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

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No. 93-8363
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE GARCIA-TOVAREZ,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
(P-93-CR-7-2, 3 & 4)

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(May 12, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Jose Garcia-Tovarez (Garcia) was convicted by a jury of conspiracy to possess and possession of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 846 and

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

841(a)(1). Garcia does not appeal his conviction, but does appeal the sentence imposed by the district court. Specifically, Garcia assigns as sentencing error the district court's alleged failure either expressly to resolve the controverted factual matters or expressly to adopt the presentence report (PSR), thus purportedly violative of Fed. R. Crim. P. 32(c)(3)(D). Garcia complains in the alternative that, if we determine that the district court did adopt the PSR, that court's findings are not sufficiently clear to satisfy Rule 32. Finding no reversible error, however, we affirm the sentence assessed by the district court.

## I

## FACTS AND PROCEEDINGS

In a two-count indictment, the grand jury charged Garcia and two others with conspiracy to possess a quantity of marijuana with intent to distribute (count one) and possession of a quantity of marijuana with intent to distribute (count two). Garcia entered a plea of not guilty, and the case proceeded to trial before a jury which returned a verdict of guilty on both counts.

In the PSR, the probation officer calculated a combined base offense level of 20 under Guidelines § 2D1.1(a)(3), based on a quantity of 40-60 kilograms of marijuana. There were no adjustments; therefore, the total offense level was the same as the base levelSQ20SQand the criminal history category was one. The sentencing range for imprisonment under the guidelines was 33-41 months. The district court sentenced Garcia to the shortest prison term within the guidelines range, i.e., concurrent terms of

imprisonment of 33 months; plus three-year, concurrent terms of supervised release and a special assessment of $100. Proceeding pro se, Garcia filed a timely notice of appeal. See Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 101 L.Ed.2d 245.

II

ANALYSIS

Represented by counsel on appeal, Garcia asserts that his sentence should be vacated and the case remanded for resentencing due to the district court's alleged failure to meet the requirements of Fed. R. Crim. P. 32(c)(3)(D). Specifically, Garcia insists that the district court neither resolved the factual disputes affecting the sentence nor stated an intention not to rely on the controverted matters before imposing sentence. The three disputed factual matters affecting his sentence are: the quantity of marijuana involved in the offense; Garcia's role in the offense; and whether his conduct was a single act of aberrant behavior.

We will "uphold a sentence imposed under the Sentencing Guidelines so long as it is the result of a correct application of the Guidelines to factual findings which are not clearly erroneous." United States v. Mora, 994 F.2d 1129, 1141 (5th Cir.), cert. denied, 114 S.Ct. 417 (1993). "Where there are disputed facts material to the sentencing decision, the district court must cause the record to reflect its resolution thereof, particularly when the dispute is called to the court's attention." United States v. Sherbak, 950 F.2d 1095, 1098 (5th Cir. 1992). A claim that the district court failed to comply with the procedural

requirements of Rule 32 is a question of law and is reviewed de novo. See United States v. Otero, 868 F.2d 1412, 1414 (5th Cir. 1989); see also United States v. Velasquez, 748 F.2d 972, 974 (5th Cir. 1984) ("A sentence is imposed in an illegal manner if the court fails to comply with the procedural rules in imposing sentences."). Nevertheless, "Rule 32 does not require a catechismic regurgitation of each fact determined and each fact rejected when they are determinable from a PSR that the court has adopted by reference." Sherbak, 950 F.2d at 1099.

A. Adopting the PSR

Garcia contends that the district court did not expressly adopt the presentence report. He argues that "this Court would have to infer that the district court adopted the presentence report and that the district court, in implicitly adopting the report, implicitly found that the disputed facts in the presentence report were correct." According to Garcia, "[s]uch an attenuated resolution cannot satisfy the demands of Rule 32."

Garcia's assertion is contradicted by the record. In its judgment, the district court expressly adopted "the factual findings" of the presentence report. "This Court has held that a defendant is generally provided adequate notice of the district court's resolution of disputed facts when the court merely adopts the findings of the PSR." Mora, 994 F.2d at 1141.

