

APPENDIX A

United States v. Zapata-Ochoa,
No. 17-50470 (5th Cir. Mar. 5, 2018) (unpublished)

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

No. 17-50470
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

March 5, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GUSTAVO ZAPATA-OCHOA,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:15-CR-1346-1

Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Gustavo Zapata-Ochoa appeals the within-guidelines sentence imposed following his jury conviction for possession and conspiracy to possess with intent to distribute 50 grams or more of methamphetamine. He argues that his sentence was substantively unreasonable because it was greater than necessary to effectuate the sentencing goals of 18 U.S.C. § 3553(a). He asserts that the sentence was

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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greater than necessary (1) to reflect the seriousness of his involvement in the offense because his codefendant was the leader and primary offender and (2) to provide adequate deterrence because the subject offense was his first drug-trafficking offense. He also contends that the district court failed to give adequate weight to the fact that he was motivated to commit the instant offense—illegally smuggling drugs into the U.S. from Mexico—out of a desire to see his family members who currently reside in the U.S.

Zapata-Ochoa objected to the substantive reasonableness of his sentence in the district court, so our review is for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). “A discretionary sentence imposed within a properly calculated guidelines range is presumptively reasonable.” *United States v. Campos-Maldonado*, 531 F.3d 337, 338 (5th Cir. 2008). The presumption of reasonableness “is rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors.” *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). A defendant’s “mere belief that the mitigating factors presented for the court’s consideration should have been balanced differently is insufficient to disturb this presumption.” *United States v. Alvarado*, 691 F.3d 592, 597 (5th Cir. 2012).

The district court had before it both mitigating and aggravating factors. After balancing these factors, it determined that a sentence near the middle of the guidelines range was appropriate. We see no reason to disturb the presumption of reasonableness in this case. *See United States v. Gomez-Herrera*, 523 F.3d 554, 565-66 (5th Cir. 2008). Considering the totality of the circumstances, as we must, we conclude that Zapata-Ochoa has not shown that

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the district court's sentence was an abuse of discretion. *See Gall*, 552 U.S. at 51.

AFFIRMED.

APPENDIX B

U.S.S.G. §2D1.1



KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or PreemptedHeld Unconstitutional by [U.S. v. Detwiler](#), D.Or., Oct. 05, 2004

[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) (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.

(14) 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.

(15) 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.

(16) 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.

(17) 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.

(c) DRUG QUANTITY TABLE

	<i>Controlled Substances and Quantity*</i>	<i>Base Offense Level</i>
(1)	• 90 KG or more of Heroin; • 450 KG or more of Cocaine; • 25.2 KG or more of Cocaine Base; • 90 KG or more of PCP, or 9 KG or more of PCP (actual); • 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of “Ice”; • 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); • 900 G or more of LSD; • 36 KG or more of Fentanyl; • 9 KG or more of a Fentanyl Analogue; • 90,000 KG or more of Marihuana; • 18,000 KG or more of Hashish; • 1,800 KG or more of Hashish Oil; • 90,000,000 units or more of Ketamine; • 90,000,000 units or more of Schedule I or II Depressants;	Level 38

- 5,625,000 units or more of Flunitrazepam.

(2)

- At least 30 KG but less than 90 KG of Heroin;
- At least 150 KG but less than 450 KG of Cocaine;
- At least 8.4 KG but less than 25.2 KG of Cocaine Base;
- At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual);
- At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of “Ice”;
- At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
- At least 300 G but less than 900 G of LSD;
- At least 12 KG but less than 36 KG of Fentanyl;
- At least 3 KG but less than 9 KG of a Fentanyl Analogue;
- At least 30,000 KG but less than 90,000 KG of Marihuana;
- At least 6,000 KG but less than 18,000 KG of Hashish;
- At least 600 KG but less than 1,800 KG of Hashish Oil;
- At least 30,000,000 units but less than 90,000,000 units of Ketamine;
- At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;
- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam.

Level 36

(3)

- At least 10 KG but less than 30 KG of Heroin;
- At least 50 KG but less than 150 KG of Cocaine;
- At least 2.8 KG but less than 8.4 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of “Ice”;
- At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;

Level 34

- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

(4)

- At least 3 KG but less than 10 KG of Heroin;
- At least 15 KG but less than 50 KG of Cocaine;
- At least 840 G but less than 2.8 KG of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD;
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

Level 32

(5)

- At least 1 KG but less than 3 KG of Heroin;
- At least 5 KG but less than 15 KG of Cocaine;
- At least 280 G but less than 840 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";

Level 30