

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

LILIA ABRIL OLMEDO-PEREZ,

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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Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, LILIA ABRIL OLMEDO-PEREZ, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:

December 29, 2020.

Respectfully submitted,

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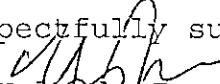
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QUESTIONS PRESENTED

I. Whether the Fifth Circuit violated federal law when it conducted a cursory review of the facts related to a warranted two- level adjustment under U.S.S.G. § 3B1.2 (b) because Olmedo -Perez' role in a drug related offense was minor; and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

PARTIES TO THE PROCEEDINGS

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

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PRAYER

The petitioner, LILIA ABRIL OLMEDO-PEREZ, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on September 30, 2020.

OPINIONS BELOW

The original judgments reflecting Ms. Perez's original conviction and sentence can be found at United States v. Olmedo-Perez, Cr. No. 7:19:CR:1088-1 (S.D. Tex. February 13, 2020). (Appendix B). However, on September 30, 2020, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Perez's conviction and sentence. United States v. Olmedo-Perez, No. 20-40007, 2020 U.S. App. LEXIS 31104 (5th Cir. Sept. 30, 2020) (affirmed) (unpublished). (Exhibit A).

No petition for rehearing was filed.

JURISDICTION

On September 30, 2020, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence in this case. This petition is filed within ninety days after entry of the judgment. See. Sup. Ct. R. 13.1 and 13.3. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

FEDERAL STATUTES INVOLVED

U.S.S.G. § 3B1.2: Mitigating Role Adjustment

Based upon the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

U.S.S.G. 3B1.2(2018).

STATEMENT OF THE CASE

A. Course of Proceedings

On June 18, 2019, an eight-count Indictment was filed in the Southern District of Texas McAllen Division, charging Lilia -Abril Olmedo-Perez (hereinafter referred to as Olmedo-Perez) as follows: Count One charged conspiracy to import into the United State from Mexico 500 grams or more of cocaine, in violation of 21 U.S.C. § 963, 952 (a), 960(a)(1) and 960 (b)(2). Count Two importing into the United States from Mexico 500 grams or more, that is approximately 4 kilograms of cocaine, in violation of 21 U.S.C. § 952(a), 960(a)(1), 960(b)(2), and 18 U.S.C. § 2. (ROA.19).

Count Three charged Olmedo-Perez with conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 846, 841(a)(1), and 841 (b)(1)(B). In Count Four, Olmedo-Perez, was charged with possession with intent to distribute 500 grams or more of cocaine, in violation 21 U.S.C. 21 U.S.C. § 841(a)(1), and 841 (b)(1)(B) 18 U.S.C. § 2. (ROA.20).

Count Five charged with Olmedo-Perez with conspiracy to import into the United States from Mexico 500 grams or more methamphetamine, in violation of 21 U.S.C. § 963, 952(a), 960(a)(1), and 960(b)(1). (ROA.20-21). Count Six charged Olmedo-Perez with importing into the United States from Mexico 500 grams or more, that is, approximate 2 kilograms of methamphetamine, in violation of 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(1), and 18 U.S.C. § 2. (ROA.21).

In Count Seven, Olmedo-Perez was charged with conspiracy to possess with intent to distribute 500 grams or more or methamphetamine, in violation of 21 U.S.C. § 846, 841 (a)(1), and 841(b)(1)(A). (ROA.21-22). Count Eight charged Olmedo-Perez with possession with intent to distribute 500 grams or more, that is, approximately 2 kilograms of methamphetamine, in violation of 21 U.S.C. 841 (a)(1), 841(b)(1)(A) and 18 U.S.C. § 2. (ROA.22).

The Plea

On August 1, 2019, Olmedo-Perez accompanied by counsel, entered a plea of guilty to Count Two of the Eight-Count Indictment. (ROA.63-64,86-87). The plea stipulates that in exchange Olmedo-Perez's plea of guilty to Count Two of the Indictment, the government will recommend a two-level reduction to the offense level pursuant to U.S. S. G. § 3 E.1.1(a), if she clearly demonstrated acceptance of responsibility. The government also agreed that the remaining counts of the Indictment be dismissed at the time of sentencing, (ROA.70-71,86). The government alleged that had the case proceeded to trial, it would prove beyond a reasonable doubt that:

On or about May 20th, 2019, Lilia Abril Olmedo-Perez did knowingly and intentionally import from the United Mexican States into the United States of America 500 grams or more of cocaine that is approximately 4 kilograms of cocaine, and approximately 2 kilograms of methamphetamine, both Schedule 2 Controlled Substances. (ROA.72-73).

