

APPENDIX A

United States v. Cruz-Colocho,

No. 17-50298, unpub. op.

(5th Cir. March 29, 2018)

716 Fed.Appx. 381 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee

v.

Victor Armando **CRUZ-COLOCHO**,

Defendant-Appellant

No. 17-50298

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Summary Calendar

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Filed March 29, 2018

Appeal from the United States District Court for the Western District of Texas, USDC No. 2:16-CR-101-1

Attorneys and Law Firms

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Laura G. Greenberg, Assistant Federal Public Defender, Maureen Scott Franco, Federal Public Defender, Federal Public Defender's Office, Western District of Texas, San Antonio, TX, for Defendant-Appellant

Before STEWART, Chief Judge, and ELROD and HIGGINSON, Circuit Judges.

Opinion

PER CURIAM: *

Victor Armando **Cruz-Colocho** appeals the above-guidelines 60-month sentence he received following his guilty plea conviction for illegal reentry. He renews his argument that the statutory maximum sentences applicable under 8 U.S.C. § 1326(b) do not apply in his case because his indictment did not allege any prior felony conviction, citing *Appendi v. New Jersey*, 530 U.S. 466,

120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). As he concedes, however, the argument is foreclosed. See *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007); see also *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014).

For the first time on appeal, Cruz contends that the district court erred in assessing six criminal history points for his 2005 Texas convictions for aggravated robbery and cocaine possession. His failure to object to the alleged error in his criminal history score results in review for plain error only. See *United States v. Soza*, 874 F.3d 884, 889 (5th Cir. 2017). To prevail on plain error review, Cruz must demonstrate (1) a forfeited error, (2) that is clear or obvious, rather than subject to reasonable *382 dispute, and (3) that affects his substantial rights. See *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). If he satisfies the first three requirements, this court may, in its discretion, remedy the error if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks and citation omitted).

According to Cruz, the PSR shows that the sentences for his aggravated robbery and cocaine possession convictions were imposed on the same day, the offenses were not separated by an intervening arrest, and they should have been treated as a single sentence under U.S.S.G. § 4A1.2(a)(2). He acknowledges that the PSR lists the arrest date for his aggravated robbery as April 12, 2005, and lists the arrest date for his cocaine possession as April 21, 2005, but he urges that the factual recitation regarding his cocaine possession offense demonstrates that he was in fact arrested for both offenses on April 21, 2005.

Even if the issue were reviewable, Cruz has failed to carry his burden of demonstrating clear or obvious error. See *Puckett*, 556 U.S. at 135, 129 S.Ct. 1423. Cruz has not attempted to supplement the record with his arrest records, and he has not presented any evidence to show that his aggravated robbery and cocaine possession offenses were separated by an intervening arrest. He has thus demonstrated only a potential discrepancy between the date listed for his arrest for aggravated robbery and the factual recitation of events surrounding his arrest for cocaine possession. The question is subject to reasonable

dispute and therefore does not establish clear or obvious error. See [Puckett](#), 556 U.S. at 135, 129 S.Ct. 1423.

All Citations

Accordingly, the district court's judgment is 716 Fed.Appx. 381 (Mem) AFFIRMED.

Footnotes

- * 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.

APPENDIX B

U.S.S.G. §2L1.2



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 L. Offenses Involving Immigration, Naturalization, and Passports](#)

[1. Immigration](#)

USSG, § [2L1.2](#), 18 U.S.C.A.

§ [2L1.2](#). Unlawfully Entering or Remaining in the United States

[Currentness](#)

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining--

(A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or

(B) two or more convictions for misdemeanors under [8 U.S.C. § 1325\(a\)](#), increase by 2 levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained--

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

(3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in--

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

CREDIT(S)

(Effective November 1, 1987; amended effective January 15, 1988; November 1, 1989; November 1, 1991; November 1, 1995; November 1, 1997; November 1, 2001; November 1, 2002; November 1, 2003; November 1, 2007; November 1, 2008; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2014; November 1, 2015; November 1, 2016.)

PROPOSED AMENDMENT OF SUBSEC. (B)(2)

<Effective November 1, 2018, absent contrary Congressional action, subsec. (b)(2) is amended to read as follows:>

<**(2)** (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in-->

<**(A)** a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;>

<**(B)** a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;>

<**(C)** a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;>

<**(D)** a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or>

<**(E)** three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.>