NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARY GONZALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

UNITED STATES DISTRICT COURT
District of New Mexico

UNITED STATES OF AMERICA

V.

MARY GONZALES

Judgment in a Criminal Case

Case Number: **1:19CR00240-001KWR**
USM Number: **03183-151**
Defendant's Attorney: **Nicole Moss**

THE DEFENDANT:

☐ pleaded guilty to count(s) .
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) **SS1, SS2, SS3 and SS4** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title and Section	*Nature of Offense*	*Offense Ended*	*Count*
21 U.S.C. Sec. 841(b)(1)(A)	Possession with Intent to Distribute 50 Grams and More of Methamphetamine	06/07/2018	SS1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 .The Court has considered the United States Sentencing Guidelines and, in arriving at the sentence for this Defendant, has taken account of the Guidelines and their sentencing goals. Specifically, the Court has considered the sentencing range determined by application of the Guidelines and believes that the sentence imposed fully reflects both the Guidelines and each of the factors embodied in 18 U.S.C. § 3553(a). The Court also believes the sentence is reasonable, provides just punishment for the offense and satisfies the need to impose a sentence that is sufficient, but not greater than necessary to satisfy the statutory goals of sentencing.

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

08/18/2021
Date of Imposition of Judgment

/s/ Kea W. Riggs
Signature of Judge

Honorable Kea W. Riggs
United States District Judge
Name and Title of Judge

08/20/2021
Date

DEFENDANT: **MARY GONZALES**
CASE NUMBER: **1:19CR00240-001KWR**

ADDITIONAL COUNTS OF CONVICTION

Title and Section	*Nature of Offense*	*Offense Ended*	*Count*
21 U.S.C. Sec. 841(b)(1)(C)	Possession with Intent to Distribute Heroin	06/07/2018	SS2
18 U.S.C. Sec. 922(g)(1), 18 U.S.C. Sec. 924	Felon in Possession of a Firearm and Ammunition	06/07/2018	SS3
18 U.S.C. Sec. 924(c)(1)(A)(i)	Possessing a Firearm in Furtherance of a Drug Trafficking Crime	06/07/2018	SS4

DEFENDANT: **MARY GONZALES**
CASE NUMBER: **1:19CR00240-001KWR**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **195 months**.

A term of 120 months (10 years) is imposed as to Count SS1. A term of 15 months is imposed as to each of Counts SS2 and SS3; said terms shall run concurrently. A term of 5 years is imposed as to Count SS4; said terms shall run consecutively to each of Counts SS1, SS2 and SS3, for a total term of 195 months.

☐ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant participate in the Bureau of Prisons 500 hour drug and alcohol treatment program.

☒ 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: **MARY GONZALES**
CASE NUMBER: **1:19CR00240-001KWR**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **5years** .
A term of 5 years is imposed as to each of Counts SS1 and SS4. A term of 3 years is imposed as to each of Counts SS2 and SS3; said terms shall run concurrently for a total term of 5 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, require you to notify that person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **MARY GONZALES**
CASE NUMBER: **1:19CR00240-001KWR**

SPECIAL CONDITIONS OF SUPERVISION

You must not use or possess alcohol. You may be required to submit to alcohol testing that may include urine testing, a remote alcohol testing system, and/or an alcohol monitoring technology program to determine if you have used alcohol. Testing shall not exceed more than 4 test(s) per day. You must not attempt to obstruct or tamper with the testing methods. You may be required to pay all, or a portion, of the costs of the testing.

You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic cannabinoids, synthetic cathinones, etc.) that impair your physical or mental functioning, whether or not intended for human consumption.

You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You may be required to pay all, or a portion, of the costs of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer may disclose the presentence report, any previous mental health evaluations and/or other pertinent treatment records to the treatment provider.

You must complete 40 hours of community service during your term of supervised release . The probation officer will supervise the participation in the program by approving the program (agency, location, frequency of participation, etc.). You must provide written verification of completed hours to the probation officer.