Moreover, the district court implicitly adopted the findings of the PSR when it considered and expressly denied Garcia's objections to the PSR. Pertinent to this appeal, Garcia objected

to the PSR's conclusions regarding the quantity of marijuana involved, his role in the offense, and non-entitlement to a downward departure for aberrant behavior. The district court stated: "Your objections are noted. You are overruled. I make this observation. I have, I heard the evidence in this case and I don't ever second-guess juries, they heard it too. . . . [T]hey did find him guilty. So I am going to disallow the objections." The district court's denial of the objections coupled with that statement in the judgment are sufficient to comply with Rule 32. See Mora, 994 F.2d at 1141.

B. Adequacy of the PSR

Garcia argues that, even if the district court is deemed to have adopted the PSR, the findings in the PSR were not sufficiently clear to satisfy Rule 32. Effectively, his argument is a challenge to the findings of fact in the PSR.

We have "allowed the district court to make implicit findings [regarding any controverted facts in the PSR] by adopting the PSR. This adoption will operate to satisfy the mandates of Rule 32 when the findings in the PSR are so clear that the reviewing court is not left to `second-guess' the basis for the sentencing decision." United States v. Carreon, 11 F.3d 1225, 1231 (5th Cir. 1994) (footnote citations omitted). The district court's factual findings are reviewed for clear error. Mora, 994 F.2d at 1141.

Garcia contends that the probation officer's conclusion that the offense involved approximately 90 pounds of marijuana was incorrect. According to Garcia, the probation officer mistakenly

relied on the courtroom deputy's statement that the parties had stipulated at trial to a total weight of 90.2 pounds (41 kilograms). Garcia asserts that the deputy was wrong, that Garcia stipulated to the chain of custody and the fact that the substance was marijuana but not to the quantity of marijuana. Hence, he argues, the basis for the district court's sentencing decision is not clear.

Garcia also objected to the probation officer's calculation of an offense level of 20. He argues that the "actual quantity of marijuana involved in this offense was less than 40 kilograms, with the result that the proper offense level should be 18." And Garcia objected to the probation officer's assertion that the parties had stipulated to a quantity of 90.2 pounds of marijuana. As noted, he argued that there was no stipulation as to quantity.

The probation officer declined to revise the PSR because Garcia had "offered no information or evidence to support his assertion that the offense involved less than 40 kilograms of marijuana." Moreover, the probation officer commented that the quantity was taken from the proceeding sheet prepared by the courtroom deputy. The sheet contained information indicating that Garcia had stipulated to the fact that 90.2 pounds of marijuana were involved.

"Confronted with an objection to the findings in the PSR, the party seeking an adjustment in the sentence level must establish the factual predicate justifying the adjustment by a preponderance of relevant and sufficiently reliable evidence." United States v.

Elwood, 999 F.2d 814, 817 (5th Cir. 1993) (internal quotation and footnote citation omitted). In his objections to the PSR, Garcia made only conclusionary statements without factual support that the quantity calculation was incorrect. At sentencing, Garcia supported his argument with a sentencing memorandum and a copy of the chemist's report. Although the chemist's report lists the gross quantity of marijuana seized as 41731.2 grams (41.7 kilograms or 91.9 pounds), Garcia argued in the sentencing memorandum that the true weight of the marijuana was less than 40 kilograms.

Garcia reached this conclusion in the following manner: The report listed the amount of marijuana provided by the agents for testing at 832.4 grams and the quantity received by the lab for testing at 713.3 grams, producing a variance of 14.31%. Also, when the marijuana was reweighed after trial and allowances were made for packaging, the total weight was 40.062 kilograms. Garcia's contention was that the discrepancy showed that the results of weighing in the field were inaccurate. Applying the variance, he stated that the quantity should be 35.73 kilos if the amounts in the chemist's report are used, or 34.33 kilos if the results of the "reweigh" of the marijuana after trial are used.

The government contends that Garcia's comparison is inaccurate. The government insists that there is no evidence to establish whether the agent weighed the samples wrapped or unwrapped prior to submitting them to the chemist and suggests that the "variance in the weight of the samples could also be explained by the fact that the marijuana weighs less as it `dries out.'"

