



F I L E D

Mar. 11, 2019

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

THE BOARD of DISCIPLINARY APPEALS
Appointed by the Supreme Court of Texas

**IN THE MATTER OF
MARCO A. DELGADO
STATE BAR CARD NO. 00796001**

§
§
§

CAUSE NO. 54396

FIRST AMENDED MOTION FOR ENTRY OF JUDGMENT OF DISBARMENT

TO THE HONORABLE BOARD:

COMES NOW, Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), and files this its First Amended Motion for Entry of Judgment of Disbarment, showing as follows:

1. On June 5, 2014, Petitioner filed its Petition for Compulsory Discipline against Respondent, Marco A. Delgado, (hereinafter called "Respondent") seeking compulsory discipline based upon Respondent's conviction in Case No. EP-12-CR-2106-DB, styled *United States of America v. Marco Antonio Delgado*, in the United States District Court for the Western District of Texas, El Paso Division, wherein Respondent was found guilty of Conspiracy to Commit Money Laundering and was committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months with credit for time served while in custody for this federal offense. Respondent was ordered upon release from imprisonment to be on supervised release for 3 years, ordered to pay an assessment of \$100.00 and a fine of \$25,000.00.

2. On July 30, 2014, an Interlocutory Order of Suspension was entered by the Board of Disciplinary Appeals which provides in pertinent part, as follows:

It is further ORDERED that this Order is interlocutory and that the Board retains jurisdiction to enter a final judgment when the appeal of the criminal conviction is final. *In the Matter of Mercier*, 242 SW 3d 46 (Tex. 2007).

3. Following the appeal by Respondent of his criminal conviction, the United States Court of Appeals for the Fifth Circuit, in Case No. 14-50079, styled *United State of America, Plaintiff – Appellee v. Marco Antonio Delgado, Defendant – Appellant*, issued an Opinion and Judgment (Exhibit C) vacating Respondent’s sentence and remanding the case for resentencing.

4. On June 17, 2016, and pursuant to the United States Court of Appeals for the Fifth Circuit’s Opinion and Judgment, the United States District Court for the Western District of Texas, El Paso Division, entered a Judgment in a Criminal Case (Exhibit D) in Case No. 3:12-CR-0216-DCG(1), styled *United States of America v. Marco Antonio Delgado, Defendant*, wherein Respondent was again found guilty of Conspiracy to Commit Money Laundering and was resentenced and committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 192 months with credit for time served while in custody for the federal offense. Respondent was ordered upon release from imprisonment to be on supervised release for 3 years, ordered to pay an assessment of \$100.00. As an additional condition of supervised release, Respondent was ordered to remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release as directed by the Court.

5. On or about June 29, 2016, Respondent appealed the June 17, 2016, Judgment in a Criminal Case. Following the appeal by Respondent of his criminal conviction of the judgment entered on June 17, 2016, in Case No. 3:12-CR-2106-DCG(1), on the charge of Conspiracy to Commit Money Laundering, an Opinion (Exhibit A) was issued by the United States Court of Appeals for the Fifth Circuit, on or about January 9, 2019, in Cause No. No. 16-50841 (Consolidated with 17-50040), styled *United States of America, Plaintiff – Appellee v. Marco*

Antonio Delgado, Defendant – Appellant, which affirmed the judgment issued by the District Court.

6. On or about January 31, 2019, two Judgments were issued as Mandates (Exhibit B) by the United States Court of Appeals for the Fifth Circuit, in Cause No. No. 16-50841 and 17-50040, *United States of America, Plaintiff – Appellee v. Marco Antonio Delgado, Defendant – Appellant*, which affirmed the judgment issued by the District Court.

7. True and correct copies of the Judgment in a Criminal Case entered on June 17, 2016 and the Opinions and Judgments Issued as Mandate by the United States Court of Appeals for the Fifth Circuit, are attached hereto as Exhibits A through D, and are made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits A through D at the time of hearing of this cause.

8. Petitioner represents to the Board that the Judgment entered against Respondent, Marco A. Delgado, has now become final. Petitioner seeks the entry of a judgment of disbarment. Attached hereto is a true and correct copy of the form of the proposed judgment of which Petitioner seeks the entry herein.

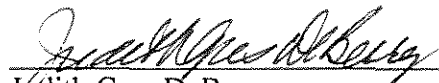
PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays, upon notice to Respondent, that the Board enter its order disbarring Respondent and for such other and further relief to which Petitioner may be entitled.

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

Judith Gres DeBerry
Assistant Disciplinary Counsel
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Judith Gres DeBerry
Bar Card No. 24040780
ATTORNEYS FOR PETITIONER

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a trial on the merits of the First Amended Motion for Entry of Judgment of Disbarment heretofore sent to be filed with the Board of Disciplinary Appeals on this day, will be held in the courtroom of the Supreme Court of Texas, Tom C. Clark Building, 14th and Colorado Streets, Austin, Texas, at **9:00 a.m. on the 12th day of April 2019.**



Judith Gres DeBerry

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been sent by U. S. Mail, Certified, Return Receipt, Requested, to Marco Antonio Delgado, Register # 06804-380, Loretto FCI, P.O. Box 1000, Loretto, Pennsylvania 15940 on March 11, 2019.



Judith Gres DeBerry


UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA

v.

MARCO ANTONIO DELGADO

Defendant.

FILED
2016 JUN 17 PM 2:24
Case Number: 3:12-CR-02106-DCG(1)
USM Number: 06804-380
BY  CLERK

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, MARCO ANTONIO DELGADO, was represented by Maureen Franco.

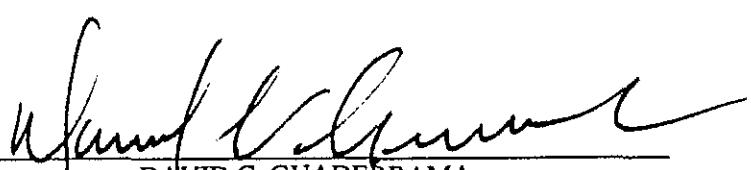
The defendant was found guilty of the Indictment by a jury verdict on October 28, 2013 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. 1956 Conspiracy To Commit Money Laundering	December 2008	1

As pronounced on March 31, 2016, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall 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 shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 17th day of June, 2016.



DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

Exhibit

C

DEFENDANT: MARCO ANTONIO DELGADO
CASE NUMBER: 3:12-CR-02106-DCG(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one hundred and ninety-two (192) months with credit for time served while in custody for this federal offense.

The Court makes the following recommendations to the United States Bureau of Prisons:

That the defendant be screened for, and if found to be eligible, to be admitted to the (500 hour) Comprehensive Drug Abuse Treatment Program.

The defendant shall remain in custody pending service of sentence.

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 Marshal

DEFENDANT: MARCO ANTONIO DELGADO
CASE NUMBER: 3:12-CR-02106-DCG(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the additional conditions on the attached page that have been adopted by this Court.

Mandatory Conditions:

- 1) The defendant shall not commit another federal, state, or local crime during the term of supervision.
- 2) The defendant shall not unlawfully possess a controlled substance.
- 3) The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be meliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
- 4) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.
- 5) The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- 6) The defendant shall cooperate in the collection of DNA as directed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- ☐ If convicted of a sexual offense and required to register under the Sex Offender and Registration Act, that the defendant comply with the requirements of the Act.
- ☐ If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- ☐ If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

- 1) The defendant shall not leave the judicial district without permission of the court or probation officer.
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family obligations, and shall comply with the terms of any court order or order of an administrative process requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living.
- 5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

DEFENDANT: MARCO ANTONIO DELGADO
CASE NUMBER: 3:12-CR-02106-DCG(1)

- 10) The defendant shall permit a probation officer to visit him or her at any time, at home or elsewhere, and shall permit confiscation of any contraband observed in plain view of the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications, and to confirm the defendant's compliance with such notification requirement.
- 14) If convicted of a sex offense as described in the Sex Offender Registration and Notification Act or has a prior conviction of a State or local offense that would have been an offense as described in the Sex Offender Registration and Notification Act if a circumstance giving rise to federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.
- 15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. During treatment, the defendant shall abstain from the use of alcohol and any and all intoxicants. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.
- 16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.
- 17) The defendant shall participate in a cognitive behavioral treatment program as directed by the probation officer, and if deemed necessary by the probation officer. Such program may include group sessions led by a counselor or participation in a program administered by the probation office. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.
- 18) The defendant shall participate in workforce development programs and services as directed by the probation officer, and if deemed necessary by the probation officer, which include occupational/career development, including but not limited to assessment and testing, education, instruction, training classes, career guidance, job search and retention services until successfully discharged from the program. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.
- 19) If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally reenter the United States. If the defendant lawfully reenters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.
- 20) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.
- 21) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- 22) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

DEFENDANT: MARCO ANTONIO DELGADO
CASE NUMBER: 3:12-CR-02106-DCG(1)

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

- X The defendant shall remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release as directed by the Court.

DEFENDANT: MARCO ANTONIO DELGADO
CASE NUMBER: 3:12-CR-02106-DCG(1)

CRIMINAL MONETARY PENALTIES/ SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 525 Magoffin Avenue, Room 105, El Paso, Texas 79901.

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTAL:	\$100.00	\$.00	\$.00

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00.

Fine

The fine is waived because of the defendant's inability to pay.

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 above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

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

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.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-50079

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARCO ANTONIO DELGADO,

Defendant - Appellant



A True Copy

Certified order issued Mar 11, 2019

Stacy W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:12-CR-2106-1

Before JOLLY and DENNIS, Circuit Judges, and REEVES, District Judge.*
PER CURIAM:**

This appeal arises out of the sentencing of defendant Marco Antonio Delgado for a conviction on one count of conspiracy to commit money laundering. He argues that he should not have received several sentencing enhancements. For the reasons stated below, we VACATE in part and REMAND.

* District Judge of the Southern District of Mississippi, sitting by designation.

** 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.



I. Background

In 2007, agents with United States Immigration and Customs Enforcement (ICE) began investigating Delgado because of financial transactions in El Paso, Texas; Chicago, Illinois; and Atlanta, Georgia, which were believed to have involved proceeds of Mexican drug trafficking organizations. In September 2007, Georgia law enforcement officials conducted a traffic stop on a vehicle driven by Delgado's associate, Victor Ignacio Pimentel. After receiving Pimentel's consent, officials searched his vehicle and found approximately \$1 million. That \$1 million, Pimentel testified, was a trial run amount to test their ability to launder large sums of money.

Following his detainment, Pimentel volunteered information to ICE agents pertaining to his partnership with Delgado, their criminal affiliation with Francisco Fernandez and Pedro-Mendoza-Meneses, and the group's plans to illegally transfer currency. He further informed agents that Delgado, who communicated with Pimentel from the email of his law firm, "Delgado and Associates," provided him with fraudulent court documents indicating that the currency derived from a court settlement. Delgado had instructed Pimentel to show law enforcement officials these documents in the event he was stopped.

Subsequently, ICE agents conducted a controlled delivery of the currency to Delgado in El Paso. Officials stopped Pimentel and Delgado during the delivery, and a search of their vehicle revealed the currency. Delgado waived his constitutional rights and cooperated with the agents. He informed them that the scheme involved Lillian De La Concha, the former wife of Mexican President Vincente Fox, and that he met Fernandez and Mendoza-Meneses through De La Concha in the 2006-2007 time frame. In May 2007, Delgado, De La Concha, Fernandez, and Mendoza-Meneses

discussed an operation which involved transferring \$600 million from the United States to Mexico. Delgado further explained that he was subsequently introduced to Isidro Rubio-Vega, who was involved in the transfer of the currency with which Pimentel was apprehended in Georgia.

Delgado agreed to assist in a second controlled delivery of money, this time to Mendoza-Meneses and Rubio-Vega in El Paso. Arrangements for the transfer of currency were made and, with the assistance of an undercover agent, the currency was again seized and law enforcement obtained information on yet another participant, Chuy (last name unknown). The undercover agent learned more about the operations, including that the laundering conspiracy involved seven people: Delgado, Pimentel, Chuy, Fernandez, De La Concha, Mendoza-Meneses, and Rubio-Vega.

Pimentel also provided law enforcement agents with emails between Delgado and De La Concha. The emails, which spanned from June 2006 to August 2007, contained discussions about the group's money laundering scheme. In an August 16, 2006 email, for example, De La Concha informed Delgado that the "Girl Scouts" wanted him to help them place more than five boxes of cookies per school each week, because they had in the warehouse 500 boxes instead of 300, a figure that would increase because of the donations they would be receiving. "Girl Scouts" was a code word used by the cartel: the e-mail meant that members of the organization wanted Delgado to launder \$5 million per week, and they had \$500 million ready to be laundered. As another example, in a March 4, 2007 email, De La Concha discussed "100 houses," translated as \$100 million, for another client.