You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to pay all, or a portion, of the costs of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer may disclose the presentence report, any previous substance abuse evaluations and/or other pertinent treatment records to the treatment provider.

You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing shall not exceed more than 60 test(s) per year. Testing may include urine testing, the wearing of a sweat patch, and/or any form of prohibited substance screening or testing. You must not attempt to obstruct or tamper with the substance abuse testing methods. You may be required to pay all, or a portion, of the costs of the testing.

You must submit to a search of your person, property, residence, vehicle, papers, computers (as defined in 18 U.S.C. 1030(e)(1)), other electronic communications or data storage devices or media, or office under your control. The probation officer may conduct a search under this condition only when

reasonable suspicion exists, in a reasonable manner and at a reasonable time, for the purpose of detecting firearms, deadly weapons, illegal substances or illegal contraband . You must inform any residents or occupants that the premises may be subject to a search.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: **MARY GONZALES**
CASE NUMBER: **1:19CR00240-001KWR**

CRIMINAL MONETARY PENALTIES

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

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
	$400.00	**$0.00**	**$0.00**	**$ 0.00**	**$0.00**

☐ The determination of the restitution is deferred until . An *Amended Judgment in a Criminal Case* will be entered after such determination.
☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

SCHEDULE OF PAYMENTS

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

A ☒ In full immediately; or

B ☐ $ due immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Based on the defendant's lack of financial resources, the Court will not impose a fine or a portion of a fine. However, in accordance with U.S.S.G. 5E1.2(e), the Court has imposed as a special condition that the defendant complete community service. The Court concludes the total combined sanction without a fine or alternative sanction, other than the defendant complete community service, is sufficiently punitive.

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 court.

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

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.

* 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.

FILED
United States Court of Appeals
Tenth Circuit

December 16, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARY GONZALES,

Defendant - Appellant.

No. 21-2099
(D.C. No. 1:19-CR-00240-KWR-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **MATHESON**, **KELLY**, and **PHILLIPS**, Circuit Judges.

A jury found Mary Gonzales guilty of four felony offenses: possessing methamphetamine and heroin with intent to distribute, possessing a firearm in furtherance of a drug-trafficking crime, and possessing a firearm as a felon. On appeal, Gonzales mainly argues that the district court erred by not suppressing two incriminating statements she made to the police before receiving the warnings recited in *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). We need not decide the *Miranda* issue, because we conclude that any error was harmless beyond a reasonable doubt. We thus affirm her conviction and sentence.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

I. Factual Background

Socorro County Sheriff's Deputy Richard Lopez received information that on June 7, 2018, Mary Gonzales would be delivering methamphetamine to a certain house in Socorro, New Mexico. Javier Martinez, a known drug dealer, lived in the house. On the afternoon of June 7, as Deputy Lopez was surveilling the area in response to the tip, he saw Gonzales arrive at Martinez's house in her truck. Deputy Lopez rushed from his vehicle to get a better look. From behind a neighbor's fence about forty to fifty yards away, he saw Veronica Soto-Paz, Martinez's girlfriend, interact with Gonzales at her truck for about thirty seconds. From what Deputy Lopez could see, he believed that a drug transaction had just occurred.

When Gonzales drove away, Deputy Lopez returned to his patrol vehicle, pursued her, and stopped her. He approached Gonzales's truck and asked her to step out; she complied. He confronted Gonzales by telling her a lie—that he had a source in Martinez's house who told him Gonzales was dealing drugs. Deputy Lopez observed a plastic bag sticking out of her shirt. Believing that the bag contained drugs, Deputy Lopez ordered her to give it to him. As directed, Gonzales handed Deputy Lopez the bag, acknowledging that "[i]t's in my shirt." R. vol. III, at 114. The bag appeared to contain methamphetamine; chemists later determined that it contained 10.68 grams of pure methamphetamine. Sometime during the brief conversation, Gonzales disclosed to Deputy Lopez that she had to "drop off," which Deputy Lopez took to mean delivering drugs. *Id.* at 149–50.