On said date, the Defendant entered the United States through the Anzalduas, Texas Port of Entry in a motor vehicle coming from Mexico. The Defendant was the owner and driver of the vehicle. After being sent to secondary, a search of the vehicle revealed seven packages of cocaine and methamphetamine, which weight

approximately 4 kilograms for the cocaine and 2 kilograms for the methamphetamine.

The Defendant knew that she was importing a controlled substance from Mexico into the United States. (ROA.73).

The Sentence

The 2018 Guidelines Manual, incorporating all guideline amendments was utilized in this case to determine the offense level pursuant to U.S.S.G. § 1B1.1. were used in this case. (ROA.161). A Final Presentence Investigation Report (PSI) was filed on January 10, 2020. (ROA.115).¹ The PSI set the Base Offense Level at a level 36. (ROA.122). The United States Sentencing commission Guideline for violation of 21 U.S.C. § 952(a) 960(a)(1), 960(b)(2) and 18 U.S.C. § 2 is found in U.S.S.G. § 2D1.1(a)(5).

This guideline instructs that the base offense level is determined by the type and quantity of illicit controlled substance attributable to the relevant conduct findings for this defendant. Pursuant to in U.S.S.G. § 1B1.3(a)(1)(A) and (B), according to the PSI, based upon relevant conduct, Olmedo-Perez is alleged to have undertaken in jointly undertaken criminal activity. Therefore she was held responsible for the entire amount of narcotics seized. In this particular case, Olmedo-Perez attempted to import 3.93 kilograms of cocaine and 1.98 kilograms of methamphetamine into the United States from Mexico. (ROA.121-123).

¹ Olmedo-Perez was also an undocumented alien. Deportation proceeding were pending at the time the Final PSR

Section 2D1.1., Commentary, Application Note 8 Use of Drug Equivalency Tables (B) Combining Differing Controlled Substances, provides a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its converted drug weight, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.

SUBSTANCE	CONVERSION	CONVERTED DRUG WEIGHT (CDW)
Cocaine	1gm=200 gm of CDW	3,925 gm x 200 gm = 785,000gm or 785kg
"Ice"	1gm= 20 kg of CDW	1,980gm x 20 kg = 39,600kg
TOTAL		
40,385 kg		

Based on the aforementioned conversions, the total amount of converted drug weight is approximately 40,385 kilogram [785 kilograms + 39,600 kilograms = 40,385 kilograms]. According to the Drug Quantity Table offenses involving at least 30,000 kilograms but less 90,000 kilograms of Converted Drug Weight are assigned a base level offense of 36.

Pursuant to U.S.S.G. § 2D1.1(b) (5) (A) and (B), 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 and the defendant is not subject to an adjustment under U.S.S.G. § 3B1.2 (Mitigating Role), the offense is to be increase by two levels. In this case, Olmedo-Perez's offense of conviction involved the importation of methamphetamine, which was subsequently determined to be "Ice" based on the purity strength of the same. Thus, a two-level increase in points was assessed. (ROA.122). However, two points were deducted for acceptance of responsibility pursuant to U.S.S.G. 3D.1.1(a). (ROA.122).

Based upon the foregoing, the Total Offense Level resulted in a level 36. (ROA.126). Olmedo-Perez had no computable criminal history. (ROA.123). With a criminal history category of I and a criminal history category of 36, the guideline range of imprisonment resulted in 188 to 235 months, and is found in Zone D of the Sentencing Table, U.S.S.G. Chapter 5, Part A. (ROA.125).

Olmedo-Perez lodged written objections at sentencing. She contended that a two level adjustment under U.S.S.G. § 3B1.2(b) was warranted because her role was minor. (ROA.79-80,105-110). This would mean that the two points added pursuant to U.S.S.G. § 2D1.1(b) (5) (A) and (B), would be deducted as well. (ROA.79-180,109). The court denied the objections finding her to be an average participant. (ROA.80-81).