In July 2008, Pimentel informed ICE agents that Delgado was seeking to transport \$100,000 in illegal drug proceeds from Chicago to El Paso. Pimentel was to transfer this amount as a trial run for the cartel, to determine if he and Delgado would eventually be able to transport \$10

million to Mexico. ICE agents in Chicago were notified of the pending money pick up and, from that point, the illegal activities proceeded under the agents' observation and control. After various amateurish missteps,¹ under Delgado's direction, \$45,000 was eventually deposited into the Delgado and Associates bank account.

Delgado was indicted for Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. § 1956(h). At trial, a jury found him guilty as charged.

At Delgado's sentencing hearing, the district court adopted the factual findings of the Presentencing Report (PSR). Although he was to challenge the sentencing enhancements recommended by the PSR, Delgado did not challenge the factual information in the PSR either via written objections or at the sentencing hearing. The PSR established that his base offense level was 38, due to a money laundering offense involving more than \$400 million. Six levels were added pursuant to U.S.S.G. § 2S1.1(b)(1) based on a finding that Delgado knew or believed that some of the laundered funds were the proceeds of, or were intended to promote, an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical. Four levels were added pursuant to U.S.S.G. § 2S1.1(b)(2)(C) based on a determination that Delgado was in the business of laundering funds. Two more levels were added pursuant to U.S.S.G. § 3B1.3 based on a finding that he abused a position of public or private trust, or used a special skill, in

¹ Delgado planned for Pimentel to receive the \$100,000 in two \$50,000 installments, which Pimentel was supposed to deposit into a Wells Fargo account provided by Delgado. After receiving the first half, Pimentel had to drive to Wisconsin because there were no Wells Fargo branches in Chicago. His drive proved futile because the bank account number was under the name of Delgado's girlfriend and personnel at the bank were not able to communicate with her to confirm the transaction. Upon being informed of the complications, Delgado instructed Pimentel to deposit the money with the bank in exchange for cashier's checks, but this method also failed because Pimentel did not have a bank account with Wells Fargo. Ultimately, Delgado texted Pimentel the Delgado and Associates Wells Fargo bank account number to complete the transaction.

a manner that significantly facilitated the commission or concealment of the offense. Another four levels were added pursuant to U.S.S.G. § 3B1.1(a) based on a finding of Delgado's aggravated role. Two levels were then added pursuant to U.S.S.G. § 3C1.1 for obstruction of justice, based on the belief that Delgado provided a fraudulent email during trial. His resulting offense level was 56. It was reduced to 43 pursuant to U.S.S.G. Chapter Five, Part A.

Delgado objected to the base offense level and to all sentencing enhancements recommended by the PSR. The district court overruled all except Delgado's objection to the obstruction of justice enhancement. It found that, based upon a total offense level of 43 and a criminal history category of I, Delgado's guideline imprisonment range was life. However, because the statutorily authorized maximum sentence of 240 months was less than life imprisonment, it became the guideline sentence. Delgado was sentenced to 240 months, followed by three years supervised release, a \$25,000 fine, and a \$100 special assessment. This appeal followed.

II. Standard of Review

"We review a district court's interpretation or application of the Sentencing Guidelines *de novo*, but review its factual findings for clear error." *United States v. Alexander*, 602 F.3d 639, 641 (5th Cir. 2010) (citation omitted). "A factual finding on a sentencing factor is not clearly erroneous so 'long as it is plausible in light of the record read as a whole.'" *United States v. Alaniz*, 726 F.3d 586, 622 (5th Cir. 2013) (quoting *United States v. Morris*, 46 F.3d 410, 419 (5th Cir. 1995)). When significant procedural error occurs at sentencing, remand is required unless the error was harmless. *See United States v. Delgado-Martinez*, 564 F.3d 750, 752-53 (5th Cir. 2009). Harmless error applies if the government establishes that "the district court would have imposed the same sentence had it not made the error, and . . . that it

would have done so for the same reasons it gave at the prior sentencing.” *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010).

III. Discussion

Delgado now raises four challenges to the district court’s sentencing enhancements. We address each in turn.

A. Thirty-level Enhancement Under § 2S1.1

U.S.S.G. § 2S1.1 imposes a base offense level of eight for money laundering, and instructs that the level increases as the amount of loss increases. *See* §§ 2S1.1(a)(2), 2B1.1 (providing level increases for loss amounts deemed to exceed \$5,000). The district court found that Delgado intended to launder up to \$600 million. Consequently, it imposed the 30-level increase afforded to persons who launder more than \$400 million, thereby creating the base offense level of 38. Delgado argues that the district court’s finding that over \$400 million was involved in the money laundering conspiracy was clearly erroneous, as there is no evidence that he was *reasonably capable* of laundering \$600 million, more than a half billion dollars. In response, the Government’s argument focuses on *intent*. It avers that Delgado conspired to launder more than \$400 million.

“When calculating funds for sentencing purposes, it is permissible to consider the entire amount the parties *intended* to launder.” *United States v. Leahy*, 82 F.3d 624, 638 (5th Cir. 1996) (citing *United States v. Tansley*, 986 F.2d 880, 884 (5th Cir. 1993)). District courts “*may also* use the broader amount that defendants could have been ‘reasonably capable’ of laundering.” *Tansley*, 986 F.2d at 884 (citing *United States v. Fuller*, 974 F.2d 1474, 1484 (5th Cir. 1992)) (emphasis added). Thus, our precedent provides two options for determining the amount of laundered funds.

Neither option is squarely presented in this case. To understand why, we begin with a discussion of two seminal cases on money laundering

enhancements under § 2S1.1, *United States v. Tansley* and *United States v. Richardson*, 925 F.2d 112 (5th Cir. 1991).