Deputy Lopez then handcuffed Gonzales and asked if she had any other drugs. Though handcuffed, she managed to reach inside the truck and hand Deputy Lopez a small pouch containing 48.3 grams of pure methamphetamine, 24.61 grams of heroin, some prescription Suboxone strips, a digital scale, and a glass methamphetamine pipe. With Gonzales's consent, Deputy Lopez searched her purse and found a loaded .22 caliber revolver. Even after Gonzales made two incriminating statements—that she had to "drop off" and that the plastic bag of methamphetamine was "in [her] shirt"—she continued making incriminating statements during the roadside stop without receiving *Miranda* warnings. Only at the police station did Deputy Lopez read Gonzales those warnings. She made more incriminating statements there.

A federal grand jury later indicted Gonzales for possession with intent to distribute fifty grams or more of methamphetamine under 21 U.S.C. § 841(a)(1), possession with intent to distribute heroin under § 841(a)(1), felon in possession of a firearm under 18 U.S.C. § 922(g)(1), and possessing a firearm in furtherance of a drug-trafficking crime under § 924(c)(1)(A)(i).

II. Procedural Background

Gonzales filed two pretrial motions to suppress. In her first motion, she argued that Deputy Lopez lacked reasonable suspicion to pull her over. After a hearing, the district court denied this motion.[1] In her second motion, Gonzales sought to suppress

[1] Gonzales does not challenge this ruling, and we express no opinion whether the stop was valid without an observed traffic violation.

her roadside statements to Deputy Lopez as *Miranda* violations; her post-*Miranda* statements at the station as involuntary under the Fifth Amendment; and the drugs, firearm, and any testimony about them as fruit of the poisonous tree.

The district court held an evidentiary hearing on the second motion to suppress and afterward granted the motion in part and denied it in part. The court suppressed Gonzales's roadside statements made after the handcuffing and her statements at the police station.[2] But it declined to suppress the drugs, the firearm, or Gonzales's roadside statements before she was handcuffed. The court determined that Gonzales was not in custody before being handcuffed, ruling out any asserted *Miranda* violation.

At trial, the government called four witnesses: Deputy Lopez, two Drug Enforcement Administration (DEA) chemists, and an FBI agent. Deputy Lopez testified about the events from June 7, 2018. He related the inside information that Gonzales would be delivering drugs at Martinez's house that day, described the interaction between Gonzales and Soto-Paz, and recounted the traffic stop and Gonzales's handing him the two bags containing methamphetamine and heroin. During his testimony, Deputy Lopez also identified the two samples of methamphetamine, the heroin, the revolver, and the ammunition from the revolver.

[2] The district court suppressed Gonzales's police-station statements as involuntary confessions because Deputy Lopez made coercive, misleading promises of leniency.

On cross-examination, the defense questioned him about seeing Soto-Paz at Gonzales's truck and about his location during the surveillance. After defense counsel suggested that the Suboxone strips (used to treat heroin addiction) and methamphetamine pipe meant the drugs were for Gonzales's personal use, Deputy Lopez testified on redirect examination that drug dealers typically use drugs. Not until redirect did Deputy Lopez reference Gonzales's roadside statement about dropping off. The prosecutor asked, "[B]efore you placed Ms. Gonzales in a pair of handcuffs, did she say anything to you that indicated that she intended to distribute any drugs?" Deputy Lopez answered, "She did say she had to drop off." R. vol. III, at 149. He testified that based on his training and experience he understood that Gonzales was saying she had more drugs to deliver elsewhere.

Next, the two DEA chemists testified about the drug samples that they tested. The first chemist testified that the two methamphetamine samples were 100% pure and weighed 10.68 and 48.3 grams. The second chemist testified that the heroin weighed 24.61 grams.

