence was insufficient to support one of the defendants' convictions for conspiracy to possess cocaine because of the absence of any evidence he had specific knowledge of the conspiracy, despite the fact the 5th Circuit easily found a conspiracy existed and the Defendant was present while parts of the conspiracy were taking place, including his presence with other conspirators at the restaurant where the conspiracy was being carried out and a large amount of money was present: "His

conviction may not rest on mere conjecture and suspicion." In *U.S. v. Fitzharris*, 633 F.2d 416 (5th Cir.1980), the Fifth Circuit found insufficient evidence for conspiracy to distribute marijuana, despite the defendant knowing several of the conspirators, his [untrue] claims he was entering the ranch (where a large amount of marihuana was found) to feed his cows when Agents did not see any livestock, numerous documents found in the trash barrel tying the Defendant to the ranch, and calls between the defendant and the other conspirators: "Any association with the conspiracy would be forbidden speculation," citing *Vick v. United States*, 216 F.2d.228 (5th Cir.1954): "The 'appellant' may be guilty, but his conviction cannot rest upon mere conjecture and suspicion." In *U.S. v. Longoria*, 569 F.2d 422 (5th Cir. 1978), the Fifth Circuit reversed the Defendant's conviction for aiding and abetting in a drug distribution case where the Defendant was told there was marihuana in the car and paid $300 shortly before the checkpoint apprehension, remained silent at the checkpoint (indicating her desire the unknown quantity of marihuana escape detection and she and the co-defendant arrive safely in Austin) because there was insufficient evidence proving the defendant's guilt beyond a reasonable doubt, finding that mere negative acquiescence will not suffice, citing *Glasser v. United States*, 315 U.S. 60 (Sup.Ct.1942): "Unless the conviction is supported by 'substantial evidence,' it must be overturned." In *United States v. Jackson*, 526 F.2d 1236 (5th Cir.1976), the Fifth Circuit was convinced of the Defendant's involvement in the distribution of the cocaine, but held there was no evidence of the Defendant's involvement in the possession of the cocaine because he was not present at the actual sale, despite helping to set up the transaction, being aware of all the circumstances and his intent that the illegal venture succeed.

Viewing the evidence in the light most favorable to the Government and giving the Government the benefit of all reasonable inferences, there was insufficient evidence from which the jury could infer Ms. Gray knew illegal aliens were in the trunk of her vehicle and that she

knowingly participated in an alien smuggling conspiracy. There was no evidence presented that having individuals in her trunk would have caught her attention- there was no evidence presented that noise was coming from the trunk, that her luggage had been removed, that the trunk failed to close, that Ms. Gray did not have luggage in her trunk, there was no large sums of cash found in the vehicle or on Ms. Gray's person, neither of the two material witnesses identified Ms. Gray as being involved in the conspiracy or as being present when they were loaded into the trunk, no evidence was presented that ledgers were found, no evidence presented that there were texts found discussing moving or transporting individuals or even product, there was no history presented of Ms. Gray engaging previously in this type of activity, no evidence presented that her nervous behavior of grabbing her thighs or not making eye contact at the checkpoint *was not because of* the intimidating nature of the checkpoint teeming with agents, dogs and weapons, no evidence presented her GPS was not set for her daughter's school in Houston, no evidence presented that Ms. Gray was familiar with South Texas or alien smuggling or the border checkpoint, no wire-tap evidence or video evidence, and no evidence presented that Ms. Gray had looked into her trunk after loading her luggage. The Government failed to prove Ms. Gray flew to Harlingen and/or rented vehicles to engage in an alien smuggling conspiracy rather than for a different purpose. The Government did not meet its burden of proving or inferring the defendant knew illegal aliens were in her trunk or that she agreed with one or more persons, including Nicole Veal, to transport illegal aliens. Likewise, the Government failed to prove Ms. Gray engaged in Alien transporting applying these same factors. Mere presence alone is not enough to sustain a conviction. The Fifth Circuit stated in *U.S. v. Blessing*, 727 F.2d 353 (5th Cir. 1989), *cert denied*:

> "the government must show beyond a reasonable doubt that the defendant had the deliberate, knowing , and specific intent to join the conspiracy… this court will not

"lightly infer a defendant's knowledge and acquiescence in a conspiracy." It is not enough that the defendant merely associated with those participating in a conspiracy, nor is it enough that the evidence placed the defendant in a '*climate of activity that reeks of something foul*.'"

Without more, the Government failed to prove Ms. Gray had knowledge there were undocumented aliens in her trunk at the time she was arrested at the checkpoint, failed to prove she had not refused and was not merely acquiescing to Joe because she was afraid when asked if she would consider smuggling aliens tomorrow as she was leaving the taco stand, and failed to prove the absence of mistake or simply of bad judgment by association rather than a desire to smuggle aliens through the checkpoint.

## II. As to the second question presented, this Court should grant certiorari to decide whether the district court acted improperly in adding two points for obstruction of justice under U.S.S.G § 3C1.1.

The district court acted improperly in adding two points for obstruction of justice under U.S.S.G § 3C1.1, which provides that the court should increase the offense level by two points if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct.

Because the evaluation of whether a defendant has obstructed the administration of justice is factual, the district court's ruling is evaluated under the clearly erroneous standard. *United States v. Franco-Torres*, 869 F.2d 797, 800 (5th Cir.1989); *accord* *United States v. Garcia,* 902 F.2d 324, 326 (5th Cir.1990). This standard requires that there be sufficient evidence in the record to support the district court's conclusion. *Franco-Torres*, 869 F.2d at 800.

The PSR Addendum alleged Ms. Gray "provided contradicting statements during her testimony at trial which were materially false:"

> "She initially testified that she advised the smuggler that she could not rent a vehicle as she already had a vehicle rented and owed some money for a rental. On cross examination, the defendant testified she agreed to rent two vehicles, one for herself and one for the co-defendant."
>
> "Initially the defendant testified that she advised that upon finding out she was to smuggle undocumented aliens and continued pressure by the smugglers, including one who displayed a firearm, she advised the smuggler that she would have to think about it. On cross examination, she testified that the smuggler asked if she would think about smuggling for them, and she only answered "yes."
>
> "Lastly, her testimony regarding when and if she had spoken to the co-defendant conflicted."

ROA.492.

During Sentencing, the District Court focused upon the last allegation regarding phone calls between Ms. Gray and the co-defendant, Nicole Veal:

> "…I'm really only interested on …the phone calls- because there was the evidence regarding the documents that were submitted kind of shows something different. So I'm going to focus on that."

ROA.424

The Application note 2 of § 3C1.1 cautions the Court to be cognizant that inaccurate testimony sometimes may result from confusion, mistake or faulty memory and, thus, is not necessarily a willful attempt to obstruct justice.

During her testimony, the Defendant admitted she called Nicole Veal and her phone records were admitted without objection prior to Ms. Gray's testimony. ROA. 298. In addition, Agent Juan Rojas testified Ms. Gray provided Agents with the password for her cellphone so the Cellebrite program could be used to extract her phone calls, text messages, contact information, media information, app data, files, hidden files, and deleted data, which showed "those two

numbers called each other 15 time during the day on the 4th." ROA. 298-299. The Government did not meet its burden of showing, per the PSR Addendum, that Ms. Gray "provided contradicting statements during her testimony at trial which were materially false" regarding "when and if she had spoken to the co-defendant" which "conflicted." ROA.424. Two Government witnesses testified they were nervous because it was their first time testifying in Court. ROA. 193, 201. Ms. Gray stood accused of a serious crime, and the Government failed to prove she was not nervous and/or misunderstood the questions without the intent to obstruct justice. For example, the Government asked her a vague question, "So, through this whole time you never got hold of Nicole?" without specifying what "the whole time" encompassed. ROA.353-353. In addition, because the phone records had been admitted and it was undisputed fifteen calls were made, the Government failed to show her testimony was materially false. The Application note 6 of § 3C1.1 defines a "material" statement that, if believed, would tend to influence or affect the issue under determination. The government failed to show how her answers affected a "determination" or to specify what "determination" her answers affected, especially in light of the extraction data and her cooperation in allowing Agents to secure it. Because she readily provided her password for the phone messages and did not dispute the phone call records, the Government failed to prove she obstructed justice and the two point enhancement was improper.

## CONCLUSION

For the foregoing reasons, petitioner Aleisha O. Gray prays that this Court grant certiorari to review the judgment of the Fifth Circuit in her case.

Date: October 13, 2019

Respectfully submitted,

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APPENDIX A- United States Court of Appeals, Fifth Circuit- Memorandum Opinion (July 16, 2019)

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
July 16, 2019
Lyle W. Cayce
Clerk

No. 18-40789
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ALEISHA O. GRAY,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:18-CR-84-2

Before BARKSDALE, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:[*]

Following a jury trial, Aleisha O. Gray was convicted of one count of conspiring to transport illegal aliens within the United States, and two counts of transporting illegal aliens within the United States, in violation of 8 U.S.C. § 1324. The district court varied downwardly from the sentencing range under the advisory Sentencing Guidelines and sentenced Gray to, *inter alia*, 20 months' imprisonment.

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

She challenges her convictions and sentence. Regarding the former, Gray, who elected to testify at trial, contends the evidence adduced as to each count of conviction was insufficient, claiming the Government did not prove she: knowingly participated in a conspiracy to transport illegal aliens; and was aware she was transporting illegal aliens in the trunk of a rental vehicle.

She failed, however, to preserve her sufficiency challenges because, although she moved for a judgment of acquittal at the close of the Government's case, she did not renew the motion after the close of all evidence. *See United States v. Davis*, 690 F.3d 330, 336 (5th Cir. 2012). Therefore, our review is limited to whether the record is "devoid of evidence pointing to guilt" or the evidence on an element of the offense is "so tenuous that a conviction would be shocking". *Id.* at 336–37 (internal quotation marks and citation omitted).