The *Tansley* defendants were convicted of various crimes stemming from a telemarketing scheme. *Tansley*, 986 F.2d at 883. They made deposits at various banks in an effort to launder funds from credit card purchases. *Id.* at 884. The defendants only withdrew a fraction of the money they had deposited before the accounts were frozen, and they argued that the amount of loss should be based solely on what they took out. *Id.* In upholding the money laundering sentencing enhancements, this court reasoned that “the larger amount that was processed through the various factors and then deposited in various banks were [sic] put in the laundering process and the fact that all the money was not withdrawn is irrelevant.” *Id.* at 884. *Tansley* concluded that intent to launder the entire amount was sufficient for sentencing purposes and that funds under negotiation are properly considered to calculate a sentence. *Id.*

Similarly, the *Richardson* court found intent to launder where the defendant “had not yet touched the money,” due to evidence that “a co-conspirator . . . had accompanied [the defendant] to the meeting, had fully counted the money, placed it in the valise, closed the valise, and placed it near [the defendant].” *Richardson*, 925 F.2d at 116. Thus, in *Tansley* and *Richardson*, this court found that the defendants were liable for the entire amounts they intended to launder. In those cases, however, the values of laundered funds were actual funds which were measured in financial transactions or in accounts. Delgado’s case, in contrast, is not based on measurable funds. Delgado merely floated the *prospect* of laundering \$600 million; his ability to actually launder the funds was contingent upon first successfully securing the Mexican cartel’s business.

In this situation, we have sought guidance from this court's previous explanation that "the same policy considerations" govern the "analogous situation involving the distribution of controlled substances, in which the question arises whether the weight under negotiation in an uncompleted distribution should be used to calculate the applicable amount for sentencing purposes." *Id.* at 116 n.12. Those policy considerations, found in the commentary to § 2D1.1, provide as follows:

If, however, the defendant establishes that the defendant did not intend to provide or purchase, *or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance*, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

U.S.S.G. § 2D1.1, cmt. n.5 (emphasis added).

Here, the record is replete with evidence indicating that Delgado's capability to launder more than \$400 million was still inchoate. The only tangible funds he was given, for "trial runs," totaled \$1,050,000, which represents a mere 0.175% of the \$600,000,000 the district court attributed to him. Moreover, the email conversations from which the Government derived its enhancement calculation simply evince discussions of large amounts of currency that could *possibly* be laundered. They are insufficient to displace all of the evidence suggesting the implausibility that the amount could ever materialize, including: Delgado's unsuccessful "test runs" demonstrating that he had no capability to launder large sums of money; Pimentel's testimony clarifying that he and Delgado were among other competitors bidding for business agreements with the cartel; and an email to Delgado from De La Concha explaining that "one of the reasons nothing has happened is because [the cartel] went to your competition because you were too expensive (at 10%

per total laundered amount).” Given the evidence, Delgado should not have been accountable for \$600 million in enhancements.² On remand, the district court must recalculate the enhancement based on the sum Delgado was reasonably capable of laundering.

B. Four-level Enhancement Under § 2S1.1(b)(2)(C)

Under § 2S1.1(b)(2)(C), if a defendant is found to be in the business of laundering funds, his offense level is increased by four levels. Delgado argues that the evidence fails to establish that he was in the business of laundering funds. We agree.

The commentary to § 2S1.1 instructs that courts shall consider the totality of the circumstances when determining whether a defendant was in the business of laundering funds. U.S.S.G. § 2S1.1, cmt. n.4(A).³ The

² Evidence of the unskilled manner in which they attempted to execute the transaction illustrates that these defendants were not equipped to accomplish an operation of this scale. Pimentel drove his vehicle with a Mexican license plate on Interstate 20 carrying \$1 million, which he testified was in two “huge bags full of money, really heavy, and . . . in \$1s, \$5s, and \$20s.” Our cases are legion concerning targeted drug corridors and identifiers that law enforcement authorities hone in on to make traffic stops. *See, e.g., United States v. Jenson*, 462 F.3d 399, 405-06 (5th Cir. 2006) (noting that among the factors the Court has considered in finding a search reasonable is that the defendant was traveling on I-20, a known drug corridor) (citing *United States v. Reyes Gonzalez*, 328 F.3d 755, 758 (5th Cir. 2003)); *United States v. Irick*, 315 F. App’x 111, 113 (11th Cir. 2008) (finding that reasonable suspicion existed given the arresting officer’s “knowledge about drug trafficking, [the defendant’s] lack of luggage in the light of his explanation that he had been in Atlanta for the weekend, his nervousness, and that I-20 is a known drug corridor”) (citation omitted). On the issue of an initial traffic stop’s legality, the district court in *United States v. Lopez* found that the arresting officer’s suspicions, which were based on his belief that I-20 is a frequent channel of illegal narcotics, were reasonable. 817 F. Supp. 2d 918, 920 n.6 (S.D. Miss. 2011) (The arresting officer provided testimony that in his experience, drug traffickers on I-20 use the eastbound lanes and transport money – presumably the proceeds from successful drug transactions – in the westbound lanes.); *see also United States v. Mendez*, 181 F. App’x 754, 758 (10th Cir. 2006) (holding that the presence of a foreign license plate would more strongly support a finding of reasonable suspicion).

³ Section B to the commentary provides courts with the following non-exhaustive list of factors that may indicate that a defendant was in the business of laundering funds:

- (i) The defendant regularly engaged in laundering funds.
- (ii) The defendant engaged in laundering funds during an extended period of time.

Government's argument that this adjustment was warranted is based on incidents that, when viewed in their totality, demonstrate efforts made by Delgado in his *attempt* to be in the business of laundering funds. To support this enhancement, the PSR details, among other things, Delgado's participation in various meetings over several years which involved sales pitches to De La Concha and introductions to supposed drug lords. Also documented are trips to the Turks and Caicos Islands to set up a dummy corporation through which Delgado would launder money, and the large sums of money deposited into his girlfriend's bank account. The glaring omission from the PSR, however, is any occurrence of successful money laundering by Delgado.

This court has upheld a district court's finding that a defendant was in the business of laundering funds where he "regularly laundered money from numerous customers over the course of two years, and . . . made a substantial amount of money doing so." *United States v. Arledge*, 524 F. App'x 83, 88 (5th Cir. 2013) (unpublished). Whether the defendant "regularly engaged in laundering funds" is one of the non-exhaustive factors that the district court

-
- (iii) The defendant engaged in laundering funds from multiple sources.
 - (iv) The defendant generated a substantial amount of revenue in return for laundering funds.
 - (v) At the time the defendant committed the instant offense, the defendant had one or more prior convictions for an offense under 18 U.S.C. § 1956 or § 1957, or under 31 U.S.C. § 5313, § 5314, § 5316, § 5324 or § 5326, or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. A conviction taken into account under subsection (b)(2)(C) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
 - (vi) During the course of an undercover government investigation, the defendant made statements that the defendant engaged in any of the conduct described in subdivisions (i) through (iv).

may consider to determine whether the defendant is in the business of laundering funds. U.S.S.G. § 2S1.1, cmt. n.4(B)(i)-(vi).