Sher further argued for the two level reduction "safety valve" reduction under U.S.S.G. § 2D.1.1(b) (18) set forth at 5C.1.2 (a) (1)-(5). (ROA.110-113). The court granted Olmedo-Perez a two-point safety valve deduction. (ROA.79-80).

At sentencing the government moved for an additional one-point deduction for acceptance of responsibility. (ROA.78-79). The court granted the government's request. With a Criminal History Category of I, and a Total Offense Level of 33, the guideline range resulted in 135-168 months imprisonment. (ROA.135) U.S.S.G. Chapter 5 Part A.

The court granted the government's motion for a downward departure and Olmedo-Perez was sentenced to 80 months imprisonment. (ROA.84,136). The court also imposed a \$100 special assessment. No supervised release was imposed in light of the fact that she will be deported. No fine was imposed. (ROA.84). She was awarded credit for the time served and the government moved to dismiss the remaining counts. (ROA.84-85). ²

As she did in the district court, on appeal Olmedo challenged the district court's failure to grant a mitigating role reduction under Guideline U.S.S.G. § 3B1.2. United States v. Olmedo-Perez, No. 20-40077, 2020 U.S. App. LEXIS 31104 at *1 (5th Cir. Sep. 30, 2020). Olmedo contended that she was not involved as a leader organizer or supervisor. However, the Fifth Circuit affirmed the conviction and sentence stating that "she did not include facts to suggest that she

was less culpable than the average participant. Nor did she otherwise demonstrate that she participated so much less than other participants that she was peripheral to the advancement of the criminal activity. Id at *2-3.

This Court should grant certiorari to determine whether the Fifth Circuit violated federal law when it refused to vacate the sentence; and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

2 Restitution was not an issue in this case. (ROA.127).

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution involving the importation of drugs in violation of in violation of 21 U.S.C. §§ 952(a); 960(a)(1) and (b)(2), and 18 U.S.C. § 2. The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to determine whether the Fifth Circuit violated federal law when it conducted a cursory review of the facts related to a warranted two- level adjustment under U.S.S.G. § 3B1.2 (b) and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

ISSUE ONE RESTATED: Whether the Fifth Circuit violated federal law when it conducted a cursory review of the facts related to a warranted two- level adjustment under U.S.S.G. § 3B1.2 (b) because Olmedo-Perez' role in a drug related offense was minor.

A. Standard of Review

A review of factual findings includes the district court's deciding whether defendant was a minor or minimal participant in order to apply a mitigating-role reduction under Guideline § 3B1.2. United States v. Gomez-Valle, 828 F.3d 324, 327 (5th Cir. 2016). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." *Id.* (internal quotation marks and citation omitted). Defendant's burden of showing her entitlement to a mitigating-role reduction must include two things: "(1) the culpability of the average participant in the criminal activity; and (2) that [defendant] was substantially less culpable than that participant". United States v. Castro, 843 F.3d 608, 613 (5th Cir. 2016) (footnote omitted).

B. Olmedo-Perez was Substantially Less Culpable Than Other Defendants Warranting a Two-Level Minor Role

Adjustment Pursuant to U.S.S.3B1.2 (b) .

Olmedo-Perez lodged written objections at sentencing. She contended that a two level adjustment under U.S.S.G. § 3B1.2 (b) was warranted because her role was minor. (ROA.79-80-81,105-110). This would mean that the two points added pursuant to U.S.S.G. § 2D1.1(b) (5) (A) and (B), would be deducted as well. (ROA.79-180,109). The court denied the objections finding her to be an average participant. (ROA.80-81) .

Pursuant to U.S.S.G. § 3B1.2: (a) if the defendant was a minimal participant in any criminal activity, decrease by 4 levels; (b) if the defendant was a minor participant in any criminal activity, decrease by 2 levels; in cases falling between (a) and (b), decrease by 3 levels. In this case, no analysis or reasoning was presented as the Presentence Investigation Report simply provides "None." (ROA.122) .

Application Note 3 (C) provides, the determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, the court should consider the following non-exhaustive live factors:

- (1) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
- (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision making authority; (iv) the nature and extent of the defendant's participation

in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts; (v) the degree to which the defendant stood to benefit from the criminal activity.

Application Note 3 (C) further provides, for example, a defendant who does not have a proprietary interest in the criminal activity and who is being paid to perform certain tasks should be considered for an adjustment under this guideline. The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.

