

No. _____

In the
Supreme Court of the United States

Oscar Daniel Rios Benitez,

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

PETITION FOR A WRIT OF CERTIORARI

PETITIONER'S APPENDIX

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 8, 2021

Lyle W. Cayce
Clerk

No. 20-10494
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

OSCAR DANIEL RIOS BENITEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CR-1-1

Before KING, SMITH, and WILSON, *Circuit Judges.*

PER CURIAM:*

Oscar Daniel Rios Benitez appeals his 18-month, within-guidelines sentence for illegal reentry following deportation. Rios Benitez asserts that the district court plainly erred by characterizing his prior Texas conviction for assault-family violence under TEX. PENAL CODE ANN. § 22.01(a)(1),

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 20-10494

(b)(2) as a crime of violence under 18 U.S.C. § 16 and, thus, as an aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(F) and 8 U.S.C. § 1326(b)(2). He contends that Texas assault-family violence does not qualify as an aggravated felony because it can be committed recklessly. The Government moves for summary affirmance, asserting that Rios Benitez’s argument is foreclosed by *United States v. Gracia-Cantu*, 920 F.3d 252 (5th Cir.), *cert. denied*, 140 S. Ct. 157 (2019).

As Rios Benitez correctly concedes, his argument is foreclosed. *See Gracia-Cantu*, 920 F.3d at 253–55 (holding that assault causing bodily injury under TEX. PENAL CODE ANN. § 22.01(a)(1) and (b)(2) is a crime of violence under § 16(a)). He raises the issue only to preserve it for future review. Consequently, the Government is “clearly right as a matter of law,” such that “there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Accordingly, the Government’s motion for summary affirmance is GRANTED, and the district court’s judgment is AFFIRMED. The Government’s alternative motion for an extension of time to file a brief is DENIED AS MOOT.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 4:20-CR-001-Y(1)

Douglas A. Allen, assistant U.S. attorney

OSCAR DANIEL RIOS-BENITEZ

Michael A. Lehmann, attorney for the defendant

On January 15, 2020, the defendant, Oscar Daniel Rios-Benitez, 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>
8 U.S.C. § 1326(a) and (b)(2)	Illegal Reentry After Deportation	December 11, 2019	1

The defendant is sentenced as provided in pages two through three 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 count 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 May 12, 2020.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed May 15, 2020.

Judgment in a Criminal Case

Defendant: Oscar Daniel Rios-Benitez

Case Number: 4:20-CR-001-Y(1)

Judgment -- Page 2 of 3

IMPRISONMENT

The defendant, Oscar Daniel Rios-Benitez, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 18 months on count one of the one-count information.

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.

Under 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 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 also comply with the standard conditions recommended by the U.S. 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 unlawfully possess illegal controlled substances;
- (16) shall not possess a firearm, destructive device, or other dangerous weapon;
- (17) cooperate in the collection of DNA as directed by the probation officer as directed by the probation officer, as authorized by the Justice for All Act of 2004;

Judgment in a Criminal Case

Defendant: Oscar Daniel Rios-Benitez

Case Number: 4:20-CR-001-Y(1)

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- (18) report in person to the probation office in the district to which the defendant is released from the 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;
- (19) not illegally re-enter the United States, if deported, removed, or allowed voluntary departure, and
- (20) refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

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.

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