In this case, Delgado did not regularly engage in laundering funds. Nor do the other factors support this enhancement: the evidence, for example, does not show that the alleged laundering was from “multiple sources” or that Delgado actually obtained “substantial revenue” from his efforts to launder. *See id.* In fact, at trial Pimentel testified that after a year of holding meetings with discussions of large sums of money and “promises of . . . being rich and powerful people . . . nothing had actually happened.” Delgado regularly *presented himself* as an individual in the business of laundering funds. But there is insufficient proof that Delgado was in fact in the “business” of laundering funds.

C. Two-level Enhancement Under § 3B1.3

The district court assessed a two-level enhancement pursuant to § 3B1.3, which provides an increase for “abuse of position of trust or use of special skill.” U.S.S.G. § 3B1.3. It erred by imposing this enhancement without performing the requisite two-step inquiry in *United States v. Ollison*, 555 F.3d 152 (5th Cir. 2009).

The district court’s § 3B1.3 ruling suggests that Delgado’s status as an attorney alone placed him in a position of trust which automatically assisted him significantly with laundering money. The PSR and the Addendum to the PSR, which the trial court adopted, state how Delgado drafted fraudulent court documents for Pimentel to present if stopped by law enforcement, and used the “Delgado and Associates” bank account to deposit funds used in a sting operation. The PSR notes the adjustment is warranted “for Abuse of Position of Trust or Use of a Special Skill,” but it fails to specify under which basis the two-level enhancement should be applied.

“The application of § 3B1.3 is a sophisticated factual determination reviewed under the clearly erroneous standard.” *United States v. Fisher*, 7 F.3d 69, 70 (5th Cir. 1993) (citation omitted).

The district court found that the initial *Ollison* inquiry, whether Delgado “occupied a position of trust,” produced an affirmative answer. *Ollison*, 555 F.3d at 165 (citing *United States v. Kay*, 513 F.3d 432, 459 (5th Cir. 2007)). The analysis should not have ended there. In *Ollison*, this court held that, following a determination that the defendant held a position of trust, “the court *must* proceed to ascertain the extent to which the defendant used that position to facilitate or conceal the offense.” *Id.* (citing *United States v. Reccko*, 151 F.3d 29, 31 (1st Cir. 1998) (emphasis added)); see § 3B1.3, cmt. n.1 (providing an example that the adjustment “applies in the case of an embezzlement of a client’s funds by an attorney serving as a guardian”).

In this case, the first prong in *Ollison* is met because attorneys inherently occupy a position of public trust. See *United States v. Harrington*, 114 F.3d 517, 519 (5th Cir. 1997). There also is record evidence supporting the point that, to some extent, Delgado used his position as an attorney to attempt to facilitate the commission or concealment of money laundering, as he prepared fraudulent court documents, used his client trust account, and used his law firm’s email account in connection with the offense.

Even though Delgado held a position of trust, the next question to be answered is whether his profession “significantly facilitate[d] the commission or concealment of the offense.” *Ollison*, 555 F.3d at 165. The “significant facilitation” standard asks the court to consider “whether the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of her job.” *United States v. Pruett*, 681 F.3d 232, 248 (5th Cir. 2012) (quoting *Kay*, 513 F.3d at 459 (quotation marks omitted)). In

Ollison, this court referenced a number of cases showing circumstances where a defendant's position of trust significantly facilitated the offense, thereby warranting § 3B1.3 enhancements. *Ollison*, 555 F.3d at 168 n.12 (citing, *inter alia*, *Harrington*, 114 F.3d at 519 (attorney subject to enhancement because his position helped him secure fraudulent affidavits and "shrouded" his actions "with a false presumption of regularity and legality"); *United States v. Dial*, 542 F.3d 1059, 1060 (5th Cir. 2008) (insurance adjuster subject to enhancement because he used his position to settle and pay fraudulent claims up to \$25,000); *United States v. Scurlock*, 52 F.3d 531, 541 (5th Cir. 1995) (correctional officer subject to enhancement because her position allowed her to interact with prisoners and smuggle money into the prison)).

Without a finding that Delgado used his position of trust to "significantly facilitate the commission or concealment" of money laundering, the § 3B1.3 enhancement cannot be imposed. *Ollison*, 555 F.3d at 165. On remand, the district court must consider the second step of the *Ollison* inquiry.

D. Four-level Enhancement Under § 3B1.1

The district court applied a four-level enhancement to Delgado's sentence pursuant to § 3B1.1, based on his role as an organizer or leader of a criminal activity. *See* § 3B1.1(a) (providing for an increase in the base offense level where "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive"). The language in § 3B1.3, however, provides that an enhancement under § 3B1.1 may not be imposed if the court also imposes a § 3B1.3 enhancement based solely on the defendant's use of a special skill. Specifically, § 3B1.3 provides:

If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under

(Aggravating Role); *if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under § 3B1.1* (Aggravating Role).

U.S.S.G. § 3B1.3 (emphasis added).

As discussed above, the PSR and the Addendum to the PSR are ambiguous regarding the basis for the § 3B1.3 adjustment. In overruling Delgado's objection to the enhancement under § 3B1.3, however, the district court stated that the enhancement was a two-level upward adjustment for abuse of a position of trust. Although no reasoning behind that enhancement was provided, it was read conjunctively with the "four levels for aggravated role." Therefore, we are satisfied that the court determined the enhancement appropriate on a finding of abuse of a position of trust, which, as previously discussed, was unwarranted. Given the evidence in this case, the four-level enhancement under § 3B1.1 is likely appropriate;⁴ however, the enhancement cannot be applied without first determining the proper application of the enhancement under § 3B1.3.

IV. Conclusion

For the foregoing reasons, we vacate Delgado's sentence and remand this case for resentencing.

VACATED and REMANDED.