Finally, the government called an FBI agent as an expert witness on firearms and drug trafficking. The agent had inspected the revolver, ammunition, and drugs before trial. He testified that drug traffickers often use firearms to protect themselves from being robbed. And he testified that dealers often use digital scales to weigh their drugs for sale. Importantly, he also testified that the methamphetamine and heroin were both distribution quantities, not personal-use quantities. The agent estimated that 58.9 grams of pure methamphetamine would yield 235 to 589 doses and that it

could be "stepped on," or diluted with a cutting agent, to double or triple those numbers. As for the heroin, the agent testified that 24.61 grams represented 49 to 246 doses. Based on the dosages, the agent concluded that a single user would be unlikely to have such amounts for personal use.

The defense called Soto-Paz, who disputed Deputy Lopez's testimony that she had met Gonzales on June 7. She testified that she had never been to Martinez's house when Gonzales was there. But on cross-examination, Soto-Paz admitted that she dated Martinez in 2018, that she herself was a former drug user (but was not involved in drug dealing), and that she knew Gonzales and her family. The defense also called Gonzales's brother, who testified that he gave Gonzales the firearm to return to their father the day before she was arrested, despite knowing that she was a felon.

Though the district court's suppression order allowed the government to introduce Gonzales's two pre-handcuffing statements, the government failed to admit either Deputy Lopez's body-camera video of his encounter with Gonzales or the accompanying transcript. Had the government done so, the jury would have heard the full context of the encounter:

> DEPUTY LOPEZ: What else do you have on you right now?
> MS. GONZALES: I got something else to drop off.
> DEPUTY LOPEZ: Okay. Give it to me. One of your sources and I can also see it in your shirt, so hand it to me.
> MS. GONZALES: It's in my shirt.

R. vol. II, at 50. During its closing argument summarizing its evidence in support of the drug charges, however, the government quoted Gonzales as saying she had

"something else to drop off." R. vol. III, at 299, 302, 322.[3] It argued Gonzales's statement, together with the FBI agent's testimony about distribution quantities and the presence of the digital scale, proved her intent to distribute. The defense countered that Gonzales's admission—in its words, that "she had dropped something off"—referred to her plan to take the firearm to her father (though the firearm was in her purse inside the truck). *Id.* at 316. The district court instructed the jury to give Gonzales's statement "the weight you think it deserves." R. vol. I, at 538.

The jury convicted Gonzales on all four counts. The court sentenced her to 195 months' imprisonment from an advisory guideline range of 181 to 211 months. Gonzales timely appealed.

STANDARD OF REVIEW

We review de novo a motion-to-suppress ruling about an alleged *Miranda* violation. *United States v. Williston*, 862 F.3d 1023, 1031 (10th Cir. 2017) (citing *United States v. Jones*, 523 F.3d 1235, 1239 (10th Cir. 2008)). In doing so, we accept the district court's factual findings unless they are clearly erroneous, and we view the evidence in the light most favorable to the prevailing party—here, the government. *Id.* We also review the entire record de novo in evaluating whether alleged error is

[3] Three times the government argued to the jury that Gonzales said she had "something else to drop off." R. vol. III, at 299, 302, 322. This accurately tracked the body-camera transcript, but the jury never had that. Instead, it had only Deputy Lopez's recollection that Gonzales said she "had to drop off." *Compare* R. vol. II, at 50, *with* R. vol. III, at 149.

harmless beyond a reasonable doubt. *United States v. Perdue*, 8 F.3d 1455, 1469 (10th Cir. 1993) (citations omitted).

