No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAUL HERNANDEZ-SERRANO,

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

APPENDIX

/s/ Kevin Joel Page

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 28, 2021
Lyle W. Cayce
Clerk

No. 20-10485

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SAUL HERNANDEZ-SERRANO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-316-1

Before JONES, COSTA, and DUNCAN, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

United States Court of Appeals for the Fifth Circuit

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No. 20-10485

UNITED STATES OF AMERICA,

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SAUL HERNANDEZ-SERRANO,

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Appeal from the United States District Court
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USDC No. 4:19-CR-316-1

Before JONES, COSTA and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Saul Hernandez-Serrano appeals a 60-month sentence of imprisonment imposed following his guilty plea to illegal reentry, which the district court ordered to run consecutively to an undischarged state sentence for driving while intoxicated. Hernandez-Serrano argues that the district

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

court erred by adopting and imposing a consecutive sentence. Because the district court did not plainly err, we AFFIRM.

BACKGROUND

Section 3584 of title 18 provides that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a). Although, as Hernandez-Serrano contends, the statute provides a default rule for interpreting judgments that are silent on the issue, this court has interpreted the statute to create a preference for imposing such sentences consecutively. *See United States v. Candia*, 454 F.3d 468, 477 (5th Cir. 2006) ("§ 3584 favors imposition of a consecutive sentence when the sentences are imposed at different times.").

The Sentencing Guidelines implement the statutory scheme set forth in § 3584. *See* 28 U.S.C. § 994(a)(1)(D) (authorizing the Sentencing Commission to devise Guidelines regarding "determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively"). Specifically, U.S.S.G. § 5G1.3 addresses the imposition of a sentence on a defendant, like Hernandez-Serrano, who is subject to an undischarged term of imprisonment at the time of sentencing. Subsection (a) provides that if an offense is committed after sentencing for another offense but before commencement of that sentence, the district court "shall" impose a consecutive sentence. § 5G1.3(a). Under subsection (d), in a case involving an undischarged term of imprisonment that is not covered by the other subsections, a district court may impose the sentence concurrently, partially concurrently, or consecutively to the undischarged sentence. § 5G1.3(d). The comment to subsection (d) also directs the district court, in applying subsection (d), to consider the 18 U.S.C. § 3553(a) factors, the type and length of the undischarged sentence, the time remaining on the undischarged sentence, and "[a]ny other circumstance relevant to the

determination of an appropriate sentence for the instant offense." U.S.S.G. § 5G1.3, cmt. (4)(A).

Hernandez-Serrano contends that, because the district court adopted the PSR, it erroneously applied § 5G1.3(a), which calls for a consecutive sentence, rather than (d), because the PSR used some of the language of (a), including the word "shall," although it cited (d). The relevant portion of the PSR states: "Therefore, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment. U.S.S.G. § 5G1.3(d)." The parties agree that subsection (a) was inapplicable on the facts, consequently, the question here is whether the court applied subsection (a) erroneously or (d) correctly.

The Government argues that, although the PSR used the word "shall," as in subsection (a), the PSR properly cited and the district court relied on subsection (d). According to the Government, subsection (d) "must be read" with the commentary, which directs the district court to be guided by factors including § 3584's default rule that multiple terms of imprisonment imposed at different times should run consecutively. Thus, although the PSR's use of the term "shall" was "imprecise," the PSR did not misrepresent the district court's discretion under § 5G1.3 and the district court did not plainly err.

DISCUSSION

As Hernandez-Serrano acknowledges, he did not raise this claim in the district court and we thus review only for plain error. *See Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 1429 (2009); *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009). To succeed on plain error review, Hernandez-Serrano must show (1) an error, (2) that is clear or obvious, and (3) that affected his substantial rights. *See Puckett*, 556 U.S. at 135, 129 S. Ct. 1423, 1429. If he can satisfy those three prongs, this court has

the discretion to correct the error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (alterations, internal quotation marks, and citation omitted). We find neither "plain" error nor an adverse effect on the appellant's rights.

In determining whether the district court erroneously believed that a consecutive sentence was mandatory, this court considers the record as a whole. Beyond adopting the PSR in general terms, the district court gave no indication at sentencing that the decision to impose the sentence consecutively to the undischarged sentence was based on § 5G1.3(a). Further, in contrast to at least two of the cases upon which Hernandez-Serrano relies, *United States v. Bowman*, 634 F.3d 357, 362–63 (6th Cir. 2011); *United States v. Gibbs*, 506 F.3d 479, 487–88 (6th Cir. 2007), the court did not indicate a belief that a consecutive sentence was mandatory. The district court instead specifically noted, at the sentencing hearing and in the statement of reasons, the advisory nature of the Guidelines and the § 3553(a) factors guiding the sentencing decision. In keeping with the application note to U.S.S.G. § 5G1.3(d) and § 3553(a), the district court considered Hernandez-Serrano's history and characteristics, the need to deter criminal conduct, and the need to protect the public from further crimes by Hernandez-Serrano.[1] U.S.S.G. § 5G1.3, cmt. (4)(A). On balance, there is