⁴ Commentary to § 3B1.1 provides that "[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of *one or more* other participants." § 3B1.1, cmt. n.2 (emphasis added). There is ample evidence that Delgado exercised control and authority over Pimentel during the commission of an offense. He orchestrated the money laundering transactions in both Atlanta and Chicago, and directed Pimentel's actions in each. Pimentel also testified that Delgado planned Pimentel's trips to Turks and Caicos and instructed him about the individual with whom he should meet to create dummy corporations for laundering funds.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

May 26, 2015

Ms. Jeannette Clack
Western District of Texas, El Paso
United States District Court
525 Magoffin Avenue
Room 108
El Paso, TX 79901-0000

No. 14-50079 USA v. Marco Delgado
USDC No. 3:12-CR-2106-1

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

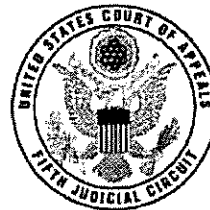
LYLE W. CAYCE, Clerk



By: _____
Shawn D. Henderson, Deputy Clerk
504-310-7668

cc:

Mr. Joseph H. Gay Jr.
Mr. Robert Joseph Perez



A True Copy
Certified order issued Mar 11, 2019

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-50079

D.C. Docket No. 3:12-CR-2106-1



A True Copy
Certified order issued Mar 11, 2019

Lyfe W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARCO ANTONIO DELGADO,

Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas, El Paso

Before JOLLY and DENNIS, Circuit Judges, and REEVES, District Judge.*

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

* District Judge of the Southern District of Mississippi, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50841
Summary Calendar



A True Copy
Certified order issued Feb 13, 2019

Styl W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Consolidated with 17-50040

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARCO ANTONIO DELGADO,

Defendant-Appellant

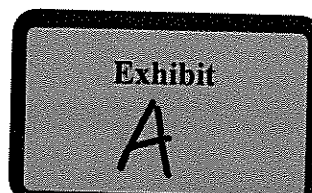
Appeals from the United States District Court
for the Western District of Texas
USDC No. 3:12-CR-2106-1

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:*

A jury convicted Marco Antonio Delgado of one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956. The district court sentenced Delgado to 240 months of imprisonment and three years of supervised release. This court vacated Delgado's sentence and remanded for resentencing. *See United States v. Delgado*, 608 F. App'x 230 (5th Cir. 2015).

* 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.



On remand, the district court recalculated the guidelines range and resentenced Delgado to 192 months of imprisonment, below the advisory range of 210 to 240 months. Delgado challenges his sentence on appeal.

As an initial matter, Tiffany Talamantez, who was appointed after the Federal Public Defender withdrew from representing Delgado, has filed a motion to withdraw as counsel. Delgado has filed an opposition to Talamantez's motion to withdraw, with an incorporated motion to proceed pro se on appeal. A panel of this court previously denied a request by Delgado to proceed pro se on appeal, and Delgado offers no compelling reason for the court to reconsider its decision. Delgado's contention that Talamantez has refused to assist his pursuit of various issues does not warrant relieving appointed counsel. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *United States v. Fields*, 483 F.3d 313, 351-53 (5th Cir. 2007). Similarly, counsel has not shown "that there is a conflict of interest or other most pressing circumstances or that the interests of justice otherwise require relief of counsel." *See FIFTH CIRCUIT PLAN FOR REPRESENTATION ON APPEAL UNDER THE CRIMINAL JUSTICE ACT* § 5(b); *see also* 18 U.S.C. § 3006A(c). Given that briefs have been filed on Delgado's behalf by both the FPD and Talamantez, and the Government has filed a responsive brief, the issues raised in the pending motions do not suggest the existence of a conflict that risks compromising Delgado's representation. *See Fields*, 483 F.3d at 350; *cf. United States v. Wagner*, 158 F.3d 901, 902-03 (5th Cir. 1998). Accordingly, the pending motions are DENIED.

In the briefs filed by the FPD and Talamantez, Delgado argues that the district court erred by concluding that he abused a position of trust in a manner that warranted a two-level increase to his offense level pursuant to U.S.S.G. § 3B1.3 (2013). He also argues that the district court erred by finding that he held an aggravating role in the offense that warranted a three-level increase

pursuant to U.S.S.G. § 3B1.1(b). Finally, he challenges the substantive reasonableness of his sentence.

This court reviews the district court's interpretation and application of the Guidelines de novo and its factual findings for clear error. *See United States v. Juarez-Duarte*, 513 F.3d 204, 208 (5th Cir. 2008). Regarding Delgado's challenge to the substantive reasonableness of his sentence, the district court's decision is reviewed under the abuse of discretion standard, and his below-guidelines sentence is presumed reasonable. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Murray*, 648 F.3d 251, 258 (5th Cir. 2011); *United States v. Campos-Maldonado*, 531 F.3d 337, 338 (5th Cir. 2008).

The Guidelines provide a two-level offense level increase "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." § 3B1.3. As an attorney, Delgado occupied a position of public trust. *See United States v. Harrington*, 114 F.3d 517, 519 (5th Cir. 1997). He used that position to significantly facilitate the commission of the offense, as he prepared false settlement documents for a co-conspirator to tender to law enforcement officials to explain the source of \$1 million dollars, used his law firm email address to transmit documents, used his law firm's bank account to wire money, provided misrepresentations regarding the number of employees in his law firm, appeared at an arbitration hearing in Houston, Texas, and arranged a meeting with a lawyer in the Turks and Caicos Islands. Thus, the district court did not clearly err in applying § 3B1.3. *See* § 3B1.3; *United States v. Roussel*, 705 F.3d 184, 199 (5th Cir. 2013); *United States v. Ollison*, 555 F.3d 152, 164-65 (5th Cir. 2009).

A three-level increase is warranted where “the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive.” § 3B1.1(b). When assessing whether an organization is “otherwise extensive,” all persons involved during the course of the entire offense are to be considered. § 3B1.1 (comment. (n.3)). While Delgado disputes the district court’s application of § 3B1.1(b) and contends that he did not exercise control over anyone other than co-conspirator Victor Pimentel, he does not refute the considerable facts set forth in the PSR that establish that the money laundering scheme was extensive and involved five or more participants. Accordingly, the district court’s application of § 3B1.1(b) was not clear error. *See* § 3B1.1(b) (comment. (n.3)); *United States v. Cabrera*, 288 F.3d 163, 173 (5th Cir. 2002).

