

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTONIO DIAZ-AGURCIA,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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Northern District of Texas

APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 22, 2020

Lyle W. Cayce
Clerk

No. 19-11376
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANTONIO DIAZ-AGURCIA,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-92-1

Before BARKSDALE, GRAVES, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Antonio Diaz-Aguria pleaded guilty to one count of illegally reentry, in violation of 8 U.S.C. §§ 1326(a), (b)(1), and (b)(2). He was sentenced to, *inter alia*, 61-months' imprisonment, an upward variance from an advisory

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Sentencing Guidelines sentencing range of 33- to 41-months' imprisonment. Diaz asserts: his sentence was substantively unreasonable; and the district court imposed an unconstitutional sentencing enhancement relating to 8 U.S.C. §§ 1326(b)(1) and (b)(2) (establishing sentencing enhancement when removal follows, *inter alia*, a felony or aggravated-felony conviction).

Although post-*Booker*, the 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). As noted, procedural error is not claimed.

An upward variance is unreasonable if the sentence “(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” in 18 U.S.C. § 3553(a). *United States v. Chandler*, 732 F.3d 434, 437 (5th Cir. 2013) (citation omitted). Diaz contends the court erred in balancing the § 3553(a) sentencing factors when it neglected the mitigating circumstances of his time in state custody and cultural assimilation. His claim fails; there was no abuse of discretion.

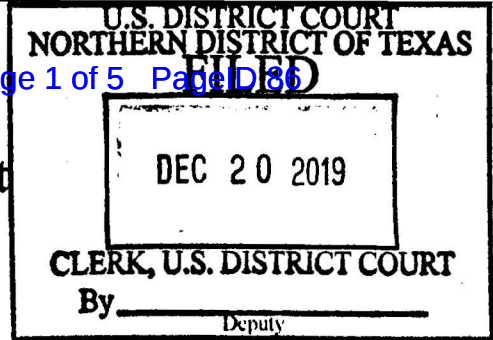
In that regard, the court considered Diaz’ claims for mitigation but found them outweighed by his criminal history, the need for adequate deterrence, and the necessary protection of the public. *See* 18 U.S.C. § 3553(a)(2)(B)–(C). The court appropriately considered Diaz’ criminal history and pattern of illegal reentry into the United States in choosing an above-Guidelines sentence. *See United States v. Smith*, 440 F.3d 704, 709 (5th Cir. 2006) (“A defendant’s criminal history is one of the factors that a court may consider in imposing a non-Guideline sentence.”). His sentence is well within the range of upward variances we have upheld. *See, e.g., United States v. Key*, 599 F.3d 469, 475–76 (5th Cir. 2010) (upholding 216-month sentence where Guidelines maximum was 57 months); *United States v. Smith*, 417 F.3d 483, 492 (5th Cir. 2005) (upholding 120-month sentence where Guidelines maximum was 41 months).

For his other claim, Diaz maintains the court imposed an unconstitutional sentencing enhancement under 8 U.S.C. §§ 1326(b)(1) and (2) because his prior convictions were not alleged in the indictment or found by a jury beyond reasonable doubt. In *Almendarez-Torres*, however, the Supreme Court held that, for purposes of a statutory sentencing enhancement, neither of those factors for a prior conviction are required. *Almendarez-Torres v. United States*, 523 U.S. 224, 239–47 (1998). And, our court has held *Almendarez-Torres* “remains binding precedent until and unless it is officially overruled by the Supreme Court”. *United States v. Pineda-Arrellano*, 492 F.3d 624, 625–26 (5th Cir. 2007). Diaz correctly observes this

challenge is foreclosed by our precedent and seeks only to preserve the issue for possible further review.

AFFIRMED.

APPENDIX B

United States District CourtNorthern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA §

v. §

Case Number: 4:19-CR-092-A(01)

ANTONIO DIAZ-AGURCIA §

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Michael Levi Thomas. The defendant, ANTONIO DIAZ-AGURCIA, was represented by Federal Public Defender through Assistant Federal Public Defender Michael A. Lehmann.

The defendant pleaded guilty on July 5, 2019 to the one count indictment filed on March 27, 2019. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
8 U.S.C. § 1326(a) and (b)(1)/(2) Illegal Reentry After Deportation	March 17, 2017	1

As pronounced and imposed on December 20, 2019, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of \$100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, 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, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 61 months.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years. The court imposed a term of supervised release because it will provide an added measure of deterrence and protection based on the facts and circumstances of this case.

Pursuant to 18 U.S.C. §3583(d), as a condition of supervised release, upon the completion of the sentence of imprisonment the defendant shall be surrendered by the Federal Bureau of Prisons 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 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 comply with the standard conditions ordered by this court and shall comply with the following additional conditions:

1. The defendant shall not unlawfully possess controlled substances.
2. The defendant shall not commit another federal, state, or local crime.
3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.
4. The defendant shall 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.
5. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall 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.
2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.
3. The defendant shall provide to the U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.

5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.
7. The defendant shall support his dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.
9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
10. The defendant shall refrain from excessive use of alcohol and shall 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.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. The defendant shall 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.
16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

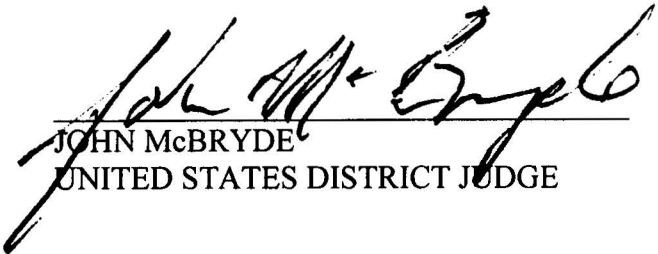
FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 20th day of December, 2019.



JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

Defendant delivered on _____, 2019 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal