

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Jose Antonio Barahona-Paz,

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/ Jessica Graf

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Appendix A Judgment of the Fifth Circuit, *United States v. Jose Antonio Barahona-Paz*, No. 21-10350, 2021 WL 5968672 (5th Cir. Dec. 15, 2021), Court of Appeals for the Fifth Circuit. Judgment affirmed on December 15, 2021.

Appendix B *United States v. Jose Antonio Barahona-Paz*, 4:20-CR-00258-Y-1, United States District Court for the Northern District of Texas. Judgment and sentence entered on April 5, 2021.

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 21-10350
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

December 15, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE ANTONIO BARAHONA-PAZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CR-258-1

Before BARKSDALE, COSTA, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Jose Antonio Barahona-Paz pleaded guilty to illegal reentry after deportation. He was sentenced to, *inter alia*, an above-Sentencing Guidelines term of 36-months' imprisonment. Barahona contends: the statutory enhancement provision in 8 U.S.C. § 1326(b) (criminal penalties for reentry

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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of certain removed aliens) is unconstitutional and, therefore, his guilty plea was unknowing and involuntary; and his sentence was substantively unreasonable.

Constitutional questions are reviewed *de novo*. *United States v. Brown*, 250 F.3d 907, 913 (5th Cir. 2001). Barahona contends: 8 U.S.C. § 1326(b) is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (explaining “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”); and, as a result, his guilty plea was not knowing and voluntary because the court did not advise him that a prior conviction is an element of the offense under § 1326(b). As he concedes, however, his assertion § 1326(b) is unconstitutional is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27, 239–47 (1998) (holding, for purposes of statutory sentencing enhancement, prior conviction not a fact that must be asserted in indictment or found by jury beyond reasonable doubt), and raises the issue only to preserve it for possible further review. *See also, United States v. Pineda-Arellano*, 492 F.3d 624, 625–26 (5th Cir. 2007) (considering the effect of *Apprendi*). Accordingly, his plea assertion fails as well.

Regarding his claimed substantively-unreasonable sentence, Barahona asserts the court erred by: imposing an upward variance; not giving him credit for time spent in state custody; and not ordering his sentence be served concurrently with his state sentences under Guideline § 5G1.3 (offenses with relevant conduct). Each claim fails.

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

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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).

Of these three assertions, however, Barahona did not preserve the third: that the court should have ordered his federal sentence to be served concurrently with any sentence he will receive on his state charges, pursuant to Guideline § 5G1.3(c). Therefore, as Barahona acknowledges, review is only for plain error for that assertion. *E.g., United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Barahona must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have the discretion to correct the reversible plain error, but generally should do so only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings”. *Id.*

For the upward-variance issue, Barahona has not shown the court: did “not account for a factor that should have received significant weight”; gave “significant weight to an irrelevant or improper factor”; or “represent[ed] a clear error of judgment in balancing the sentencing factors”. *See United States v. Warren*, 720 F.3d 321, 332 (5th Cir. 2013) (explaining standard for substantively-unreasonable sentence). The court: reviewed and adopted the presentence investigation report; considered Barahona’s mitigating assertions; and determined an upward variance was appropriate because his Guidelines range substantially underrepresented his criminal history and because of the likelihood he would commit other crimes, especially illegal entry. Along that line, his contention that the court should have weighed the

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sentencing factors differently “is not a sufficient ground for reversal”. *United States v. Malone*, 828 F.3d 331, 342 (5th Cir. 2016). He has also not shown the extent of the upward variance was not justified. *See Gall*, 552 U.S. at 51 (explaining reviewing court “may consider the extent of the deviation, but must give due deference to the district court’s decision that the [18 U.S.C.] § 3553(a) [sentencing] factors, on a whole, justify the extent of the variance”).

Moreover, in the light of Barahona’s extensive history of immigration offenses and prior deportations, the court did not err in rejecting his assertion that he should have received credit for time spent in state custody. *See* U.S.S.G. § 2L1.2, cmt. n.7 (explaining departure based on time served in state custody considered only where departure not likely to increase risk to public).

For his assertion reviewed only for plain error, Barahona has not shown the requisite clear or obvious error concerning whether his state offenses were relevant conduct under Guideline § 1B1.3 & cmt. n.5(B) (defining “same course of conduct or common scheme or plan”). *See* U.S.S.G. § 5G1.3(c) (instructing court to order concurrent sentences when anticipated sentence results from “another offense that is *relevant* conduct to the instant offense” (emphasis added)); *United States v. Ochoa*, 977 F.3d 354, 357 (5th Cir. 2020) (explaining defendant must show offenses are “part of the same course of conduct” or “part of a common scheme or plan” (citation omitted)), *cert. denied*, 141 S. Ct. 1281 (2021).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

JOSE ANTONIO BARAHONA-PAZ

Case Number: 4:20-CR-258-Y (1)

M. Levi Thomas, assistant U.S. attorney

Michael A. Lehmann, attorney for the defendant

On November 18, 2020, the defendant, Jose Antonio Barahona-Paz, 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:

| <u>TITLE & SECTION</u> | <u>NATURE OF OFFENSE</u> | <u>OFFENSE CONCLUDED</u> | <u>COUNT</u> |
|-----------------------------------|-----------------------------------|---------------------------------|---------------------|
| 8 U.S.C. § 1326(a) and (b)(1) | Illegal Reentry After Deportation | September 14, 2020 | 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 March 30, 2021.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed April 1, 2021.

Judgment in a Criminal Case

Defendant: Jose Antonio Barahona-Paz

Case Number: 4:20-CR-258-Y(1)

Judgment -- Page 2 of 3

IMPRISONMENT

The defendant, Jose Antonio Barahona-Paz, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 36 months on count one of the one-count indictment. This sentence shall run consecutively to any future sentences that may be imposed in case nos. 1657061, 1656673, and 1657059 in Criminal Court No. 5, Tarrant County, Texas. Further, this sentence shall run consecutively to any future revocation sentence that may be imposed by the Western District of Texas, Del Rio division, in case no. 2:18CR02385(1).

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 2 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 United States Sentencing Commission Guidelines Manual, and shall:

- not commit another federal, state, or local crime;
- not possess illegal controlled substances;
- not possess a firearm, destructive device, or other dangerous weapons;
- cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004;
- 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;
- not illegally re-enter the United States, if deported or allowed voluntary departure; and
- 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.

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.

Judgment in a Criminal Case

Defendant: Jose Antonio Barahona-Paz

Case Number: 4:20-CR-258-Y(1)

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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