With regard to Delgado’s challenge to the substantive reasonableness of his sentence, the district court provided detailed reasons for Delgado’s sentence, clearly explaining its rationale at length and in light of the sentencing considerations set forth in 18 U.S.C. § 3553(a). While Delgado relies upon a guidelines amendment to challenge the substantive reasonableness of his sentence, he also concedes that the guidelines amendment that he relies upon did not apply retroactively. Delgado’s challenge to substantive reasonableness is essentially a request that this court reweigh the § 3553(a) factors, which this court will not do. *See Gall*, 552 U.S. at 51. Given the significant deference that is due to the district court’s sentencing decision, Delgado has failed to rebut the presumption of reasonableness that applies to his below-guidelines sentence. *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009); *Campos-Maldonado*, 531 F.3d at 339.

No. 16-50841
c/w No. 17-50040

The judgment of the district court is AFFIRMED. All pending motions are DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 31, 2019

Ms. Jeannette Clack
Western District of Texas, El Paso
United States District Court
525 Magoffin Avenue
Room 108
El Paso, TX 79901-0000

No. 16-50841 USA v. Marco Delgado
No. 17-50040 USA v. Marco Delgado
 USDC No. 3:12-CR-2106-1
 USDC No. 3:12-CR-2106-1

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

Debbie T. Graham

By: _____
Debbie T. Graham, Deputy Clerk

cc:

Mr. Marco Antonio Delgado
Mr. Joseph H. Gay Jr.



Certified as a true copy and issued
as the mandate on Feb 14, 2019

Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

Exhibit

B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50841
Summary Calendar

D.C. Docket No. 3:12-CR-2106-1



A True Copy
Certified order issued Feb 13, 2019

Lyde W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARCO ANTONIO DELGADO,

Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas

Before JOLLY, COSTA, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50040
Summary Calendar

D.C. Docket No. 3:12-CR-2106-1



A True Copy
Certified order issued Feb 13, 2019

Lyfe W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARCO ANTONIO DELGADO,

Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas

Before JOLLY, COSTA, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50841
Summary Calendar



A True Copy
Certified order issued Feb 13, 2019

Steph W. Cuyler
Clerk, U.S. Court of Appeals, Fifth Circuit

Consolidated with 17-50040

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARCO ANTONIO DELGADO,

Defendant-Appellant

Appeals from the United States District Court
for the Western District of Texas
USDC No. 3:12-CR-2106-1

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:*

A jury convicted Marco Antonio Delgado of one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956. The district court sentenced Delgado to 240 months of imprisonment and three years of supervised release. This court vacated Delgado's sentence and remanded for resentencing. *See United States v. Delgado*, 608 F. App'x 230 (5th Cir. 2015).

* 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.

On remand, the district court recalculated the guidelines range and resentenced Delgado to 192 months of imprisonment, below the advisory range of 210 to 240 months. Delgado challenges his sentence on appeal.

As an initial matter, Tiffany Talamantez, who was appointed after the Federal Public Defender withdrew from representing Delgado, has filed a motion to withdraw as counsel. Delgado has filed an opposition to Talamantez's motion to withdraw, with an incorporated motion to proceed pro se on appeal. A panel of this court previously denied a request by Delgado to proceed pro se on appeal, and Delgado offers no compelling reason for the court to reconsider its decision. Delgado's contention that Talamantez has refused to assist his pursuit of various issues does not warrant relieving appointed counsel. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *United States v. Fields*, 483 F.3d 313, 351-53 (5th Cir. 2007). Similarly, counsel has not shown "that there is a conflict of interest or other most pressing circumstances or that the interests of justice otherwise require relief of counsel." *See FIFTH CIRCUIT PLAN FOR REPRESENTATION ON APPEAL UNDER THE CRIMINAL JUSTICE ACT* § 5(b); *see also* 18 U.S.C. § 3006A(c). Given that briefs have been filed on Delgado's behalf by both the FPD and Talamantez, and the Government has filed a responsive brief, the issues raised in the pending motions do not suggest the existence of a conflict that risks compromising Delgado's representation. *See Fields*, 483 F.3d at 350; *cf. United States v. Wagner*, 158 F.3d 901, 902-03 (5th Cir. 1998). Accordingly, the pending motions are DENIED.

In the briefs filed by the FPD and Talamantez, Delgado argues that the district court erred by concluding that he abused a position of trust in a manner that warranted a two-level increase to his offense level pursuant to U.S.S.G. § 3B1.3 (2013). He also argues that the district court erred by finding that he held an aggravating role in the offense that warranted a three-level increase

pursuant to U.S.S.G. § 3B1.1(b). Finally, he challenges the substantive reasonableness of his sentence.

This court reviews the district court's interpretation and application of the Guidelines de novo and its factual findings for clear error. *See United States v. Juarez-Duarte*, 513 F.3d 204, 208 (5th Cir. 2008). Regarding Delgado's challenge to the substantive reasonableness of his sentence, the district court's decision is reviewed under the abuse of discretion standard, and his below-guidelines sentence is presumed reasonable. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Murray*, 648 F.3d 251, 258 (5th Cir. 2011); *United States v. Campos-Maldonado*, 531 F.3d 337, 338 (5th Cir. 2008).

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A three-level increase is warranted where “the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive.” § 3B1.1(b). When assessing whether an organization is “otherwise extensive,” all persons involved during the course of the entire offense are to be considered. § 3B1.1 (comment. (n.3)). While Delgado disputes the district court’s application of § 3B1.1(b) and contends that he did not exercise control over anyone other than co-conspirator Victor Pimentel, he does not refute the considerable facts set forth in the PSR that establish that the money laundering scheme was extensive and involved five or more participants. Accordingly, the district court’s application of § 3B1.1(b) was not clear error. *See* § 3B1.1(b) (comment. (n.3)); *United States v. Cabrera*, 288 F.3d 163, 173 (5th Cir. 2002).

With regard to Delgado’s challenge to the substantive reasonableness of his sentence, the district court provided detailed reasons for Delgado’s sentence, clearly explaining its rationale at length and in light of the sentencing considerations set forth in 18 U.S.C. § 3553(a). While Delgado relies upon a guidelines amendment to challenge the substantive reasonableness of his sentence, he also concedes that the guidelines amendment that he relies upon did not apply retroactively. Delgado’s challenge to substantive reasonableness is essentially a request that this court reweigh the § 3553(a) factors, which this court will not do. *See Gall*, 552 U.S. at 51. Given the significant deference that is due to the district court’s sentencing decision, Delgado has failed to rebut the presumption of reasonableness that applies to his below-guidelines sentence. *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009); *Campos-Maldonado*, 531 F.3d at 339.

