

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EZER ROSEMBEL BARRIENTOS-OSORIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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. 19-10888
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

July 17, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EZER ROSEMBEL BARRIENTOS-OSORIO,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-211-1

Before CLEMENT, ELROD, and OLDHAM, Circuit Judges.

PER CURIAM:*

Ezer Rosembel Barrientos-Osorio appeals the sentence imposed upon revocation of his supervised release following his conviction for illegal reentry, contending that the district court plainly erred by imposing a new, 22-month supervised release term on a deportable alien without explanation, contrary to U.S.S.G. § 5D1.1(c). Because Barrientos-Osorio did not object to his revocation sentence, we review for plain error. *See United States v. Jones*, 484 F.3d 783,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

792 (5th Cir. 2007). To show plain error, Barrientos-Osorio must identify (1) a forfeited error (2) that is clear or obvious, and (3) that affects his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If he satisfies the first three requirements, we have discretion to remedy the error if the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks and citation omitted).

We need not decide whether Barrientos-Osorio has shown clear or obvious sentencing error because even if he could do so, his cursory and misdirected arguments with respect to the third and fourth plain error prongs are inadequate to warrant the exercise of our corrective discretion. *See United States v. Rivera*, 784 F.3d 1012, 1019 n.3 (5th Cir. 2015); *United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006); *United States v. Clark*, 2020 WL 3261697, at *1 (5th Cir. June 16, 2020). Contrary to his assertions, *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), is not dispositive. Because Barrientos-Osorio has not met his affirmative burden to establish each plain error prong, *see id.* at 1343, we AFFIRM the judgment.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

EZER ROSEMBEL BARRIENTOS-OSORIO

Case Number: 4:17-CR-00211-O(01)

U.S. Marshal's No.: 56347-177

J. Michael Worley, Assistant U.S. Attorney

William Hermesmeyer, Attorney for the Defendant

On November 15, 2017 the defendant, EZER ROSEMBEL BARRIENTOS-OSORIO, entered a plea of guilty as to Count One of the Indictment filed on October 11, 2017. 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	August 22, 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 October 11, 2017.

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 March 5, 2018.


REED O'CONNOR
U.S. DISTRICT JUDGE

Signed March 9, 2018.

Judgment in a Criminal Case

Page 2 of 4

Defendant: EZER ROSEMBEL BARRIENTOS-OSORIO

Case Number: 4:17-CR-00211-O(1)

IMPRISONMENT

The defendant, EZER ROSEMBEL BARRIENTOS-OSORIO, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **TEN (10) months** as to Count One of the Indictment filed on October 11, 2017.

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 October 11, 2017.

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.

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,

Judgment in a Criminal Case

Page 3 of 4

Defendant: EZER ROSEMBEL BARRIENTOS-OSORIO

Case Number: 4:17-CR-00211-O(1)

(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;

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;

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,

not illegally re-enter the United States, if deported, removed, or allowed voluntary departure.

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

Page 4 of 4

Defendant: EZER ROSEMBEL BARRIENTOS-OSORIO

Case Number: 4:17-CR-00211-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

APPENDIX C

United States District Court

Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA

v.

Case Number 4:17-CR-211-O (1)

EZER ROSEMBEL BARRIENTOS-OSORIO
Defendant.

USM Number 56347-177

JUDGMENT IN A CRIMINAL CASE
(For Revocation of Probation or Supervised Release)
(For Offenses Committed On or After November 1, 1987)

The defendant, EZER ROSEMBEL BARRIENTOS-OSORIO, was represented by Michael Lehmann.

THE DEFENDANT:

Pleaded true to violating the conditions stated in Paragraph II of the Addendum to Petition for Offender Under Supervision signed June 24, 2019.

See Petitions for Offender Under Supervision.

Certified copy of the Judgment imposed on March 5, 2018, in the U.S. District Court for the Northern District of Texas, Fort Worth Division, is attached.

As pronounced on July 25, 2019, the defendant is sentenced as provided in pages 2 and 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 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. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 26th day of July, 2019.



REED O'CONNOR
UNITED STATES DISTRICT JUDGE

Defendant: EZER ROSEMBEL BARRIENTOS-OSORIO

Judgment--Page 2 of 3

Case Number: 4:17-CR-211-O (1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **FOURTTEEN (14) months** as to Count One to run consecutively to the sentence imposed in Case No. 5:19-CR-0128 in the Southern District of Texas, Laredo Division.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **TWENTY-TWO (22) months**.

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.

Defendant: EZER ROSEMBEL BARRIENTOS-OSORIO
Case Number: 4:17-CR-211-O (1)

Judgment--Page 3 of 3

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;

report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons;

participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$5 per month; and,

adhere to the conditions of supervised release previously ordered in the attached certified Judgment.

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.

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

Fort Worth Division

UNITED STATES OF AMERICA

v.

EZER ROSEMBEL BARRIENTOS-OSORIO

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:17-CR-00211-O(01)

U.S. Marshal's No.: 56347-177

J. Michael Worley, Assistant U.S. Attorney

William Hermesmeyer, Attorney for the Defendant

On November 15, 2017 the defendant, EZER ROSEMBEL BARRIENTOS-OSORIO, entered a plea of guilty as to Count One of the Indictment filed on October 11, 2017. 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	August 22, 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 October 11, 2017.

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 March 5, 2018.


REED O'CONNOR
U.S. DISTRICT JUDGE

Signed March 9, 2018.

Certified a true copy of an instrument
on file in my office on 7/31/2019
Clerk, U.S. District Court,
Northern District of Texas
By John M. Harlan Deputy

Judgment in a Criminal Case

Page 2 of 4

Defendant: EZER ROSEMBEL BARRIENTOS-OSORIO

Case Number: 4:17-CR-00211-O(1)

IMPRISONMENT

The defendant, EZER ROSEMBEL BARRIENTOS-OSORIO, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **TEN (10) months** as to Count One of the Indictment filed on October 11, 2017.

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 October 11, 2017.

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.

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;
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- (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,

Judgment in a Criminal Case

Page 3 of 4

Defendant: EZER ROSEMBEL BARRIENTOS-OSORIO

Case Number: 4:17-CR-00211-O(1)

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not possess illegal controlled substances;

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

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not illegally re-enter the United States, if deported, removed, or allowed voluntary departure.

FINE/RESTITUTION

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Judgment in a Criminal Case

Page 4 of 4

Defendant: EZER ROSEMBEL BARRIENTOS-OSORIO

Case Number: 4:17-CR-00211-O(1)

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United States Marshal

BY
Deputy Marshal