

No. __ - _____

IN THE SUPREME COURT OF THE UNITED STATES

EMETERIO ESPINO RAMIREZ,

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. 18-10773

United States Court of Appeals
Fifth Circuit

FILED

July 9, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

EMETERIO ESPINO RAMIREZ,

Defendant – Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CR-598-1

Before KING, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Emeterio Espino Ramirez, who pleaded guilty to illegal re-entry in violation of 18 U.S.C. § 1326, appeals his sentence consisting of 37 months of imprisonment and three years of supervised release. We AFFIRM.

I.

Ramirez pleaded guilty to one count of illegal re-entry. The presentence report (PSR) recommended an imprisonment range of 30 to 37 months. The

* Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

No. 18-10773

PSR also noted that, under the Sentencing Guidelines, “the Court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.” U.S.S.G. § 5D1.1(c).

At sentencing, Ramirez argued that “there [was] no reason to vary from [the] Guideline[s].” Ramirez contended that “a Guidelines sentence is appropriate in this case” because although he had other prior re-entries, “the Guidelines has taken that into account.” The government “ask[ed] for a high end of the Guideline range” because Ramirez had seven prior re-entries and committed crimes repeatedly. The government emphasized that the high-end sentence would be “to deter him” and to reflect that fact that “he ha[d] not [been] deterred.” The district court “adopt[ed] the factual contents of the presentence report as [its] factual determination.” The district court stated that it was “tempting to vary upwards” but nonetheless concluded that “the Guidelines here are adequate” and that the “high end of the range [was] appropriate.”¹ The district court sentenced Ramirez to 37 months of imprisonment and three years of supervised release. The district court’s written statement of reasons further provided that “the Court considered the advisory guidelines . . . as well as statutory concerns listed in 18 U.S.C. [§] 3553(a).” Ramirez timely filed a notice of appeal.

¹ The PSR listed the following factors that may warrant departure:

[Ramirez’s] immigration and criminal history show a pattern of disregard for federal law as he continue[d] to illegally reenter the United States, despite a conviction for Illegal Entry, and a conviction for Illegal Reentry to the United States, and his currently being under a three-year term of supervised release. As such, his perpetual criminal behavior without deterrence indicates likelihood he will continue this established pattern of illegally reentering the United States in the future.

No. 18-10773

II.

Because Ramirez failed to object to his sentence at the district court, we review for plain error. *See United States v. Cabello*, 916 F.3d 543, 544 (5th Cir. 2019). To demonstrate plain error, Ramirez must show that “(1) there was an error; (2) the error was clear or obvious; (3) the error affected [his] substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings such that we should exercise our discretion to reverse.” *Id.* (alteration in original) (quoting *United States v. Oti*, 872 F.3d 678, 690 (5th Cir. 2017)).

III.

Ramirez argues that the district court plainly erred in imposing a term of supervised release without finding that supervised release would serve as an additional measure of deterrence. We reject this argument.

“The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.” U.S.S.G. § 5D1.1(c). However, “[t]his section does not evince an intent to confer a benefit upon deportable aliens that is not available to other defendants.” *United States v. Becerril-Pena*, 714 F.3d 347, 350 (5th Cir. 2013). “Instead, the [Sentencing] Commission’s official explanation of the [section] suggest[s] that they were animated primarily by administrative concerns inherent in trying to administer supervised release as to someone who has been deported.” *Id.* (citing U.S.S.G. app. C, vol. III, amend. 756 at 410 (2011)).

District courts may “impose terms of supervised release [on aliens facing deportation] as [the courts] deem necessary to provide ‘an added measure of deterrence and protection.’” *Id.* at 349 (quoting *United States v. Dominguez-Alvarado*, 695 F.3d 324, 329 (5th Cir. 2012)). District courts need to give some

No. 18-10773

“particularized explanation” in imposing supervised release. *Id.* However, “[a]s in other sentencing contexts where a guidelines sentence is given, the requirement is not onerous.” *Id.* (citing *Rita v. United States*, 551 U.S. 338, 356 (2007)). Under the “pragmatic approach” with which we review the sentence, “the district court satisfie[s] its duties—whether reviewed *de novo* or for plain error—with a single sentence finding supervised release appropriate under ‘the factors in [§] 3553(a), to deter future criminal conduct, [and in light of the defendant’s] particular background and characteristics.’” *Id.* (alterations in original) (quoting *Dominguez-Alvarado*, 695 F.3d at 330). We are “skeptical of requests to second-guess district courts’ decisions to impose terms of supervised release . . . [even] when the district court considers the guideline only implicitly.” *Id.* at 350.