No. 16-50841
c/w No. 17-50040

The judgment of the district court is AFFIRMED. All pending motions are DENIED.

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

**IN THE MATTER OF
MARCO A. DELGADO
STATE BAR CARD NO. 00796001**

§
§
§

CAUSE NO. 54396

JUDGMENT OF DISBARMENT

On the 12th day of April 2019, the Board of Disciplinary Appeals considered the First Amended Motion for Entry of Judgment of Disbarment filed in the above case by Petitioner, Commission for Lawyer Discipline of the State Bar of Texas, against Respondent, Marco A. Delgado. The Board finds that:

- (1) It has continuing jurisdiction of this matter pursuant to Texas Rules of Disciplinary Procedure 8.05 (“TRDP”);
- (2) The United States Court of Appeals for the Fifth Circuit affirmed Respondent, Delgado’s, criminal conviction and issued a Mandate indicating that the decision was final on or about January 31, 2019;
- (3) Petitioner filed its Motion for Entry of Judgment of Disbarment on or about February 15, 2019, and served same on Respondent in accordance with TRDP 8.05;
- (4) Petitioner filed its First Amended Motion for Entry of Judgment of Disbarment on or about March 11, 2019, and served same on Respondent in accordance with TRDP 8.05;
- (5) Respondent’s conviction for the commission of an Intentional Crime as defined by TRDP 1.06(V) and for a Serious Crime as defined by TRDP 1.06(GG), for which he was sentenced in the United States District Court for the Western District of Texas, El Paso Division, has become final and is not subject to appeal;
- (6) Petitioner’s First Amended Motion for Entry of Judgment of Disbarment should be granted.

Interlocutory Suspension

On the 30th day of July 2014, the Board of Disciplinary Appeals entered an Interlocutory Order of Suspension, which included the following findings of fact and conclusions of law:

- (1) Respondent, Marco A. Delgado, State Bar Card Number 00796001, is licensed but not currently authorized to practice law in the State of Texas by the Supreme Court of Texas.
- (2) On or about September 5, 2012, Respondent was charged by Indictment with Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. §1956(h), in Cause No. EP-12-CR-2106, styled United States of America, Plaintiff, v. Marco Antonio Delgado, Defendant, in the United States District Court for the Western District of Texas, El Paso Division.
- (3) On or about January 24, 2014, a Judgment in a Criminal Case was entered in Case No. EP-12-CR-2106-DB, styled United States of America v. Marco Antonio Delgado, in the United States District Court for the Western District of Texas, El Paso Division, wherein Respondent was found guilty of Conspiracy to Commit Money Laundering and was committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months with credit for time served while in custody for this federal offense. Respondent was ordered upon release from imprisonment to be on supervised release for 3 years, ordered to pay an assessment of \$100.00 and a fine of \$25,000.00.
- (4) Respondent, Marco A. Delgado is the same person as the Marco Antonio Delgado who is the subject of the Judgment described above.
- (5) Respondent has appealed the criminal conviction.
- (6) Respondent was personally served with the Petition for Compulsory Discipline by a duly authorized private process server on June 8, 2014, and the affidavit of service was filed with BODA on July 11, 2014.
- (7) This Board has jurisdiction to hear and determine this matter. Tex. R. Disciplinary P. ("TRDP") 7.08(G);
- (8) Respondent, Marco A. Delgado, having been convicted of Conspiracy to Commit Money Laundering, has been convicted of an Intentional Crime as defined by TRDP 1.06(T).
- (9) Respondent has also been convicted of a Serious Crime as defined by TRDP 1.06(Z).

- (10) Having been found guilty and convicted of an Intentional and Serious Crime and having appealed such conviction, Respondent, Marco A. Delgado, should have his license to practice law in Texas suspended during the appeal of his criminal conviction. TRDP 8.04.
- (11) The Board retains jurisdiction to enter a final judgment in this matter when the criminal appeal is final.

Disbarment

The Board has determined that disbarment of the Respondent is appropriate. It is, therefore, accordingly, ORDERED, ADJUDGED, AND DECREED that Respondent, Marco A. Delgado, State Bar No. 00796001, be and he is hereby DISBARRED from the practice of law in the State of Texas, and his license to practice law in this state be and is hereby revoked.

It is further ORDERED, ADJUDGED and DECREED that Respondent, Marco A. Delgado, is hereafter permanently prohibited, effective immediately, from practicing law in Texas, holding himself out as an attorney at law, performing any legal service for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any representative capacity in any proceeding in any Texas court or before any Texas administrative body, or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney," "counselor," or "lawyer."

It is further ORDERED Respondent, Marco A. Delgado, shall immediately notify each of his current clients in writing of this disbarment. In addition to such notification, Respondent is ORDERED to return any files, papers, unearned monies and other property belonging to clients and former clients in the Respondent's possession to the respective clients or former clients or to another attorney at the client's or former client's request. Respondent is further ORDERED to file with the State Bar of Texas, Statewide Compliance Monitor, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) within thirty (30) days of the signing of this judgment

by the Board, an affidavit stating that all current clients have been notified of Respondent's disbarment and that all files, papers, monies and other property belonging to all clients and former clients have been returned as ordered herein.

It is further ORDERED Respondent, Marco A. Delgado, shall, on or before thirty (30) days from the signing of this judgment by the Board, notify in writing each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice of each and every court or tribunal in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing. Respondent is further ORDERED to file with the State Bar of Texas, Statewide Compliance Monitor, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) within thirty (30) days of the signing of this judgment by the Board, an affidavit stating that each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice has received written notice of the terms of this judgment.

It is further ORDERED that Respondent, Marco A. Delgado, if he has not already done so, immediately surrender his Texas law license and permanent State Bar Card to the Office of the Chief Disciplinary Counsel, Statewide Compliance Monitor, State Bar of Texas, P. O. Box 12487, Austin, Texas 78711, for transmittal to the Clerk of the Supreme Court of Texas.

It is further ORDERED that a certified copy of the Petition for Compulsory Discipline on file herein along with a copy of this Final Judgment of Disbarment be sent to the Chief Disciplinary Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

Signed this _____ day of _____ 2019.

Chair Presiding
BOARD OF DISCIPLINARY APPEALS