In this case the evidence suggests that Olmedo-Perez understood to some degree the scope and structure of the criminal activity. The evidence indicates that Ms. Olmedo-Perez's participation in planning or organizing the criminal activity was minor, given that Olmedo-Perez's role in the offense was merely that of a narcotics or transporter courier. (ROA.119).

Application Note 5 provides that §3B1.2 (b)'s 2-level reduction for minor participants applies to defendants who are less culpable than most other participants in the criminal activity, but whose role could not be described as minimal-someone who lacks knowledge or understanding about the scope or structure of the

enterprise. See generally United States v. Broussard, 882 F.3d 104, 111 (5th Cir. 2018).

Homeland Security Investigations Task Force Officer Jesus Cuellar substantiated Ms. Olmedo-Perez's role by stating that "Ms. Olmedo-Perez's role in the particular instance was that of a narcotics courier." (ROA.120). Additionally, the PSI stated the following:

After a thorough review of the investigative material followed by an interview with the case agent and an independent investigation, Lilia Olmedo's role in the instant offense was determined to be that of a narcotics courier or transporter. Ms. Olmedo took affirmative steps to commit said offense by attempting to smuggle seven packages of narcotics from Mexico into the United States. Additionally, Lilia Olmedo, via her own admission, previously participated in the smuggling of illicit drug trafficking proceeds in exchange for financial compensation, and she had done so since October 2018. Although Ms. Olmedo was involved in bulk cash smuggling in relation to drug trafficking since October 2018, it is unclear as to the number of occasions she was successful in transporting said funds from the United States to Mexico. Further, the amount of monetary means she transported in each instance as well as the total amount of proceeds she is responsible for smuggling remains unknown.

(ROA.120).

In this case, there is no evidence to suggest that Ms. Olmedo-Perez "participated" (as defined in U.S.S.G. §3B1.1 Application Note 1-4) in planning or organizing the criminal activity other than assisting as a transporter, who operated under the instruction of her ex-boyfriend. There is no evidence to support that Olmedo-

Perez exercised decision-making authority or influenced the exercise of decision-making authority in the capacity of an organizer or leader or supervisor. The nature and extent of Olmedo-Perez's participation in the commission of the criminal activity suggests that Olmedo-Perez's responsibilities were to transport illicit proceeds, which she did not exercise on her own accord to load and conceal the narcotics in question, as she would instead be given instructions to be picked up at her residence or to be transported to a convenience store, where she would then await instructions on transportation. (ROA.119-120).

There is no clear evidence to show that Olmedo-Perez stood to benefit greatly from the criminal activity so as to have been paid lucratively for her minor role and her limited responsibilities. She was only paid \$300 to \$500 for each smuggling event. (ROA.119). The evidence suggests that Olmedo-Perez's ex-boyfriend, along with other unnamed participants, served in a leadership, organizer, and or supervisorial role in comparison to Olmedo-Perez.

The evidence further indicates that Olmedo-Perez was substantially less culpable than the average participant in the criminal activity attributed by her minor role and limited function as a transporter. (ROA.119).

In United States v. Gayton, 74 F.3d 545 (5th Cir. 1996), the Fifth Circuit affirmed the district court's decision that Appellant-Defendant, Alfredo Gayton was a minor participant in a conspiracy to possess cocaine with intent to distribute it. This

Court opined that it was not clear error for the court to conclude that Gayton was a minor participant given the district court's finding that Gayton lent his property to be used for the storing of drugs' and "acted as a chauffeur' to carry people to where drugs were stored" was supported by the record. Id. at 561-562.

In similar cases in other circuits, mere physical workers, like lifters and transporters, have been recognized as being, as a general matter, less culpable than other participants in a drug offense. See, e.g., United States v. Valdez-Gonzalez, 957 F.2d 643, 649-50 (9th Cir. 1992) ("mules" less culpable participants in drug conspiracies), limited on other grounds, United States v. Webster, 996 F.2d 209, 211 (9th Cir. 1993); 28 CFR. § 2.20 Chapter 13, Subchapter B (14) (2000) (under parole commission guidelines, "peripheral role" in drug offense refers to simple courier, chauffeur, deckhand, or drug-loader).

The facts of this case, as described in the presentence report and in the factual basis for the guilty plea, establish that Olmedo-Perez played a minor role in the offense and that a four-level mitigating adjustment should have been awarded in this case because she is plainly among the least culpable of any of the individuals involved. (ROA.119).