As noted, Gray elected to testify at trial. The evidence, viewed "in the [requisite] light most favorable to the [G]overnment" and with "all reasonable inferences and credibility choices" construed in favor of the verdict, supports that Gray: knowingly agreed, with at least one other person, to transport illegal aliens within the United States for private financial gain; and knew she was transporting illegal aliens. *See id.* at 337 (internal quotation marks and citation omitted). The record reflects Gray was recruited by, and acted in accordance with the aims and directions of, an organized network that exhibited coordination, planning, and conformity in smuggling illegal aliens and moving them within the United States. Her role—driving the aliens across the border checkpoint to a destination at which they would make additional, and in some cases final, payments—complemented the jobs of others in the network and fulfilled a goal of the enterprise. Because the success of the network relied on Gray's willingness to perform her job, she reasonably could

be viewed as a knowing participant in the conspiracy to transport illegal aliens. *See United States v. Rodriguez*, 553 F.3d 380, 390–91 (5th Cir. 2008).

Furthermore, aside from the circumstances and conditions of the job that suggested it involved transporting aliens, the evidence supports that Gray: was explicitly told before crossing the border checkpoint that she was expected to transport aliens in the trunk of her rental vehicle; and knew her codefendant—who had been recruited by the same network under identical conditions and provided a vehicle also rented by Gray—was attempting to drive aliens across the checkpoint on behalf of the enterprise. Notably, at the checkpoint and in later interviews with agents, Gray, *inter alia*, displayed nervous behavior, provided a seemingly illogical description of her itinerary, and could not explain how the aliens were able to access the trunk of the rental vehicle without her knowledge. *See United States v. Diaz-Carreon*, 915 F.2d 951, 954–55 (5th Cir. 1990); *United States v. Richardson*, 848 F.2d 509, 513 (5th Cir. 1988).

Also, she was the sole driver and occupant of the vehicle in which the aliens—who were to pay a portion of the smuggling fees after their arrival in Houston—were concealed. Therefore, she presumably would not have been allowed to transport the aliens if she was not aware of the network and the aliens and did not have an incentive to keep them hidden.

Although Gray contends the evidence supports she did not know about the aliens, the jury, as evidenced by its verdict, found her testimony in that regard not to be credible. And, as our case law dictates, "credibility determinations . . . are the province of the jury, not appellate judges". *United States v. Morrison*, 833 F.3d 491, 500 (5th Cir. 2016) (citation omitted). Again, we must defer to that finding and construe all evidence and reasonable inferences in favor of the verdict. *See Davis*, 690 F.3d at 337. Gray, therefore,

has not shown the record is devoid of evidence she knowingly agreed with others to transport illegal aliens within the United States for financial gain or that the evidence of her knowledge was so tenuous as to make her conviction shocking. *See id.* at 336–37.

Regarding her sentence, Gray claims, consistent with her objection in district court, the court incorrectly applied an obstruction-of-justice adjustment under Guideline § 3C1.1 (providing for a two-level enhancement for obstructing justice), based on its finding she committed perjury by, *inter alia*, falsely testifying at trial she and her codefendant did not talk while they were in Texas to complete jobs for the conspiracy.

Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 48–51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). Accordingly, we review for clear error the finding, objected-to in district court, that Gray obstructed justice. *See United States v. Juarez-Duarte*, 513 F.3d 204, 208 (5th Cir. 2008).

The record supports that Gray gave testimony about her discussions with her codefendant that reasonably could be viewed as a willful denial of material facts. *See United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *United States v. Perez-Solis*, 709 F.3d 453, 469 (5th Cir. 2013); U.S.S.G. § 3C1.1, cmt. n.4(B) (explaining covered conduct under § 3C1.1 includes "committing,

suborning, or attempting to suborn perjury . . . if such perjury pertains to conduct that forms the basis of the offense of conviction"). Gray repeatedly testified she did not talk to her codefendant after they came to Texas; but, the evidence at trial—and additional evidence in the unrebutted presentence investigation report (PSR)—reflected that they had substantive discussions on cell phones after their arrivals. The false testimony was relevant to the material fact of whether Gray was aware she was transporting illegal aliens and, therefore, was designed to have a substantial effect on the outcome of the proceeding. *See United States v. Como*, 53 F.3d 87, 90 (5th Cir. 1995); *United States v. Cabral-Castillo*, 35 F.3d 182, 187 (5th Cir. 1994); U.S.S.G. § 3C1.1, cmt. n.6 (defining "material" evidence).

Her claim her perjurious testimony was the result of nervousness or confusion is unsupported by the record. The district court—which adopted the PSR and therefore made independent findings to support that Gray committed perjury—did not commit clear error in finding Gray obstructed justice for its purposes of assessing a § 3C1.1 enhancement. *See Perez-Solis*, 709 F.3d at 469; *Juarez-Duarte*, 513 F.3d at 208.

AFFIRMED.