

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALONSO SANCHEZ OCHOA
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

APPENDICES

APPENDIX A-1

**(OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT)**

United States Court of Appeals
for the Fifth Circuit

No. 19-11181

United States Court of Appeals
Fifth Circuit

FILED

October 2, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ALONSO SANCHEZ OCHOA,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-176-1

Before SMITH, CLEMENT, and OLDHAM, *Circuit Judges.*

ANDREW S. OLDHAM, *Circuit Judge:*

The question presented is whether a defendant can demand that his federal sentence run concurrently with a state sentence without establishing that both are premised on the same conduct. The district court said no. We agree and affirm.

I.

A bank surveillance camera caught Ochoa cashing a stolen check. It was addressed to “Zoetis.” Ochoa previously registered the name Zoetis as a “Doing Business As” (“DBA”) in Dallas County. That DBA allowed

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Ochoa to complete the transaction using his own Texas driver's license, date of birth, and signature. Bank records show he cashed 12 more stolen checks the same way—each time using his own information and a corresponding DBA. Ochoa pleaded guilty to one count of stolen mail in violation of 18 U.S.C. § 1708.

His Pre-Sentence Report ("PSR") reflected no other pending charges. Ochoa objected on the ground that he had "state charges pending in Tarrant County, Dallas County, Hood County, and Ellis County in the State of Texas." Because Ochoa contended the state charges were based on "relevant conduct to this federal charge," he asked that his "federal sentence be ordered to run concurrent with any state sentences he may receive." *See* U.S.S.G. § 5G1.3(c). The Government said it was "not opposed to an order that the defendant's federal sentence . . . run concurrently with any related state charges," and it "would defer to the U.S. Probation Office's determination." In an addendum to the PSR, the Probation Office reported that "[a] record check revealed a pending offense out of the Ellis County District Attorney's Office; however, no court information was available."

At Ochoa's sentencing hearing, defense counsel again asked that the district court order Ochoa's federal sentence to run concurrently with any subsequent state sentences. Counsel pointed the district court to the Probation Office's addendum, which noted there was no court information on the reported Ellis County charge. After a pause, the judge said, "Well, without more information, I don't see how I can say concurrent with pending related offenses. I think it's going to have to be determined by those counties."

The district court sentenced Ochoa to a within-Guidelines term of 27 months in prison. The district court didn't specify whether the federal sentence would run concurrently with or consecutively to any subsequent

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state sentence. Our precedent requires us to presume the latter. *See United States v. Candia*, 454 F.3d 468, 475 (5th Cir. 2006).

II.

Ochoa argues that the district court's failure to impose a concurrent sentence violates Section 5G1.3(c). We have previously recognized this precise argument as a procedural-reasonableness challenge. *See, e.g., United States v. Johnson*, 760 F. App'x 261, 263 (5th Cir. 2019) (per curiam). But Ochoa challenges his consecutive sentence as substantively unreasonable. Either way, we review for abuse of discretion and find none. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

A.

"After [the Supreme] Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines are advisory only. But a district court still must consult those Guidelines and take them into account when sentencing." *Hughes v. United States*, 138 S. Ct. 1765, 1772 (2018). Section 5G1.3(c) advises that when "a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction . . . the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment." U.S.S.G. § 5G1.3(c). Thus, to trigger this Guideline provision, the state sentence must be both (1) "anticipated" and (2) based on conduct "relevant" to the federal offense. U.S.S.G. § 5G1.3(c).

Section 5G1.3(c) does not define "anticipated." *Ibid.* But we have treated pending state charges as "anticipated." *See, e.g., United States v. Looney*, 606 F. App'x 744, 748 (5th Cir. 2015) (per curiam) (defining an "anticipated" state sentence as one based on a pending state charge). *But see United States v. McCowan*, 763 F. App'x 369, 371 (5th Cir. 2019) (per curiam) ("While § 5G1.3 applies to 'anticipated' sentences, [the appellant] cites no

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authority requiring the district court to apply its provisions when the likelihood that a future sentence will be imposed is wholly speculative.”). We assume for the sake of argument that Ochoa’s pending charge in Ellis County is “anticipated.”

