

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN PEREZ-ROMAN,

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**

United States Court of Appeals
Fifth Circuit

FILED

November 7, 2019

Lyle W. Cayce
Clerk

No. 19-10068
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JUAN PEREZ-ROMAN,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CR-184-1

Before BARKSDALE, HAYNES, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Juan Perez-Roman challenges his above-Guidelines sentence of, *inter alia*, 72-months' imprisonment for illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(1). Perez asserts: his sentence was procedurally and substantively unreasonable; and the district court imposed an unconstitutional sentencing enhancement relating to 8 U.S.C. § 1326(b)(1)

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

(establishing sentencing enhancement when removal follows, *inter alia*, a felony). Each claim fails.

Although post-*Booker*, the Sentencing Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

In claiming procedural error, Perez asserts the district court failed to consider the pertinent 18 U.S.C. § 3553(a) sentencing factors; failed to adequately explain the upward variance imposed; failed to respond to his request at sentencing for a within-Guidelines sentence; and considered factors already accounted for in calculating the Guidelines range. The court, however, listened to the parties' assertions, cited the § 3553(a) factors generally, and provided an adequate explanation of the above-Guidelines sentence. The court further referenced specific facts and circumstances of this case, including Perez' history of numerous prior deportations and illegal reentries and the need to deter yet another illegal reentry. *See United States v. Pillault*, 783 F.3d 282, 289–90 (5th Cir. 2015) (holding a fact-specific explanation, consistent with the § 3553(a) factors, is sufficient to justify a sentence outside the Guidelines range). To the extent the district court based the above-Guidelines sentence on a factor already accounted for by the Guidelines range, this does not constitute procedural error. *United States v. Brantley*, 537 F.3d 347, 350

(5th Cir. 2008) (“[A] district court may rely upon factors already incorporated by the Guidelines to support a non-Guidelines sentence”) (citation omitted).

In challenging the substantive reasonableness of his sentence, Perez asserts it was greater than necessary to achieve the sentencing goals in 18 U.S.C. § 3553(a), and the court did not adequately consider or properly weigh the mitigating factors Perez presented. A non-Guidelines sentence fails to comport with § 3553(a) when it “(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”. *United States v. Diehl*, 775 F.3d 714, 724 (5th Cir. 2015) (citation omitted). “[R]eview for substantive reasonableness is highly deferential”. *Id.* (internal quotation marks and citation omitted). Disagreement with the district court’s balancing of the § 3553(a) factors “is not a sufficient ground for reversal”. *United States v. Malone*, 828 F.3d 331, 342 (5th Cir. 2016) (citations omitted).

In the light of this high level of deference, Perez has not shown the court gave improper weight to any factor or clearly erred in its balancing. As explained above, in support of its sentence, the court adequately considered the parties’ positions, weighed “all of the facts and the circumstances in this case”, and explained the sentence was based on valid § 3553(a) factors, including deterrence.

Finally, Perez asserts the court imposed an unconstitutional sentencing enhancement under 18 U.S.C. § 3553(b)(1) when it did not advise him, before he pleaded guilty, that the fact of his prior conviction was an element of the offense. In *Almendarez-Torres*, however, the Supreme Court held, for purposes of a statutory sentencing enhancement, a prior conviction need not be alleged in the indictment or found by a jury beyond a reasonable doubt. *Almendarez-*

Torres v. United States, 523 U.S. 224, 239–47 (1998). Our court has held subsequent Supreme Court decisions did not overrule *Almendarez-Torres*. See, e.g., *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014) (stating *Alleyne v. United States*, 570 U.S. 99, 107–08, 111 n.1 (2013), which held that “any fact that increases a defendant’s mandatory minimum sentence must be presented to a jury and found beyond a reasonable doubt”, did not overrule *Almendarez-Torres*). Perez correctly observes this challenge is foreclosed by our precedent and seeks only to preserve the issue for further appellate review.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

JUAN PEREZ-ROMAN

Case Number: 4:18-CR-00184-O(01)
U.S. Marshal's No.: 41085-380
Alex C. Lewis, Assistant U.S. Attorney
William Hermesmeier, Attorney for the Defendant

On September 12, 2018 the defendant, JUAN PEREZ-ROMAN, entered a plea of guilty as to Count One of the Indictment filed on August 7, 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	November 3, 2017	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 August 7, 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 January 7, 2019.


REED O'CONNOR
U.S. DISTRICT JUDGE

Signed January 8, 2019.

Judgment in a Criminal Case
Defendant: JUAN PEREZ-ROMAN
Case Number: 4:18-CR-00184-O(1)

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IMPRISONMENT

The defendant, JUAN PEREZ-ROMAN, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Seventy-Two (72) months** as to Count One of the Indictment filed on August 7, 2018. This sentence shall run consecutive to any sentence which may be imposed in Case No. 2:14-CR-01224-001 (Illegal Reentry into the United States), pending revocation in the Western District of Texas, Del Rio Division in Del Rio, Texas, as this case is not related to the instant offense.

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 **Three (3) years** as to Count One of the Indictment filed on August 7, 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.

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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; and,

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 entry.

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.

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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