For the foregoing reasons, the evidence supports an adjustment pursuant to U.S.S.G. 3B1.2(b) based on Ms. Olmedo-Perez's role and participation having been a minor. As such, pursuant to U.S.S.G. 3B1.2 (b), a two-level decrease is warranted. Accordingly, Olmedo-

Perez's sentence must be vacated and remanded for re-sentencing.

C. The District Court's Error Requires Remand

In Gall v. United States, 128 S.Ct. 586 (2007), the Supreme Court stated that improperly calculating the Guidelines range is a "significant procedural error." If a district makes such an error, this Court 'vacate[s] the resulting sentence without reaching the sentence's ultimate reasonableness.' United States v. Tzep-Mejia, 461 F.3d 522 (5th Cir. 2006) (citation omitted). Without the erroneous enhancements outlined above, Olmedo-Perez's Total Offense Level would have resulted in a level 31. If Olmedo-Perez had been deemed a minor participant the two-level increase pursuant to 2D1.1(b) (5) (A) and (B) would have been deducted as well. With a Criminal History Category I and Total Offense Level 29, the guideline range would have resulted in 87-108 months of imprisonment. U.S.S.G. Chapter 5 Part A.

The government cannot show that the district court would have imposed the same sentence had the two-level adjustment been awarded to Olmedo-Perez. Because the court's error was not harmless, remand is required. See Williams v. United States, 503 U.S. 193, 203 (1992) (when sentencing error occurs, remand required unless government can show same sentence would have been imposed); see also United States v. Kimbrough, 536 F.3d 463 (5th Cir. 2008) (correctly calculated guideline range necessary to sentence a defendant).

Based upon the foregoing law and analysis, Fifth Circuit erred in affirming the sentence. This Court has opined that although post-Booker, the Sentencing 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).

Because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, petitioner LILIA ABRIL OLMEDO-PEREZ respectfully prays that this Court grant certiorari, to review the judgment of the Fifth Circuit in this case.

Date: December 29, 2020.

Respectfully submitted,


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Respondent.

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

PETITION FOR WRIT OF CERTIORARI

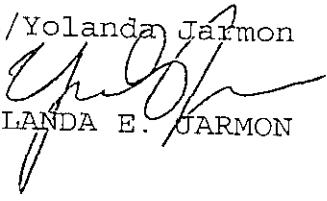
On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

YOLANDA E. JARMON, is not a member of the Bar of this Court but was appointed under the Criminal Justice Act 18 U.S.C. § 3006 A(b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit, certifies that, pursuant to Rule 29.5, On December 29, 2020, she served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid, Certified Mail No. 7019 1640 0000 6387 3968, return receipt requested, and depositing the envelope in the United States Postal Service located at 4206 Little York Rd. Houston, TX 77016-9998 and further certifies that all parties required to be served have been served and copies addressed to:

The Honorable Noel J. Francisco
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

/s/Yolanda Jarmon


YOLANDA E. JARMON

APPENDIX

United States v. Olmedo-Perez

United States Court of Appeals for the Fifth Circuit

September 30, 2020, Filed

No. 20-40077 Summary Calendar

Reporter

2020 U.S. App. LEXIS 31104 *

UNITED STATES OF AMERICA, Plaintiff—Appellee,
versus LILIA ABRIL OLMEDO-PEREZ, Defendant—
Appellant.

For Lilia Abril Olmedo-Perez, Defendant - Appellant:
Yolanda Evette Jarmon, Esq., Law Office of Yolanda
Jarmon, Houston, TX.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE* RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Judges: Before JONES, BARKSDALE, and STEWART,
Circuit Judges.

Prior History: [*1] Appeal from the United States District Court for the Southern District of Texas. USDC No. 7:19-CR-1088-1.

Disposition: AFFIRMED.

Opinion

PER CURIAM:*

Lilia Abril Olmedo-Perez pleaded guilty to, *inter alia*, importing 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 952(a); 960(a)(1) and (b)(2). The district court sentenced her below the advisory Sentencing Guidelines sentencing range to 80 months' imprisonment. As she did in district court, Olmedo challenges the court's not granting a mitigating-role reduction under Guideline § 3B1.2.

