

APPENDIX A

United States v. Acosta-Leyva,
No. 19-50554, unpub. op. (5th Cir. April 28, 2020)

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

No. 19-50554
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
April 28, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

UBALDO GABRIEL ACOSTA-LEYVA,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:18-CR-3542-1

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Ubaldo Gabriel Acosta-Leyva appeals the within-guidelines concurrent 33-month sentences imposed for his conviction for conspiracy to import marijuana, importation of marijuana, conspiracy to possess marijuana with intent to distribute, and possession of marijuana with intent to distribute. He contends that his concurrent sentences are substantively unreasonable because they punish him for a speculative quantity of marijuana and fail under

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

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18 U.S.C. § 3553(a) to adequately account for his background and lack of criminal history, his lack of knowledge of the amount of drugs involved, and the fact that he committed the nonviolent offenses out of fear for the safety of his family.

We review the substantive reasonableness of Acosta-Leyva’s sentences for abuse of discretion. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766–67 (2020). Acosta-Leyva’s concurrent sentences are presumptively reasonable because they fell within his advisory guidelines range. *See United States v. Hernandez*, 876 F.3d 161, 166 (5th Cir. 2017). The district court heard Acosta-Leyva’s arguments for below-guidelines sentences, but the district court determined that concurrent sentences at the bottom of the guidelines range were appropriate. We are also not persuaded by Acosta-Leyva’s argument that the district court should have applied a downward variance because the sentencing guidelines’ treatment of drug quantities is not based on empirical data. Acosta-Leyva does not challenge the district court’s calculation of the drug quantity attributable to him, and we have rejected the argument that a district court must disregard a particular guideline because it is not empirically based. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 366–67 (5th Cir. 2009); *see also United States v. Sphabmisai*, 703 F. App’x 275, 276 (5th Cir. 2017) (holding that a district court is “not required to question the empirical grounding” behind the guidelines).

Furthermore, our review of substantive reasonableness “is highly deferential, because the sentencing court is in a better position to find facts and judge their import under the § 3553(a) factors with respect to a particular defendant.” *Hernandez*, 876 F.3d at 166 (internal quotation marks and citation omitted). The district court was not persuaded that the § 3553(a) factors weighed in favor of sentencing below the guidelines range, and we will not

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reweigh the factors ourselves. *See United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008). Giving due deference to the district court's sentencing decision, we conclude after reviewing the record that Acosta-Leyva has not shown an abuse of discretion with respect to the substantive reasonableness of his sentence. *See Hernandez*, 876 F.3d at 166–67.

AFFIRMED.

APPENDIX B

U.S.S.G. §2D1.1

 KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedUnconstitutional as Applied by [U.S. v. Ameline](#), 9th Cir.(Mont.), Feb. 09, 2005

United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter Two. Offense Conduct (Refs & Annos)

Part D. Offenses Involving Drugs and Narco-Terrorism (Refs & Annos)

1. Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession; Continuing Criminal Enterprise

USSG, § 2D1.1, 18 U.S.C.A.

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

Currentness

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under [21 U.S.C. § 841\(b\)\(1\)\(A\)](#), [\(b\)\(1\)\(B\)](#), or [\(b\)\(1\)\(C\)](#), or [21 U.S.C. § 960\(b\)\(1\)](#), [\(b\)\(2\)](#), or [\(b\)\(3\)](#), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under [21 U.S.C. § 841\(b\)\(1\)\(A\)](#), [\(b\)\(1\)\(B\)](#), or [\(b\)\(1\)\(C\)](#), or [21 U.S.C. § 960\(b\)\(1\)](#), [\(b\)\(2\)](#), or [\(b\)\(3\)](#), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant is convicted under [21 U.S.C. § 841\(b\)\(1\)\(E\)](#) or [21 U.S.C. § 960\(b\)\(5\)](#), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) 26, if the defendant is convicted under [21 U.S.C. § 841\(b\)\(1\)\(E\)](#) or [21 U.S.C. § 960\(b\)\(5\)](#), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) The offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under [§ 3B1.2](#) (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level (“minimal participant”) reduction in [§ 3B1.2\(a\)](#), decrease to level 32.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.

(3) If 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, (B) a submersible vessel or semi-submersible vessel as described in [18 U.S.C. § 2285](#) was used, or (C) 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, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(5) If (A) 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, and (B) the defendant is not subject to an adjustment under [§ 3B1.2](#) (Mitigating Role), increase by 2 levels.

(6) If the defendant is convicted under [21 U.S.C. § 865](#), increase by 2 levels.

(7) If the defendant, or a person for whose conduct the defendant is accountable under [§ 1B1.3](#) (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.

(8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

(9) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.

(10) If the defendant was convicted under [21 U.S.C. § 841\(g\)\(1\)\(A\)](#), increase by 2 levels.

(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.

(13) If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels.

(14) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(C) If--

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

(15) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under § 3B1.1 (Aggravating Role), increase by 2 levels.

(16) If the defendant receives an adjustment under § 3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A)(i) The defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) The defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) The defendant was directly involved in the importation of a controlled substance;

(D) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) The defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood, increase by 2 levels.

(17) If the defendant receives the 4-level (“minimal participant”) reduction in [§ 3B1.2\(a\)](#) and the offense involved all of the following factors:

(A) The defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) The defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) The defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by 2 levels.

(18) If the defendant meets the criteria set forth in subdivisions (1)-(5) of [subsection \(a\) of § 5C1.2](#) (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.