DISCUSSION

Gonzales raises three issues for our review. She argues (1) that the district court should have suppressed her pre-handcuffing statements to Deputy Lopez because she was in custody and that admitting the statements was not harmless beyond a reasonable doubt, (2) that all physical evidence derived from those statements should have been suppressed, and (3) that 18 U.S.C. § 922(g)(1) requires a greater showing than that the firearm had crossed state lines, or that Congress exceeded its Commerce Clause authority by enacting § 922(g)(1). Gonzales recognizes that the latter two issues are foreclosed by precedent, so she is simply preserving them.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Harmless Error

Gonzales asks us to find that she was in custody under *Miranda* before she was handcuffed and thus argues that the district court should have suppressed her two incriminating responses to Deputy Lopez's interrogation: "I got something else to drop off" and "It's in my shirt." R. vol. II, at 50.[4] Yet even with a *Miranda* violation, the government could still prevail by proving harmless error beyond a reasonable

[4] At the outset, we note that although Gonzales calls her second statement ("It's in my shirt") incriminating, she does not argue that this statement influenced the verdict. We thus focus on Gonzales's first statement, "I got something else to drop off," which was undeniably incriminating.

doubt. *See United States v. Mikolon*, 719 F.3d 1184, 1188 (10th Cir. 2013) (quoting *United States v. Miller*, 111 F.3d 747, 751 (10th Cir. 1997)). In deciding this appeal, we will assume a *Miranda* violation and resolve the appeal based on whether that error was harmless beyond a reasonable doubt.

Harmless error is error that "did not contribute to the verdict." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Error does not contribute to the verdict when it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991), *disapproved of on other grounds by Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991).

The government first elicited testimony about Gonzales's statement during its redirect examination of Deputy Lopez. But the jury never heard testimony about Deputy Lopez's question, "What else do you have on you right now?" R. vol. II, at 50. Nor did it ever hear Gonzales's full statement, "I got something else to drop off." *Id.* The government did not offer into evidence any part of the body-camera footage or the accompanying transcript. All the jury heard was Deputy Lopez's recollection: "[Gonzales] did say she had to drop off." R. vol. III, at 149. During closing argument, the government referenced Gonzales's statement three times—while presenting its evidence for the two drug charges and during its rebuttal. And the district court instructed the jury to give Gonzales's statement "the weight you think it deserves." R. vol. I, at 538.

We must consider this contested statement—that Gonzales "had to drop off," R. vol. III, at 149—"in the context of other evidence presented." *United States v. Russian*, 848 F.3d 1239, 1248 (10th Cir. 2017) (quoting *United States v. Mullikin*, 758 F.3d 1209, 1211 (10th Cir. 2014)). Practically, we must weigh "the properly admitted evidence of guilt" against the "prejudicial effect of the [defendant's] admission." *United States v. Glass*, 128 F.3d 1398, 1403 (10th Cir. 1997) (quoting *Schneble v. Florida*, 405 U.S. 427, 430 (1972)). For the government to prove harmlessness beyond a reasonable doubt, it must show that the properly admitted evidence was "so overwhelming" and that any prejudice was "so insignificant by comparison." *Id.* After reviewing the whole record, we conclude that the government has established that any error in admitting Gonzales's pre-handcuffing statement was harmless beyond a reasonable doubt.

In considering the properly admitted evidence of guilt, we note that the government provided overwhelming proof of Gonzales's intent to distribute the methamphetamine and heroin. The government admitted into evidence the drugs and the revolver and elicited testimony from Deputy Lopez and the FBI agent. Deputy Lopez testified that based on his inside information and his own perception, he believed that Gonzales had conducted a hand-to-hand drug transaction with Soto-Paz and that he confirmed this belief when he seized the drugs, scale, and firearm from Gonzales's truck. He testified that digital scales are often used by dealers to weigh drugs. Next, the FBI agent testified that in his experience, the quantities of methamphetamine and heroin seized were more consistent with distribution than

personal use. He told the jury that the methamphetamine was highly pure, meaning it could be diluted into hundreds of doses, and that Gonzales possessed at least forty-nine doses of heroin. The agent also corroborated Deputy Lopez's testimony about digital scales being used by drug dealers. And he testified that drug dealers use firearms to protect themselves from being robbed.

