

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
FRANCISCO JAVIER PONCE-MARES,

*Petitioner*

v.

UNITED STATES OF AMERICA

*Respondent*

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

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Appendix A Judgment and Opinion of Fifth Circuit

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## APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

\_\_\_\_\_  
No. 19-10469  
Summary Calendar  
\_\_\_\_\_

United States Court of Appeals  
Fifth Circuit

**FILED**  
February 11, 2020

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

FRANCISCO JAVIER PONCE-MARES,

Defendant–Appellant.

\_\_\_\_\_  
Appeal from the United States District Court  
for the Northern District of Texas  
No. 4:18-CR-273-1  
\_\_\_\_\_

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:\*

Francisco Ponce-Mares was discovered by immigration authorities while

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

in state custody. An immigration detainer was placed on him, but his prosecution for illegal reentry did not begin until about two years later, after he had served his state sentence. Following his guilty plea to illegal reentry, Ponce-Mares moved for a downward departure under the Commentary to U.S. Sentencing Guideline § 2L1.2. The district court denied departure and, varying upwardly from the advisory guideline range, imposed a 36-month sentence. Ponce-Mares appeals, contending that the sentence is substantively unreasonable because it did not give enough weight to the delay in the commencement of his federal prosecution.

Generally, we review the substantive reasonableness of a sentence under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007). Although Ponce-Mares posits that an objection is not required to preserve the issue, our precedent permits the application of plain-error review where, as here, the defendant fails to object to substantive reasonableness after the sentence is imposed. *See United States v. Peltier*, 505 F.3d 389, 391–92 (5th Cir. 2007). Because Ponce-Mares’s substantive-reasonableness challenge fails even under the ordinary abuse-of-discretion standard, we apply the more lenient standard. *See United States v. Rodriguez*, 602 F.3d 346, 361 (5th Cir. 2010).

A non-guidelines sentence may be substantively unreasonable “if 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.” *Peltier*, 505 F.3d at 392 (internal quotation marks and citation omitted). In reviewing a non-guidelines sentence for substantive reasonableness, we consider “the totality of the circumstances, including the extent of any variance from the Guidelines range,” *United States v. Brantley*, 537 F.3d 347, 349 (5th Cir. 2008) (internal quotation marks and citation omitted), but “must give due deference to the

district court's decision that the [18 U.S.C.] § 3553(a) factors, on a whole, justify the extent of the variance.” *United States v. Broussard*, 669 F.3d 537, 551 (5th Cir. 2012) (internal quotation marks and citation omitted).

The district court considered and rejected Ponce-Mares’s arguments for leniency via a downward departure based on the government’s delay in commencing prosecution. The court then upwardly varied from the advisory range of 10 to 16 months and imposed 36 months. In determining that an upward variance was warranted, the court considered the guideline range, the arguments of the parties, the defendant’s allocution, the § 3553(a) factors, and recidivism. Moreover, although the sentence is 20 months above the top of the advisory range, this court has upheld larger upward increases. *See e.g., United States v. Rhine*, 637 F.3d 525, 528, 529–30 (5th Cir. 2011).

The record thus does not reflect that the district court failed to account for a factor that should have received significant weight, gave significant weight to an irrelevant or improper factor, or committed a clear error of judgment in balancing the § 3553(a) factors. *See Peltier*, 505 F.3d at 392; *Brantley*, 537 F.3d at 350. Finally, to the extent that Ponce-Mares contests the denial of a downward departure rather than the substantive reasonableness of his sentence, this court lacks jurisdiction to review the denial of a downward departure. *See United States v. Alaniz*, 726 F.3d 586, 627 (5th Cir. 2013); *United States v. Lucas*, 516 F.3d 316, 350–51 (5th Cir. 2008).

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 JAVIER PONCE-MARES

Case Number: 4:18-CR-00273-O(01)  
U.S. Marshal's No.: 70864-279  
Michael Levi Thomas, Assistant U.S. Attorney  
Jaidee Serrano, Attorney for the Defendant

On December 26, 2018 the defendant, FRANCISCO JAVIER PONCE-MARES, entered a plea of guilty as to Count One of the Indictment filed on November 6, 2018. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

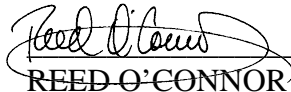
<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. § 1326(a) and (b)(1)	Illegal Reentry After Deportation	5/23/2016	One

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 November 6, 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 April 22, 2019.



REED O'CONNOR  
U.S. DISTRICT JUDGE

Signed April 23, 2019.

Judgment in a Criminal Case

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Defendant: FRANCISCO JAVIER PONCE-MARES

Case Number: 4:18-CR-00273-O(1)

### IMPRISONMENT

The defendant, FRANCISCO JAVIER PONCE-MARES, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Thirty-Six (36) months** as to Count One of the Indictment filed on November 6, 2018.

The Court recommends to the BOP that the defendant be housed at FMC Fort Worth, Texas, if possible.

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 **One (1) year** as to Count One of the Indictment filed on November 6, 2018.

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 USC § 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 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 contained in the Judgment and shall comply with the mandatory and special conditions stated herein:

- ( 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;

Judgment in a Criminal Case

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Defendant: FRANCISCO JAVIER PONCE-MARES

Case Number: 4:18-CR-00273-O(1)

- (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.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

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

cooperate in the collection of DNA as directed by the U.S. probation officer; 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 re-entry into the United States, within 72 hours of release or re-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.

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 JAVIER PONCE-MARES

Case Number: 4:18-CR-00273-O(1)

**RETURN**

I have executed this judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

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United States Marshal

BY \_\_\_\_\_

Deputy Marshal