But that charge also must be “relevant” to Ochoa’s stolen-mail conviction. The Guidelines define “relevant conduct” as “part of the same course of conduct or common scheme or plan as the offense of conviction.” U.S.S.G. § 1B1.3(a)(2). And Section 5G1.3(c) incorporates that definition. U.S.S.G. § 5G1.3(c).

At Ochoa’s sentencing hearing, defense counsel amorphously asserted, “there may be some scattered state prosecutions of relevant conduct in Ellis, Tarrant, Hood and maybe Johnson Counties.” He suggested that Ochoa’s “federal sentence could at least be concurrent with any of those.” When the district court inquired about the charges, counsel pointed to the PSR’s addendum. The last page documented a single Ellis County charge for which “no court information was available.”

That is all Ochoa presented. He did not present evidence that the Ellis County offense was “part of the same course of conduct” as the stolen-mail offense. U.S.S.G. § 1B1.3(a)(2). Nor did he present evidence that the offenses were part of a “common scheme or plan.” *Ibid.* So the district court did not err by concluding the two were not related. *Cf. United States v. Horton*, 950 F.3d 237, 243 (5th Cir. 2020) (finding “a temporal connection between the offenses . . . insufficient to establish a relevant conduct determination”), *petition for cert. filed* (U.S. July 16, 2020) (No. 20-5091); *United States v. Terrazas*, 815 F. App’x 767, 772 (5th Cir. 2020) (per curiam) (upholding as “plausible” the district court’s conclusion that two drug offenses were not based on “relevant conduct”). And without a state offense relevant to Ochoa’s federal offense, Section 5G1.3(c) is inapplicable.

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B.

It is unclear whether Ochoa also intends to challenge his within-Guidelines sentence as substantively unreasonable. If he intends such a challenge, it fails.

We review “sentences for ‘reasonableness’ measured against the factors listed in 18 U.S.C. § 3553(a).” *United States v. Rashad*, 687 F.3d 637, 644 (5th Cir. 2012) (citation omitted). Within-Guidelines sentences are “presumptively reasonable and [are] accorded great deference on review.” *Candia*, 454 F.3d at 473. Ochoa can rebut this presumption only “by showing that the sentence does not account for factors that should receive significant weight, gives significant weight to irrelevant or improper factors, or represents a clear error of judgment in balancing sentencing factors.” *Rashad*, 687 F.3d at 644.

Ochoa does not question the district court’s application of the § 3553(a) factors. Nor does he contest the length of his federal sentence. Instead, he challenges the length of time he *might* be imprisoned *if* he’s convicted and sentenced on the Ellis County charge. Ochoa says this error could double the length of his sentence. Therefore, Ochoa concludes, “his substantial rights have been harmed.”[†]

[†] The only question before our court is the legality of Ochoa’s federal sentence. Insofar as he bases his prejudice argument on potentialities in state court, however, we note that state law could give him a second opportunity to argue that his sentences should run concurrently—if and when Ochoa is convicted and sentenced on the Ellis County charge. *See Tex. Code Crim. Proc.* art. 42.08(a) (granting Texas judges discretion to order that sentences run concurrently when a defendant is convicted of multiple offenses); *Cook v. State*, 824 S.W.2d 634, 643 (Tex. App.—Dallas 1991) (concluding article 42.08 allows “cumulation of state and federal sentences”), *pet. ref’d*, 828 S.W.2d 11 (Tex. Crim. App. 1992) (en banc).

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There are at least two problems with Ochoa's argument. Most importantly, it does not address the § 3553(a) factors, which provide the only means for rebutting the presumption of reasonableness. *See Rashad*, 687 F.3d at 644. And secondarily, “[m]ere objections” without evidence to support them cannot rebut the presumption of reasonableness. *Horton*, 950 F.3d at 242 (quoting *United States v. Parker*, 133 F.3d 322, 329 (5th Cir. 1998)). Ochoa did not submit “affidavits or other evidence . . . to rebut the information contained in the PSR,” so the district court was entitled to adopt the PSR’s “findings without further inquiry or explanation.” *Ibid.* (quoting *United States v. Vital*, 68 F.3d 114, 120 (5th Cir. 1995)).

