

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

JESUS RIOS-GARZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the
Northern District of Texas

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10899
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 7, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

JESUS RIOS-GARZA,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas
No. 5:18-CR-21-1

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:*

Raising two claims, Jesus Rios-Garza challenges the above-guidelines

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

sentence of forty months and the three-year supervised release term that he received for illegally reentering the United States after deportation. First, he contends that the prison term is substantively unreasonable. Second, he avers that the prison and supervised release terms violate due process.

In support of his substantive-reasonableness challenge, Rios-Garza maintains that his sentence is shockingly high, greater than necessary to achieve the sentencing goals in 18 U.S.C. § 3553(a), and represents a clear error of judgment in balancing the § 3553(a) factors. In particular, he reasons as follows: The court failed to account for the fact that all of his DWI offenses were more than ten years old; one of them did not result in a conviction; his drug-trafficking conviction was seven years old; he had one deportation; and this criminal history did not warrant an upward variance.

There is no indication that the district court failed to account for a factor that should have received significant weight, gave significant weight to any improper factor, or clearly erred in balancing the sentencing factors. *See United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006). The court adopted the presentence report without objection and considered Rios-Garza's expression of remorse. The court then tied its reasons for imposing an above-guidelines sentence to specific facts, including Rios-Garza's deportation and criminal history, and to particular § 3553(a) sentencing factors that are sufficient to justify the variance. *See Gall v. United States*, 552 U.S. 38, 51 (2007). In essence, Rios-Garza is asking us to reweigh the § 3553(a) sentencing factors, which is not within the scope of our review. *See id.* Thus, the district court did not abuse its sentencing discretion. *See id.*; *United States v. McElwee*, 646 F.3d 328, 344–45 (5th Cir. 2011).

Regarding Rios-Garza's due process claim, he cites *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), in

support of his theory that the statutory maximum sentences of § 1326(b)(1) do not apply because his indictment did not allege a prior felony conviction. As Rios-Garza correctly concedes, that issue is foreclosed. *See Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998); *see also United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007).

The judgment is AFFIRMED.

APPENDIX B

~~United States District Court~~

Northern District of Texas
Lubbock Division

UNITED STATES OF AMERICA

v.

JESUS RIOS-GARZA
Defendant.

Case Number: 5:18-CR-00021-C(01)
USM No. 56864-177

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JESUS RIOS-GARZA, was represented by David E. Sloan.

The defendant pleaded guilty to count 1 of the indictment filed February 14, 2018. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
8 U.S.C § 1326 and 6 U.S.C. §§ 202(3), 202(4), and 557	Illegal Re-entry After Deportation	02/07/2018	1

As pronounced on July 6, 2018, the defendant is sentenced as provided in pages 1 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00, for count 1 of the indictment, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further 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 change in the defendant's economic circumstances.

Signed this the 6th day of July, 2018.



SENIOR DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

DEFENDANT: JESUS RIOS-GARZA
CASE NUMBER: 5:18-CR-00021-C(01)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 40 months as to count 1.

The defendant shall remain in the custody of the U.S. Marshal Service.

The Court recommends incarceration at FCI Big Spring, Texas.

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: JESUS RIOS-GARZA
CASE NUMBER: 5:18-CR-00021-C(01)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.

The defendant shall report to the U.S. Probation Officer in a manner and frequency directed by the Court or Probation Officer in the district to which the defendant is released from the custody of the Federal Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or entry.

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

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

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 directed by the probation officer.

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.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
- ☐ The defendant shall participate in an approved program for domestic violence.
- ☐ The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD 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 in a manner and frequency directed by the court or probation officer.
- 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 by 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.
- 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: JESUS RIOS-GARZA
CASE NUMBER: 5:18-CR-00021-C(01)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not illegally re-enter the United States, if deported, removed, or allowed voluntary departure.
2. The defendant shall abstain from the use of alcohol and all other intoxicants during the term of supervision.
3. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$25.00 per month