

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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ALFREDO MARTINEZ-REY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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Northern District of Texas

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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United States Court of Appeals  
Fifth Circuit

**FILED**

July 11, 2018

Lyle W. Cayce  
Clerk

No. 17-10978  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ALFREDO MARTINEZ-REY,

Defendant - Appellant

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:17-CR-47-1

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Before BARKSDALE, OWEN, and ENGELHARDT, Circuit Judges.

PER CURIAM:\*

Alfredo Martinez-Rey challenges his above-Sentencing Guidelines sentence of 120-months imprisonment, imposed following his guilty-plea conviction for having been found unlawfully in the United States following deportation, in violation of 18 U.S.C. §§ 1326(a) and (b)(1). He claims the sentence was substantively unreasonable and violates due process.

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\* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 48–51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g., United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

In support of his substantive-reasonableness challenge, Martinez asserts the court gave too much weight to his criminal history, which, he contends, overstated the seriousness of his “relatively minor” convictions. (Among other offenses, he has been removed several times.) Additionally, he contends the court gave no weight to the following factors: the double-counting of some of his prior convictions when calculating his offense level and criminal history; the sentencing range that would have applied to him under the 2015 version of Guideline § 2L1.2; and his reason for unlawfully reentering the country.

There is no indication, however, that the court refused to account for a factor that should have received significant weight, gave significant weight to any improper factor, or made a clear error of judgment in balancing the relevant factors. *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006). Further, the court tied its reasons to specific facts and particular 18 U.S.C. § 3553(a) sentencing factors sufficient to justify the variance. *Gall*, 552 U.S. at 49–53. In essence, Martinez is asking this court to reweigh the § 3553(a) sentencing factors, which is not within the scope of our review. *Id.* at 51.

For the first time on appeal, Martinez challenges the statutory maximum sentences applicable under 8 U.S.C. § 1326(b)(1) as inapplicable because his indictment did not allege any prior felony conviction, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013). As he concedes, however, the issue is foreclosed; it is, instead, presented to preserve it for possible further review. *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Pineda-Arellano*, 492 F.3d 624, 625 (5th Cir. 2007); *Almendarez-Torres v. United States*, 523 U.S. 224, 239–47 (1998).

AFFIRMED.

## APPENDIX B

**United States District Court**Northern District of Texas  
Fort Worth Division

UNITED STATES OF AMERICA

§

v.

§

Case Number: 4:17-CR-047-A(01)

ALFREDO MARTINEZ-REY

§

CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy \_\_\_\_\_

AUG 18 2017

**JUDGMENT IN A CRIMINAL CASE**

The government was represented by Assistant United States Attorney J. Michael Worley. The defendant, ALFREDO MARTINEZ-REY, was represented by Federal Public Defender through Assistant Federal Public Defender Leandro Delgado.

The defendant pleaded guilty on May 5, 2017 to the one count indictment filed on April 4, 2017. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title &amp; Section / Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
8 U.S.C. §§ 1326(a) and (b)(1) Illegal Reentry After Deportation	February 14, 2017	1

As pronounced and imposed on August 18, 2017, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of \$100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, 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, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

**IMPRISONMENT**

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months. The sentence of 120 months shall run consecutively to any sentence imposed as to Case No. TR2006-167078, for the offenses of Driving Under the Influence of Intoxicating Liquor-Actual Physical Control (Count 1) and Driving Under the Influence With BAC of .08 or More (Count 2), in the West Mesa Justice Court in Mesa, Arizona and to any probation revocation sentences in Case Nos. CR2006-143844 and CR2007-13472 in the Maricopa County Superior Court in Phoenix, Arizona.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years. The court imposed a term of supervised release because it will provide an added measure of deterrence and protection based on the facts and characteristics of the case.

Pursuant to 18 U.S.C. §3583(d), as a condition of supervised release, upon the completion of the sentence of imprisonment the defendant shall be surrendered by the Federal Bureau of Prisons to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. As a further condition of supervised release, if ordered deported the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of the term of supervised release, the defendant shall comply with the following conditions:

1. The defendant shall not possess illegal controlled substances.
2. The defendant shall not commit another federal, state, or local crime.
3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.
4. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.
5. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least \$25 per month.
6. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.

3. The defendant shall provide to the U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.
5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.
7. The defendant shall support his dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.
9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. 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 U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. 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.
16. 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.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

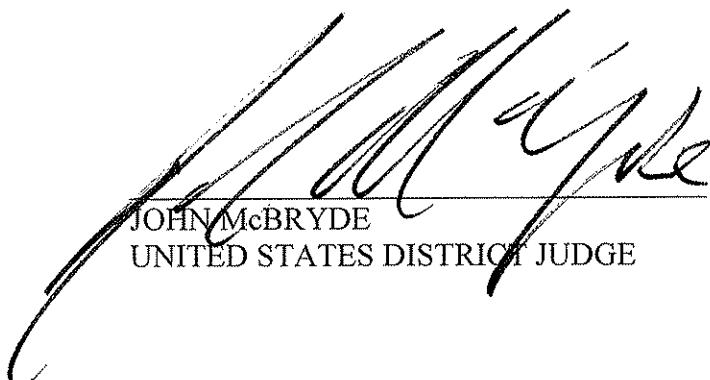
FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 18<sup>th</sup> day of August, 2017.



JOHN McBRYDE  
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

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Defendant delivered on \_\_\_\_\_, 2017 to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

United States Marshal for the  
Northern District of Texas

By \_\_\_\_\_  
Deputy United States Marshal