A Border Patrol agent testified at trial that the total weight of the marijuana was 90.2 pounds. On cross-examination, the agent stated the marijuana had been weighed twice: "once by the border patrol agents for their records and once by myself, which is the final weighing." The agent explained that the actual marijuana weighed "at maximum, a pound or two" less because of an allowance for the packaging and tape. The findings of fact in the PSR concerning the quantity of marijuana, as adopted by the district court, are sufficient for purposes of Rule 32 and are not clearly erroneous. See Mora, 994 F.2d at 1141.

Garcia's next contention concerning the adequacy of the PSR is that it did not contain adequate information to resolve the dispute over his role in the offense. Garcia quotes the probation officer's statement that he "was left without any reliable information upon which to base an adjustment for role in the offense," then artfully turns that statement into an argument that "the probation officer had no reliable information on which to evaluate a role-in-the-offense adjustment." He insists that he played only a minor role.

The guidelines define a minor participant as one who is "less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2(b), comment. (n.4). "The commentary to § 3B1.2 provides that the determination of a defendant's status as a minor participant is `heavily dependent upon the facts of the particular case.'" United States v. Melton, 930 F.2d 1096, 1099 (5th Cir. 1991). It is intended that the

adjustment for minor role status will be used infrequently. United States v. Maseratti, 1 F.3d 330, 341 (5th Cir. 1993), cert. denied, 114 S.Ct. 1096 and ____ S.Ct. ____, 1993 WL 570539 (U.S., Apr. 18, 1994) (No. 93-7706).

The PSR indicated that Garcia was recruited in Mexico to haul a load of marijuana in Texas for $1,500. Along with three or four other men, he unloaded marijuana from a truck at a designated location and carried the marijuana on foot to a bridge in Alpine, Texas. Even if Garcia's role was that of a "mule," he is not necessarily entitled to minor status. United States v. Pofahl, 990 F.2d 1456, 1485 (5th Cir.), cert. denied, 114 S.Ct. 266 and 114 S.Ct. 560 (1993). On appeal, Garcia points to no other facts to justify a minor role adjustment. Under these circumstances the district court was not clearly erroneous in determining that Garcia had failed to show that he is entitled to the adjustment; the findings are sufficient for the purposes of Rule 32.

In his final complaint about the adequacy of the PSR Garcia asserts that "the report contained no information that the court could have adopted to find that Garcia's conduct was not a single act of aberrant behavior." He contends that the report showed that he had no criminal history and that he had a pregnant wife and three children. He argues that, "[b]ecause the facts highlighted by Garcia might have supported a finding that his conduct was a single act of aberrant behavior and because no information in the presentence report supported, let alone clearly supported, a finding that it was not a single aberrant act," the district court

did not adequately resolve the matter by adopting the PSR.

There is no guidelines section that specifically addresses aberrant behavior. In the section on Probation and Split Sentences that appears in the Introduction to the guidelines, the commission stated that it had "not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures." U.S.S.G. Ch. 1, Pt. A, intro. comment. 4(d). We have stated:

> Although the Guidelines do not define "aberrant behavior", we are most certain that it requires more than an act which is merely a first offense or "out of character" for the defendant. Accord United States v. Carey, 895 F.2d 318, 325 (7th Cir. 1990). Instead, those considerations are taken into account in calculating the defendant's criminal history category. U.S.S.G. Ch. 4, Pt A, intro. comment. & § 4A1.1.

United States v. Williams, 974 F.2d 25, 26 (5th Cir.), cert. denied, 113 S.Ct. 1320 (1993). We quoted the following statement from the Seventh Circuit:

> "there must be some element of abnormal or exceptional behavior. . . . A single act of aberrant behavior . . . generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable."

Id. at 26-27 (quoting Carey, 895 F.2d at 325). The district court's determinations in this regard are reviewed for clear error. Id. at 27.

Garcia's acts were neither spontaneous nor without thought and do not qualify as aberrant behavior. The findings of the district court are not clearly erroneous. Id. at 27.

We conclude that Garcia has not established a factual predicate to justify an aberrant behavior adjustment by a preponderance of relevant and sufficiently reliable evidence. See Elwood, 999 F.2d at 817. It is not our role to "second-guess" the basis for the district court's sentencing decision. Carreon, 11 F.3d at 1231.

For the foregoing reasons, Garcia's sentence is, in all respects,

AFFIRMED.