[1] This court's decision in *United States v. Lindsey*, 969 F.3d 136, 143 (5th Cir. 2020), *cert. denied*, 592 U.S. _(U.S. Feb. 22, 2021) (No. 20-6803), is helpful, although Lindsey had arguably abandoned his claim of § 5G1.3(d) error. This court noted that, even if Lindsey had not abandoned the issue, any error under § 5G1.3(d) as to the consecutive sentencing would not be plain because the guidelines application note directed the court to consider factors including § 3553(a) and any challenge to the weighing of those factors would not provide a sufficient basis for reversal. *Lindsey*, 969 F.3d at 141, 143. In light of *Lindsey*, the guidelines commentary, and the record, any error is not clear or obvious. *See Lindsey*, 969 F.3d at 143.

no basis for a conclusion that the court "plainly" erred. *See Puckett,* 556 U.S. at 135, 129 S. Ct. at 1429.

Moreover, Hernandez-Serrano fails to show that the alleged error affected his substantial rights. *See Puckett*, 556 U.S. at 135, 129 S. Ct. at 1429. The presumption of an effect on a defendant's substantial rights in *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016), upon which Hernandez-Serrano relies in his reply brief, is inapplicable here. *Molina-Martinez* held that, absent additional evidence, courts will presume that an error in calculating the guidelines range affected a defendant's substantial rights. *Id.* Hernandez-Serrano has shown no error in the calculation of his guidelines range.

In addition, to show that a sentencing error affected his substantial rights, Hernandez-Serrano must demonstrate a reasonable probability that his sentence would have been different but for the error. *See United States v. Gozes-Wagner*, 977 F.3d 323, 342 (5th Cir. 2020). He avers that it is at least reasonably probable that the district court would have imposed a concurrent sentence had it "properly analyzed" the guidelines, both because "[m]any courts" would find a potential ten-year sentence too harsh for his offense and because the district court also relied on an erroneously imposed additional criminal history point in setting the sentence.

The law arguably favors a consecutive sentence where sentences are imposed at different times, 18 U.S.C. § 3584; *Candia*, 454 F.3d at 477, but § 5G1.3(d) is agnostic as to whether a sentence should run concurrently, partially concurrently, or consecutively. In comparison, § 5G1.3 recommends concurrent sentences when the undischarged sentence is for conduct "relevant" to the offense for which the defendant is being sentenced. § 5G1.3(b), (c). Hernandez-Serrano's DWI convictions were not relevant conduct to his illegal reentry offense. In fact, at sentencing, the

district court considered the Hernandez-Serrano's DWI convictions to reflect a "pattern of endangering American society," and specifically agreed with the Government that it was "appropriate to be concerned about that."

Additionally, the fact that the district court denied Hernandez-Serrano's request for a downward departure based on his time served in state custody does not suggest a preference for a concurrent sentence but rather the opposite. Further, as noted, the district court explained at sentencing that the sentence as imposed served the § 3553(a) objectives of reflecting the seriousness of the offense, providing just punishment, promoting respect for the law, deterring future criminal conduct, and protecting the public. Against these indicators, Hernandez-Serrano's rhetoric that "[m]any courts" would find his sentence overly harsh fails to show a reasonable probability of a concurrent sentence absent the alleged error. *See Gozes-Wagner*, 977 F.3d at 342.

Finally, Hernandez-Serrano argues that the PSR should not have allotted an extra criminal history point for a decade-old 2008 DWI sentence. He acknowledges that any error as to the point was harmless, but contends that, without it, he could have argued "that he only just barely falls in category IV." With or without the criminal history point, however, the 2008 DWI conviction further underscored the court's concern about the danger Hernandez-Serrano posed to the general public. *United States v. Brantley*, 537 F.3d 347, 350 (5th Cir. 2008) (finding the sentence reasonable because the defendant's "undisputed criminal history provides ample justification for the sentence.") There is no reasonable probability that, without the criminal history point, the district court would have overlooked the prior DWI offense. *See Gozes-Wagner*, 977 F.3d at 342.

For these reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

v.

SAUL HERNANDEZ-SERRANO

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:19-CR-316-Y(1)
Matthew R. Weybrecht, assistant U.S. attorney
Jaidee Serrano, attorney for the defendant

On January 8, 2020, the defendant, Saul Hernandez-Serrano, entered a plea of guilty to count one of the one-count indictment. Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE CONCLUDED	COUNT
8 U.S.C. § 1326(a) and (b)(1)	Illegal Reentry After Deportation	November 29, 2018	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 indictment.

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

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed May 15, 2020.

IMPRISONMENT

The defendant, Saul Hernandez-Serrano, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 60 months on count one of the one-count indictment. This sentence shall run consecutively to the undischarged sentence of imprisonment imposed in case no. 1572280 in Criminal District Court No. 1, Tarrant County, Texas.

The Court recommends that the defendant be enrolled in a program that addresses alcoholism.

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 year on count one of the one-count indictment.

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;

(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