

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO GUERRERO-SAUCEDO,

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. 18-11626
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
October 8, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FRANCISCO GUERRERO-SAUCEDO,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CR-174-1

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Francisco Guerrero-Saucedo appeals from the above-Guidelines sentence imposed after his guilty plea conviction for illegal reentry. The presentence report, which the district court adopted, determined that the advisory Guidelines imprisonment range was 10 to 16 months. After hearing Guerrero-Saucedo's mitigation arguments, the district court sentenced him to 60 months of imprisonment and two years of supervised release. The district

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

court explained that the 60-month sentence was based primarily on Guerrero-Saucedo's eight prior removals, his two prior convictions for illegal entry, and the close temporal proximity between some of his prior removals and illegal reentries.

In his first argument on appeal, Guerrero-Saucedo asserts that the district court's reasons for his sentence were inadequate because they failed to include specific references to his mitigation arguments and were insufficient to support the upward variance. We first ensure that the sentencing court committed no significant procedural error and then, if the district court's decision is procedurally sound, we will review the substantive reasonableness of the sentence using an abuse-of-discretion standard, if the issue has been preserved. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

When a district court imposes an upward variance, as in this case, "the district court must more thoroughly articulate its reasons . . . than when it imposes a" within-Guidelines sentence. *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006). The record shows that the district court acknowledged that it had reviewed Guerrero-Saucedo's mitigation arguments and articulated detailed bases—including references to particular 18 U.S.C. § 3553(a) factors—supporting the upward variance. The district court did not err in this regard. *See United States v. Anderson*, 697 F. App'x 359, 359 (5th Cir. 2017); *United States v. Lopez-Velasquez*, 526 F.3d 804, 807 (5th Cir. 2008).

In his challenge to the substantive reasonableness of his sentence, Guerrero-Saucedo argues that the extent of the upward variance was unreasonable because the district court's underlying reasons were taken fully into account by the Guidelines and his criminal history consisted of nonviolent and relatively minor offenses. The record shows that the district court did not fail to account for a factor that should have received significant weight, did not

give significant weight to an irrelevant or improper factor, and did not commit a clear error of judgment in balancing the § 3553(a) factors. *See United States v. Gerezano-Rosales*, 692 F.3d 393, 401 (5th Cir. 2012). Guerrero-Saucedo's arguments amount to a request for this court to reweigh the § 3553(a) factors, which we will not do. *See Gall*, 552 U.S. at 51. Moreover, we have upheld greater variances than the one at issue here. *See, e.g., United States v. Rhine*, 637 F.3d 525, 526, 528-29 (5th Cir. 2011) (upholding an upward variance to 180 months from a range of 30 to 37 months); *United States v. Key*, 599 F.3d 469, 475-76 (5th Cir. 2010) (upholding sentence of 216 months of imprisonment where the top of the Guidelines sentencing range was 57 months). Accordingly, the district court did not abuse its discretion by imposing a 60-month sentence.

Guerrero-Saucedo also argues that the enhancement provisions in 8 U.S.C. § 1326(b) are unconstitutional and that his guilty plea was invalid because he was not admonished that his prior felony conviction was an essential element that had to be proved beyond a reasonable doubt. He correctly concedes that these arguments are foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

FRANCISCO GUERRERO-SAUCEDO

Case Number: 4:18-CR-00174-O(01)
U.S. Marshal's No.: 31561-177
Alex C. Lewis, Assistant U.S. Attorney
Michael A. Lehmann, Attorney for the Defendant

On August 22, 2018 the defendant, FRANCISCO GUERRERO-SAUCEDO, entered a plea of guilty as to Count One of the Indictment filed on July 24, 2018. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. § 1326(a) and (b)(1)	Illegal Reentry After Deportation	June 1, 2018	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 July 24, 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 December 3, 2018.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed December 4, 2018.

Judgment in a Criminal Case

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Defendant: FRANCISCO GUERRERO-SAUCEDO

Case Number: 4:18-CR-00174-O(1)

IMPRISONMENT

The defendant, FRANCISCO GUERRERO-SAUCEDO, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Sixty (60) months** as to Count One of the Indictment filed on July 24, 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 July 24, 2018.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant 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.

Judgment in a Criminal Case

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Defendant: FRANCISCO GUERRERO-SAUCEDO

Case Number: 4:18-CR-00174-O(1)

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; and,

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.

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.

Judgment in a Criminal Case

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Defendant: FRANCISCO GUERRERO-SAUCEDO

Case Number: 4:18-CR-00174-O(1)

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