

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE NINO-CARREON,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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Appendix B Judgment and Opinion of Fifth Circuit

APPENDIX A

United States District Court

Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA

§

v.

§

JOSE NINO-CARREON

§

NOV 17 2017

CLERK, U.S. DISTRICT COURT

By _____

Deputy

Case Number: 4:17-CR-097-A(01)

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Christopher Wolfe. The defendant, JOSE NINO-CARREON, was represented by Federal Public Defender through Assistant Federal Public Defender William Hermesmeyer.

The defendant pleaded guilty on August 4, 2017 to the one count indictment filed on June 6, 2017. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title & 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	August 17, 2016	1

As pronounced and imposed on November 17, 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 50 months. The sentence of 50 months shall run consecutively to any sentences imposed in Case Nos. CM-2001-00067, in Lincoln County District Court, in Chandler, Oklahoma, and CF-2001-01439, in Cleveland County District Court, in Norman, Oklahoma, which are unrelated to the instant offense.

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 circumstances of this 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 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).

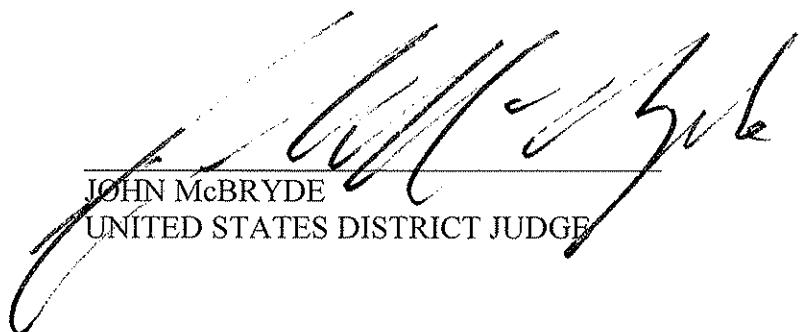
FINE

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 17th day of November, 2017.



JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

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

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

APPENDIX B

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

No. 17-11433

United States Court of Appeals
Fifth Circuit

FILED

December 3, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE NINO-CARREON,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Texas

Before SMITH, BARKSDALE, and HO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Jose Nino-Carreon pleaded guilty of illegal reentry after removal and was sentenced to fifty months' imprisonment. He appeals his sentence, asserting that the district court plainly erred in assessing criminal history points for three convictions occurring in 2003 and 2004. He maintains that the court determined that the earliest date of his offense and relevant conduct was August 17, 2016, the date he was apprehended by immigration authorities, and

consequently, that the earlier convictions should not have been scored because the sentence in each was imposed more than ten years before that date. *See U.S.S.G. § 4A1.2(e)(2)*. Though Nino-Carreon is correct that the district court erred in scoring those three convictions, he has not demonstrated that the error affected his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). Therefore, we affirm.

I.

We review this issue for plain error because Nino-Carreon failed to object to the computation of his criminal history score in the district court. *See United States v. Carlile*, 884 F.3d 554, 556 (5th Cir. 2018). Nino-Carreon must satisfy three hurdles before this court may exercise its discretion to correct plain error. First, “there must be an error or defect . . . that has not been intentionally relinquished or abandoned . . . by the appellant.” *Puckett*, 556 U.S. at 135. Second, “the legal error must be clear or obvious, rather than subject to reasonable dispute.” *Id.* Third, “the error must have affected the appellant’s substantial rights.” *Id.* If Nino-Carreon satisfies these three conditions, “the court of appeals should exercise its discretion to correct the forfeited error if the error ‘seriously affects the fairness, integrity or public reputation of judicial proceedings.’” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

II.

As Nino-Carreon acknowledges, his criminal history category of VI remains unchanged so long as the district court correctly assessed a criminal history point for one of the three contested convictions. The most recent sentencing date is December 1, 2004. Therefore, he must have entered the United States on or before December 1, 2014, when the ten-year limitations period expired, for the district court not to have erred.

Nino-Carreon contends that this court must use the date he was apprehended in the United States, August 17, 2016, as his earliest offense date. But “when determining whether a prior conviction meets the time-period requirement for assessing criminal history points under § 4A1.2(e), the triggering date is that of the defendant’s illegal reentry, not the date on which the defendant was found by immigration authorities in the United States.” *United States v. Ponce*, 896 F.3d 726, 728 (5th Cir. 2018). Thus, Nino-Carreon’s assertion is meritless.

Nevertheless, contrary to the government’s claims, the record does not support a finding that Nino-Carreon reentered the United States between his December 30, 2012, deportation and December 1, 2014. The Presentence Report (“PSR”) states that Nino-Carreon (1) worked as a roofer in Texas from 2015 to 2016 and (2) was in a relationship with his girlfriend, an alleged U.S. resident who lived in Fort Worth, “for two years” before his August 29, 2017, PSR interview. Consequently, nothing in the PSR points to a date of reentry earlier than 2015. The government’s assertion that the probation officer “implicitly found” that the December 1, 2004, sentence occurred “within ten years of [Nino-Carreon’s] most recent illegal reentry,” contrary to the PSR’s explicit statement that his “earliest offense date, including relevant conduct[,] is August 17, 2016,” is unavailing. Therefore, Nino-Carreon has satisfied the first two plain-error prongs: There was an error that was not intentionally relinquished or abandoned, and the error was clear based on the evidence contained in the PSR.

To satisfy the third prong, “the defendant ordinarily must ‘show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.’” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904–05 (2018) (quoting *Molina-Martinez*, 136 S. Ct. at 1343). “When a defendant is

sentenced under an incorrect Guidelines range—whether or not the defendant’s ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.” *Molina-Martinez*, 136 S. Ct. at 1345. But “[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist.” *Id.* at 1346. For example, “[j]udges may find that some cases merit a detailed explanation of the reasons the selected sentence is appropriate [and] [t]hat explanation could make it clear that the judge based the sentence . . . on factors independent of the Guidelines.” *Id.* at 1346–47.

That is the case here. There is no reasonable probability that Nino-Carreon’s sentence would have been different had the district court used the correct range. Even before the sentencing hearing, the court expressed a “tentative conclusion that the defendant should receive a sentence of imprisonment significantly above the top of the advisory guideline range.” During the hearing, the court emphasized Nino-Carreon’s criminal history through a comprehensive recitation filling six transcript pages. The court devoted particular attention to Nino-Carreon’s two 2016 assaults resulting in bodily injury on a family member, describing in detail what he had done. The court added, “And I have concluded a sentence of imprisonment of 50 months is absolutely necessary to satisfy those [sentencing] factors.” In its statement of reasons, the court specified that those factors were “the history and characteristics of the defendant, the nature and circumstances of the offense, . . . [the need for the sentence imposed to reflect] the seriousness of the offense[,] to promote respect for the law, and [to] protect the public from further crimes by the defendant.”

The district court’s statements thus substantiate that there is no reasonable probability that Nino-Carreon’s sentence would have been different had

the court used the correct guideline range of 21 to 27 months instead of 24 to 30 months. The court provided “a detailed explanation of the reasons the selected sentence is appropriate” and made “clear that the [court] based the sentence . . . on factors independent of the Guidelines.” *Id.* Consequently, Nino-Carreon has not demonstrated that the error affected his substantial rights, and we have no need to address the fourth prong.

The judgment of sentence is AFFIRMED.