Intent to distribute drugs is usually proven by circumstantial evidence. *United States v. Powell*, 982 F.2d 1422, 1430 (10th Cir. 1992) (citing *United States v. Gay*, 774 F.2d 368, 372 (10th Cir. 1985)). That intent "may be inferred from the possession of a large quantity of the substance." *Id.* (collecting cases). The physical evidence here, including 58.98 grams of pure methamphetamine and 24.61 grams of heroin, overwhelmingly established Gonzales's intent to distribute. The FBI agent—who was admitted as an expert witness on drug trafficking with no objection from Gonzales—testified that he had never seen a non-dealing personal user with as much methamphetamine and heroin as Gonzales had. This compelling expert evidence, combined with the firearm, the scale, and Deputy Lopez's eyewitness testimony, was overwhelming evidence of Gonzales's intent to distribute.

As for prejudice from the testimony about Gonzales's roadside statement, we agree with the government that any prejudice was comparatively insignificant. Gonzales calls her statement a "confession." Opening Br. 28. A confession is a suspect's "acknowledgment of guilt." *Confession*, *Black's Law Dictionary* (11th ed. 2019). It is "the most compelling possible evidence of guilt." *Miranda*, 384 U.S. at 466. But the Supreme Court has distinguished between "statements by a defendant

[that] may concern isolated aspects of the crime or may be incriminating only when linked to other evidence" and "a full confession in which the defendant discloses the motive for and means of the crime." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).[5] The latter type of confession "may tempt the jury to rely upon that evidence alone in reaching its decision." *Id.*

Gonzales's incriminating statement falls into the former category of confessions because it bears on her intent to distribute but is meaningless without being linked to the physical evidence Deputy Lopez seized. *Fulminante*, 499 U.S. at 296. By itself, the statement that the jury heard was vague and ambiguous. Although the government argued that Gonzales meant she had other drug deliveries in Socorro, defense counsel argued that Gonzales was "dropping off" her father's firearm.

Had the government provided the full context—Deputy Lopez's question and Gonzales's full statement—it would have been far more damning to her chances of acquittal. First, Gonzales's exact statement was that she had "something *else* to drop off," strongly implying that she had already dropped off, which corroborated Deputy Lopez's observation of a drug transaction. R. vol. II, at 50 (emphasis added). Second, Deputy Lopez asked her what she had "on [her] right now." *Id.* The only item Gonzales had "on her" was the plastic bag of methamphetamine, not the firearm in

[5] The two categories of confessions are subject to the same degree of harmless-error review, but "the Court's opinion [in *Fulminante*] suggests that the latter category is less likely to be harmless." *United States v. Giddins*, 858 F.3d 870, 886 n.10 (4th Cir. 2017).

her purse, as the defense argued she meant by "drop off." As it stood, the jury heard only a truncated version of Gonzales's statement—that she "sa[id] she had to drop off." R. vol. III, at 149. This statement's low probative value helps quiet any concerns that it affected the verdict.

Examining Gonzales's defense theory also confirms our conclusion. She offered only a personal-use theory to counter her alleged intent to distribute. She had no other choice; because "controlled substances are hardly collector's items, possession must be for one of two purposes, personal use or distribution to others." *United States v. Grant*, 233 F. App'x 840, 844 (10th Cir. 2007) (unpublished). Setting aside the implausibility of a drug user having the financial means to stockpile 83.59 grams of controlled substances to consume over time,[6] the story Gonzales told the jury has several gaping holes of its own. For instance, the jury never heard any direct evidence that Gonzales was even a drug user, let alone that she used both methamphetamine and heroin. If the drugs were for personal use, why were they in her truck? Why were they in two separate bags? *See United States v. Allen*, 235 F.3d 482, 492 (10th Cir. 2000) (citations omitted) (noting that the manner of packaging can support intent to distribute). Why was one of the bags in her shirt? What was she doing at Martinez's house? As for the firearm and the § 924(c) charge, if the firearm was her father's, why didn't her father testify? Why was the firearm still loaded? *See*

[6] The FBI agent testified that at a per-ounce price, methamphetamine was worth between $300 and $400 in 2018; heroin, between $800 and $1,600. Gonzales had about two ounces of methamphetamine and one ounce of heroin—worth between $1,400 and $2,400.