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, 46, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under [*2] an abuse-of-discretion standard. Id. at 51; United States v. Delgado-Martinez, 564 F.3d 750, 751-53 (5th Cir. 2009). In that

Core Terms

district court, culpability, reduction, factual findings, procedural error, mitigating-role, Sentencing, criminal activity, sentencing range, kilograms, preserved, advisory, smuggled, cocaine

Counsel: For United States of America, Plaintiff - Appellee: a Camille Offenhauser, Assistant U.S. Attorney, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX.

* Pursuant to *5TH CIRCUIT RULE 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 CIRCUIT RULE 47.5.4*.

Appendix A

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).

In this instance, only a claimed procedural error is at issue.

Our court's review of factual findings includes the district court's deciding whether defendant was a minor or minimal participant in order to apply a mitigating-role reduction under *Guideline § 3B1.2*. *United States v. Gomez-Valle*, 828 F.3d 324, 327 (5th Cir. 2016). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." *Id.* (internal quotation marks and citation omitted). Defendant's burden of showing her entitlement to a mitigating-role reduction must include two things: "(1) the culpability of the average participant in the criminal activity; and (2) that [defendant] was substantially less culpable than that participant". *United States v. Castro*, 843 F.3d 608, 613 (5th Cir. 2016) (footnote omitted).

Olmedo contends she was not involved as a leader, organizer, or supervisor; but, that contention alone is not enough. Again, she has the burden of proof. See *id. at 613*. Her objections to the presentence investigation report (PSR) failed to include information about the average culpability of a participant. Similarly, she did [*3] not include facts to suggest she was less culpable than the average participant. Nor did she otherwise demonstrate that she participated so much less than other participants that she was peripheral to the advancement of criminal activity.

Instead, the PSR and record show Olmedo attempted to enter the United States while smuggling nearly four kilograms of cocaine and two kilograms of another drug. On an unknown number of prior occasions, she smuggled drugs and illicit proceeds between Mexico and the United States and was paid for those operations. In the light of these facts, the district court found Olmedo was at least an average participant. Given the court's findings and Olmedo's failure to provide necessary evidence to the contrary, the denial of the reduction was plausible in the light of the whole record. See *Gomez-Valle*, 828 F.3d at 327.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in McAllen

ENTERED

February 13, 2020

David J. Bradley, Clerk

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

LILIA ABRIL OLMEDO-PEREZ

CASE NUMBER: 7:19CR01088-001

USM NUMBER: 93366-479

Uriel Alex Guajardo
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 2 on August 1, 2019.

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 952(a), 960(a)(1), 960(b)(2) and 18 U.S.C. § 2	Importing 500 grams or more, that is, approximately 4 kilograms of cocaine.	05/20/2019	2

See Additional Counts of Conviction.

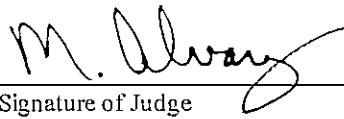
The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____.

Count(s) 1, 3, 4, 5, 6, 7 and 8 are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 16, 2020
Date of Imposition of Judgment


Signature of Judge

MICHAELA ALVAREZ
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

February 13, 2020
Date

Appendix B

20-40077.53

DEFENDANT: **LILIA ABRIL OLMEDO-PEREZ**
CASE NUMBER: **7:19CR01088-001**

Judgment — Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 80 months.

- See Additional Imprisonment Terms.
- The court makes the following recommendations to the Bureau of Prisons:
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at _____ on _____
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on _____
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LILIA ABRIL OLMEDO-PEREZ
CASE NUMBER: 7:19CR01088-001

Judgment — Page 3 of 4

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$100.00	\$	\$	\$

- See Additional Terms for Criminal Monetary Penalties.
- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$	\$	

- See Additional Restitution Payees.
- Restitution amount ordered pursuant to plea agreement \$_____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:
- Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LILIA ABRIL OLMEDO-PEREZ
CASE NUMBER: 7:19CR01088-001

Judgment - Page 4 of 4

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$100.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ installments of \$_____ over a period of _____, to commence _____ after the date of this judgment; or

D Payment in equal _____ installments of \$_____ over a period of _____, to commence _____ after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
Attn: Finance
P.O. Box 5059
McAllen, TX 78502

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number

Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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See Additional Defendants and Co-Defendants Held Joint and Several.
 The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):

 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.