Ramirez cannot show that the district court erred because the district court satisfied its duty by providing, in its written statement of reasons, that it considered the advisory guidelines as well as the statutory concerns listed in 18 U.S.C. § 3553(a). *See id.* at 349; *see also United States v. Molina*, 577 F. App’x 245, 246 (5th Cir. 2014) (“The [district] court’s implicit consideration of § 5D1.1(c), its consideration of the sentencing factors in § 3553(a), and its express finding that a guidelines sentence was appropriate satisfy the requirement [to give reasons.]”). The district court also expressly and fully adopted the PSR, which fully quoted § 5D1.1. *See United States v. Heredia-Holguin*, 679 F. App’x 306, 309 (5th Cir. 2017) (implicit consideration of § 5D1.1, evinced by the district court’s full adoption of the PSR discussing § 5D1.1, is sufficient). Furthermore, given the exchange with defense counsel and the government regarding the propriety of a within-guidelines sentence and deterrence at sentencing, the district court implicitly found that supervised release would provide an added measure of deterrence. *See*

No. 18-10773

Becerril-Pena, 714 F.3d at 350. For these reasons, Ramirez cannot show an error.

Ramirez also cannot show that his substantial rights were affected. *Cabello*, 916 F.3d at 544. Given Ramirez's lengthy criminal history and several prior re-entries into the United States, the district court would not have concluded that supervised release was unwarranted even if it had explained its reasons in greater details. *See United States v. Cancino-Trinidad*, 710 F.3d 601, 607 (5th Cir. 2013) (holding that, because the alien had a lengthy criminal history, no substantial rights were affected as the district court would have concluded that supervised release would have added a measure of deterrence).

We AFFIRM the district court's judgment.²

² Ramirez also argues that his sentence (37 months of imprisonment) violated his due process rights because it exceeds the statutory maximum as charged in the indictment, which does not allege Ramirez's prior conviction. Ramirez concedes that his argument was rejected in *Almendarez-Torrez v. United States*, 523 U.S. 224 (1998).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

v.

EMETERIO ESPINO RAMIREZ

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **3:17-CR-00598-N(1)**
§ USM Number: **73825-179**
§ **Juan Gabriel Rodriguez**
§ Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s)
- pleaded guilty to count(s) before a U.S.
- Magistrate Judge, which was accepted by the court.
- pleaded nolo contendere to count(s) which was accepted by the court
- was found guilty on count(s) after a plea of not guilty

Count 1 of the Indictment filed November 15, 2017.

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
8 Usc § 1326(A) and (B)(1) Illegal Reentry After Removal From The United States	10/20/2017	1

The defendant is sentenced as provided in pages 2 through 7 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 United States

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 11, 2018

Date of Imposition of Judgment



Signature of Judge

DAVID C. GODBEY, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

JUNE 15, 2018

Date

DEFENDANT: EMETERIO ESPINO RAMIREZ
CASE NUMBER: 3:17-CR-00598-N(1)

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

37 (Thirty-Seven) months as to count 1. This sentence shall run consecutively to any sentence imposed in case no. F-1741745 in the 204th Judicial District Court of Dallas County, Texas; This sentence shall also run consecutively to the sentence imposed in case no. 2:14-CR-633 in the Western District of Texas/Del Rio Division.

The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to FCI Seagoville, Texas, if 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: EMETERIO ESPINO RAMIREZ
CASE NUMBER: 3:17-CR-00598-N(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Three (3) years as to Count 1.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must 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 you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: EMETERIO ESPINO RAMIREZ
CASE NUMBER: 3:17-CR-00598-N(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: EMETERIO ESPINO RAMIREZ
CASE NUMBER: 3:17-CR-00598-N(1)

SPECIAL CONDITIONS OF SUPERVISION

As a condition of supervised release, upon the completion of the sentence of imprisonment, the defendant shall be surrendered 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 or removed, the defendant shall remain outside the United States.

In the event the defendant is not deported upon release from imprisonment, the defendant shall comply with the standard conditions contained in this Judgment and shall comply with the mandatory and special conditions stated herein.

DEFENDANT: EMETERIO ESPINO RAMIREZ
CASE NUMBER: 3:17-CR-00598-N(1)

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00

- The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* 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. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- 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:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** 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: EMETERIO ESPINO RAMIREZ
CASE NUMBER: 3:17-CR-00598-N(1)

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 payments of \$ _____ due immediately, balance due _____, or
 not later than _____, or
 in accordance 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 _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 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:
It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

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
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- 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:

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) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.