AFFIRMED.

APPENDIX A-2

(DISTRICT COURT JUDGMENT IN A CRIMINAL CASE)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 4:19-CR-176-Y(1)

ALONSO SANCHEZ OCHOA

Robert J. Boudreau, assistant U.S. attorney
Brett D. Boone, attorney for the defendant

On June 5, 2019, the defendant, Alonso Sanchez Ochoa, entered a plea of guilty to count one of the one-count information. 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 CONCLUDED</u>	<u>COUNT</u>
18 U.S.C. § 1708	Possession of Stolen Mail	March 22, 2019	1

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

The defendant shall pay immediately a special assessment of \$100.00 for one of the one-count information.

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 17, 2019.



TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed October 21, 2019.

Judgment in a Criminal Case

Defendant: Alonso Sanchez Ochoa

Case Number: 4:19-CR-176-Y(1)

Judgment -- Page 2 of 4

IMPRISONMENT

The defendant, Alonso Sanchez Ochoa, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 27 months on count one of the one-count information. This sentence shall run consecutively to any future sentence that may be imposed in case no. 4:13CR00077-1 in the United States District Court for the Eastern District of Texas, Sherman division.

The Court recommends that the defendant be placed in the Institution Residential Drug Abuse Treatment Program, if eligible, and that he be incarcerated within the Northern District of Texas.

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 years on count one of the one-count information.

While on supervised release, the defendant shall comply with the standard conditions of supervision adopted by the United States Sentencing Commission at §5D1.3(c) of the sentencing guidelines, and shall:

- (1) not leave the judicial district without the permission of the Court or probation officer;
- (2) report to the probation officer in a manner and frequency directed by the Court or probation officer;
- (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;
- (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;
- (14) not commit another federal, state, or local crime;
- (15) not possess illegal controlled substances;
- (16) not possess a firearm, destructive device, or other dangerous weapon;
- (17) cooperate in the collection of DNA as directed by the probation officer as authorized by the Justice for All Act of 2004;
- (18) report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Federal Bureau of Prisons;

Judgment in a Criminal Case

Defendant: Alonso Sanchez Ochoa

Case Number: 4:19-CR-176-Y(1)

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- (19) The defendant must 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;
- (20) The defendant is ordered to make restitution in the amount of \$2,492.10. Restitution shall be paid to the U.S. District Clerk, 501 West 10th Street, Room 310, Fort Worth, Texas 76102, for disbursement to I.L.P.E.Q. If, upon commencement of the term of probation, any part of the \$2,492.10 in restitution ordered by this judgment remains unpaid, the defendant shall make payments on such unpaid balance at the rate of at least \$50 per month, the first such payment to be made no later than 60 days from the date of this judgment with another payment to be made on the same day of each month thereafter until the restitution is paid in full;
- (21) The defendant shall provide to the probation officer complete access to all business and personal financial information;
- (22) The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least \$25 per month; and
- (23) The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

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.

The defendant is ordered to make restitution, in the amount of \$2,492.10. Restitution shall be paid to the U.S. District Clerk, 501 West 10th Street, Room 310, Fort Worth, TX 76102, for disbursement to:

I.L.P.E.Q.
3658 W. Highway 377
Granbury, Texas 76048
\$2,492.10
Check No. 5988, March 22, 2019

Restitution is due and payable immediately, but if, upon commencement of the term of supervised release, any part of the \$2,492.10 restitution ordered by this judgment remains unpaid, the defendant shall make payments on such unpaid balance at the rate of at least \$50 per month, the first such payment to be made no later than 60 days after the defendant's release from confinement and another payment to be made on the same day of each month thereafter until the restitution is paid in full.

However, no restitution shall be payable during incarceration from funds deposited into the defendant's inmate trust account or paid to the defendant for work performed during incarceration.

Judgment in a Criminal Case

Defendant: Alonso Sanchez Ochoa

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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