United States v. Poe, 556 F.3d 1113, 1127 (10th Cir. 2009) (noting that one factor under § 924(c) is whether the firearm was loaded). The jury was left without answers to any of these questions.

What's more, if Gonzales's unwarned statement had been excluded, her defense theory would not have changed. *Cf. United States v. Resendiz-Patino*, 420 F.3d 1177, 1181–82 (10th Cir. 2005) (reasoning that based on the defense's theory, the jury could not have drawn a favorable inference for the defense even without the allegedly erroneous evidence). The defense never addressed Gonzales's statement during its case, nor did it call any witnesses to explain the statement. The trial would have proceeded just as it did—with the same physical evidence and testimony. The minuscule role the statement played in the government's case *and* in Gonzales's defense bolsters our confidence that "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

After weighing the strength of the government's case against the prejudicial effect of Gonzales's unwarned statement, we hold that any district-court error was harmless beyond a reasonable doubt.

II. Derivative Physical Evidence

Gonzales next argues that the drugs and firearm recovered during the stop should have been suppressed as physical fruits of her unwarned statements. Yet she acknowledges that *United States v. Patane* forecloses this argument. *Patane* held that derivative physical fruits of unwarned but otherwise voluntary statements are

admissible. 542 U.S. 630, 634 (2004) (plurality op.); *id.* at 645 (Kennedy, J., concurring in the judgment) ("Admission of nontestimonial physical fruits . . . does not run the risk of admitting into trial an accused's coerced incriminating statements against himself."); *see also United States v. Phillips*, 468 F.3d 1264, 1265 (10th Cir. 2006) (explaining *Patane*'s holding).

Because Supreme Court precedent answers this argument, we affirm the district court's ruling that the derivative physical evidence was admissible.

III. Felon-in-Possession Conviction

Finally, Gonzales makes two arguments about her conviction under the felon-in-possession statute, 18 U.S.C. § 922(g)(1). In her view, § 922(g)(1) requires that a defendant's *possession* somehow affect commerce, and simply showing that a firearm was once transported in interstate commerce does not satisfy this requirement. Yet she acknowledges that *Scarborough v. United States* forecloses this argument. *Scarborough* held that the interstate-commerce-nexus requirement "was satisfied by proof that the firearm . . . possessed had previously traveled in interstate commerce." 431 U.S. 563, 566–67 (1977).

Gonzales alternatively argues that Congress exceeded its Commerce Clause authority when it passed § 922(g)(1). She admits that this claim is also foreclosed by precedent, though she does not cite a case. The government swoops in to help, citing *United States v. Urbano*, which rejected a facial interstate-commerce challenge to § 922(g)(1) under circuit precedent. 563 F.3d 1150, 1153–54 (10th Cir. 2009) (citations omitted).

Because Supreme Court and Tenth Circuit precedents answer these arguments, we affirm the § 922(g)(1) conviction.

CONCLUSION

Any *Miranda* error in admitting into evidence Gonzales's pre-handcuffing statements to Deputy Lopez was harmless beyond a reasonable doubt. We affirm Gonzales's conviction and sentence.

Entered for the Court

Gregory A. Phillips
Circuit Judge

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 8, 2023

Clerk
United States Court of Appeals for the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

Re: Mary Gonzales
v. United States
Application No. 22A784
(Your No. 21-2099)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on March 8, 2023, extended the time to and including April 17, 2023.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Clayton Higgins
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

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