

No. 19-

IN THE
Supreme Court of the United States

ERBEY ALANIS BOTELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Consolidated With

ERBEY BOTELLO-ALANIS, ALSO KNOWN AS JAVIER GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

APPENDIX VOLUME

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20225
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 1, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ERBEY ALANIS BOTELLO,

Defendant-Appellant

Consolidated with No. 18-20226

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ERBEY BOTELLO-ALANIS, also known as Javier Garcia,

Defendant-Appellant

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:11-CR-870-8
USDC No. 4:17-CR-719-1

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:*

Erbey Botello-Alanis, who had been convicted previously of possession with intent to distribute 100 kilograms or more of marijuana, pleaded true to violating the terms of his supervised release by reentering the United States illegally. He also pleaded guilty to the illegal reentry offense. The district court sentenced him to 37 months of imprisonment and a three-year term of supervised release on the illegal reentry offense and a consecutive term of eight months of imprisonment on the supervised release revocation. Botello-Alanis appeals the revocation of his supervised release and the sentence imposed in the illegal reentry case.

Botello-Alanis argues that the district court erroneously failed to verify that he knowingly and voluntarily waived his Federal Rule of Criminal Procedure 32.1 rights and asks that we extend the holding of *Boykin v. Alabama*, 395 U.S. 238 (1969), to revocation hearings. Botello-Alanis also argues that the district court did not specifically obtain a plea of true from him at the revocation hearing and that such an omission violated his due process rights.

Because Botello-Alanis did not raise these objections at the revocation hearing, we review for plain error only. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). To succeed under this standard, Botello-Alanis must show a forfeited and clear or obvious error that affects his substantial rights. *See id.* If he makes this showing, we have the discretion to correct the error if it

* 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.

seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.*

We have not addressed the issue whether *Boykin* is applicable to supervised release revocation hearings. Given the lack of controlling authority in support of Botello-Alanis's argument and the contrary jurisprudence from other circuits, any error by the district court with regard to failing to ascertain the knowing and voluntary nature of the plea was not clear or obvious and, thus, does not meet the plain error standard. *See United States v. Salinas*, 480 F.3d 750, 759 (5th Cir. 2007). In addition, the record belies Botello-Alanis's claim that the district court did not elicit a plea of true at the revocation hearing.

Botello-Alanis also argues that the within-guidelines sentence imposed by the district court in the illegal reentry case was substantively unreasonable. He explains that he came to the United States to support his children and to escape drug cartels. Botello-Alanis claims that the Government and the district court ignored these facts and placed too much weight on his criminal history. He also asserts that his previous sentence reduction should not have been a basis for imposing a lengthy sentence in the instant case. Because Botello-Alanis did not object to the substantive reasonableness of his sentence at the time it was imposed, we review for plain error only. *See Puckett*, 556 U.S. at 135.

A sentence within or below a properly calculated guidelines range is entitled to a rebuttable presumption of reasonableness. *United States v. Simpson*, 796 F.3d 548, 557 (5th Cir. 2015). The presumption may be rebutted by a showing that the sentence "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant

or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *Id.* at 558 (internal quotation marks and citation omitted).

The record in the instant case demonstrates that the district court made an individualized assessment to determine whether a sentence within the guidelines range was sufficient but not greater than necessary to achieve the goals of 18 U.S.C. § 3553(a). Botello-Alanis has not shown that the district court, when imposing sentence, failed to consider a significant factor, considered an improper factor, or made a clear error of judgment in balancing the relevant factors. *See Simpson*, 796 F.3d at 557-58. Therefore, Botello-Alanis has not shown any error, plain or otherwise, with respect to the substantive reasonableness of his sentence. *See Puckett*, 556 U.S. at 135.

The judgments of the district court are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in HoustonUNITED STATES OF AMERICA
v.
ERBEY ALANIS BOTELLO

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 4:11CR00870-008
USM NUMBER: 17436-379 See Additional Aliases.Gerardo S. Montalvo
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 on February 14, 2013.

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2	Possession with intent to distribute 100 kilograms or more of marijuana, aiding and abetting	11/15/2011	1

 See Additional Counts of Conviction.

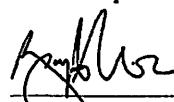
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the .

It is ordered that the defendant must 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 must notify the court and United States attorney of material changes in economic circumstances.

June 14, 2013
Date of Imposition of Judgment



Signature of Judge

GRAY H. MILLER
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

June 20, 2013

Date

18-20225.26 CJH MRO

DEFENDANT: ERBEY ALANIS BOTELLO
CASE NUMBER: 4:11CR00870-008

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 51 months.

This term consists of FIFTY-ONE (51) MONTHS as to Count 1.

See Additional Imprisonment Terms.

The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to FCI Three Rivers, as possible.

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

The defendant shall surrender to the United States Marshal for this district:
 at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

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 UNITED STATES MARSHAL

DEFENDANT: ERBEY ALANIS BOTELLO
CASE NUMBER: 4:11CR00870-008

Judgment -- Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 4 years.
This term consists of FOUR (4) YEARS as to Count 1.

See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. 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 from imprisonment and at least two periodic drug tests thereafter, as determined by the court. (for offenses committed on or after September 13, 1994)

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state registration in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable)

The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

See Special Conditions of Supervision.

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 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 responsibilities;
- 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;
- 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; and
- 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.

DEFENDANT: ERBEY ALANIS BOTELLO
CASE NUMBER: 4:11CR00870-008

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SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation officer reactivates automatically upon the defendant's reporting.

DEFENDANT: ERBEY ALANIS BOTELLO
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00		

- See Additional Terms for Criminal Monetary Penalties.
- The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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 below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

- See Additional Restitution Payees.

TOTALS	<u>\$0.00</u>	<u>\$0.00</u>
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- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:
- Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* 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.

DEFENDANT: ERBEY ALANIS BOTELLO
CASE NUMBER: 4:11CR00870-008

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$100.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
Attn: Finance
P.O. Box 61010
Houston, TX 77208

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

See Additional Defendants and Co-Defendants Held Joint and Several.
 The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:
 See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs. 18-20225.31