

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

MARCOS CORTEZ-ROGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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**

No. 18-11436
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

September 24, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARCOS CORTEZ-ROGEL,

Defendant-Appellant

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CR-89-1

Before DAVIS, SMITH and HIGGINSON, Circuit Judges.

PER CURIAM:*

Marcos Cortez-Rogel pleaded guilty to illegal reentry after deportation and was sentenced within the guidelines range to 46 months of imprisonment and two years of supervised release. On appeal, Cortez-Rogel argues that the district court failed to adequately explain his sentence because it did not respond to his arguments for a lesser sentence, which he asserts were factually supported and equitably compelling.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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Cortez-Rogel submits that, due to his argument at sentencing in favor of a lesser sentence, no objection should be needed to preserve this issue, or, alternatively, this court's strict application of the plain-error standard of review should be mitigated. However, he acknowledges this court's precedent requiring a specific objection to preserve this issue for further review. *See United States v. Whitelaw*, 580 F.3d 256, 259 (5th Cir. 2009). In light of this precedent, this issue is reviewed for plain error. *See id.* To establish plain error, a defendant must show a forfeited error that is clear or obvious and that the error affects his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes such a showing, this court has the discretion to correct the error, and that discretion "ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks, brackets, and citation omitted).

The district court adopted the presentence report's factual findings and guidelines calculations; heard from defense counsel, Cortez-Rogel, and witnesses on Cortez-Rogel's behalf; and stated that it had primarily considered "the conduct admitted in the Factual Resume" and the 18 U.S.C. § 3553 factors. The written statement of reasons provided further reasons for the sentence. The district court's reasons were adequate, even if it "might have said more." *Rita v. United States*, 551 U.S. 338, 359 (2007). The district court's failure to provide more specific reasons for rejecting Cortez-Rogel's arguments for a lesser sentence did not constitute clear or obvious error. *See Puckett*, 556 U.S. at 135; *United States v. Camero-Renobato*, 670 F.3d 633, 635 (5th Cir. 2012); *United States v. Rodriguez*, 523 F.3d 519, 525-26 (5th Cir. 2008). Additionally, Cortez-Rogel fails to demonstrate an effect on his substantial rights because he has not shown a reasonable probability that a more thorough explanation

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would have resulted in a lower sentence. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018); *Puckett*, 556 U.S. at 135; *United States v. Mondragon-Santiago*, 564 F.3d 357, 365 (5th Cir. 2009).

Cortez-Rogel also argues that (1) the district court's enhancement of his sentence to more than two years in prison and more than one year of supervised release under 18 U.S.C. § 1326(b)(1) was unconstitutional because the § 1326(b)(1) enhancement was treated as a sentencing factor rather than as an element of a separate offense; and (2) his guilty plea was involuntary because the district court failed to inform him that the prior felony provision of § 1326(b)(1) stated an essential element of his illegal reentry offense that the Government was required to prove beyond a reasonable doubt. He correctly concedes that the issue whether a sentencing enhancement under § 1326(b) must be alleged in the indictment and proved to a jury is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and he raises these arguments to preserve them for possible Supreme Court review. *See United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Pineda-Arrellano*, 492 F.3d 624, 625-26 (5th Cir. 2007).

In light of the foregoing, the district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

MARCOS CORTEZ-ROGEL

Case Number: 4:18-CR-00089-O(01)

U.S. Marshal's No.: 73054-179

Alex C. Lewis, Assistant U.S. Attorney

William Hermesmeier, Attorney for the Defendant

On June 27, 2018 the defendant, MARCOS CORTEZ-ROGEL, entered a plea of guilty as to Count One of the Indictment filed on April 11, 2018. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

Title & Section

8 U.S.C. § 1326(a) and (b)(1)

Nature of Offense

Illegal Reentry After Deportation

Offense Ended

January 1, 2017

Count

One

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on April 11, 2018.

The defendant shall notify the United States Attorney for this district within thirty 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.

Sentence imposed October 22, 2018.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed October 23, 2018.

Judgment in a Criminal Case
Defendant: MARCOS CORTEZ-ROGEL
Case Number: 4:18-CR-00089-O(1)

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IMPRISONMENT

The defendant, MARCOS CORTEZ-ROGEL, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **FORTY-SIX (46) months** as to Count One of the Indictment filed on April 11, 2018.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **TWO (2) years** as to Count One of the Indictment filed on April 11, 2018.

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 also comply with the standard conditions recommended by the U.S. Sentencing Commission and shall:

- (1) not leave the judicial district without the permission of the Court or probation officer;
- (2) report to the probation officer as directed by the Court or probation officer and submit a truthful and complete written report within the first five (5) days of each month;
- (3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) support the defendant's dependents and meet other family responsibilities;
- (5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;
- (7) refrain from excessive use of alcohol and 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;
- (8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- (9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;
- (11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
- (12) 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) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

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Defendant: MARCOS CORTEZ-ROGEL
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In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, ammunition, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the U.S. probation officer;

take notice that, 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;

report in person to the U.S. Probation Office in the district to which the defendant is released from custody of the Federal Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or re-entry into the United States; and,

refrain from any unlawful use of a controlled substance. The defendant 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.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

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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 Marshal