

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SERGIO GARCIA-LARA,

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 Opinion of Fifth Circuit, CA No. 22-10176, dated September 27, 2022, *United States v. Garcia-Lara*, 2022 WL 4494117 (5th Cir. Sept. 27, 2022)(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered February 17, 2022. *United States v. Garcia-Lara*, Dist. Court 4:21-CR-290-P.

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 27, 2022

Lyle W. Cayce
Clerk

No. 22-10176
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SERGIO GARCIA-LARA,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CR-290-1

Before JONES, HAYNES, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Sergio Garcia-Lara pleaded guilty to illegal reentry after deportation in violation of 8 U.S.C. § 1326(a) and (b)(1). The district court sentenced Garcia-Lara to 12 months of imprisonment, which represented an upward

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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variance,¹ plus two years of supervised release. On appeal, Garcia-Lara contends that the district court erred by sentencing him based on unreliable information—that is, the allegations in the presentence report (PSR) that he may have distributed drugs.

Because we conclude that Garcia-Lara did not preserve this alleged error in the district court, we review for plain error. *See United States v. Williams*, 620 F.3d 483, 493 (5th Cir. 2010).² To show plain error, Garcia-Lara must demonstrate (1) an error; (2) that was plain or obvious; and (3) that affected his substantial rights. *See id.* at 493-94. If those conditions are satisfied, we may exercise our discretion to order resentencing, but only if the error “seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 494 (internal quotation marks, brackets, and citation omitted).

For sentencing purposes, a district court “may consider any information which bears sufficient indicia of reliability to support its probable accuracy.” *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (internal quotation marks and citation omitted). This reliability requirement is found in the Guidelines but has a constitutional dimension as well. *See*

¹ The defendant’s brief to this court states: “A Presentence Report (PSR) found a Guideline range of just 6-12 months imprisonment.” However, the actual conclusion of the PSR was a guideline range of 0-6 months, such that the 12-month sentence was an upward variance.

² Although counsel for the defendant argued to the district court that the statements contained in the PSR by Garcia-Lara’s ex-girlfriend regarding whether he was selling drugs were “inconsistent” with Garcia-Lara’s criminal conviction history, counsel did not state that the PSR was inaccurate or should be altered. In any event, given our primary conclusion below – that the district court did not err – the standard of review is not determinative.

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U.S.S.G. § 6A1.3(a), p.s.; *United States v. Angulo*, 927 F.2d 202, 204 (5th Cir. 1991).

Putting aside the reliability of the allegations that he may have distributed drugs, Garcia-Lara's assertion is belied by the record, which indicates that the district court did not consider these allegations in selecting the upward variance. To the contrary, the district court explained that it imposed the variance because the PSR showed that Garcia-Lara had unlawfully entered the United States on four additional occasions and that, while unlawfully present in United States, Garcia-Lara had established himself as a violent and assaultive individual that uses illegal drugs. The district court did not mention the drug trafficking allegations at all during the sentencing hearing and did not suggest that those allegations contributed to its sentencing decision. Based on this record, Garcia-Lara has not shown any error, much less one that was plain or obvious. *See Williams*, 620 F.3d at 493-94.

In addition, even assuming arguendo that Garcia-Lara has satisfied the first two prongs of plain error review, he has not satisfied the third prong. *See Williams*, 620 F.3d at 493-95. To do so, Garcia-Lara must demonstrate that the error affected his substantial rights, meaning that he must demonstrate a "reasonable probability that he would have received a lesser sentence" but for the error. *Id.* at 496. In this case, however, the district court's explicit justification of the variance based on other factors belies any argument that he would have received a lesser sentence but for the district court's alleged consideration of the drug trafficking allegations. *See id.* at 495-96.

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

JUDGMENT IN A CRIMINAL CASE

v.

SERGIO GARCIA-LARA

Case Number: 4:21-CR-00290-P(01)

U.S. Marshal's No.: 71274-509

Shawn Smith for Levi Thomas, Assistant U.S. Attorney

Andrea Aldana, Attorney for the Defendant

On November 23, 2021 the defendant, SERGIO GARCIA-LARA, entered a plea of guilty as to Count One of the Indictment filed on October 19, 2021. 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	8/31/2021	One

The defendant is sentenced as provided in pages 2 through 5 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 19, 2021.

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 February 16, 2022.



MARK T. PITTMAN
U.S. DISTRICT JUDGE

Signed February 17, 2022.

Judgment in a Criminal Case
Defendant: SERGIO GARCIA-LARA
Case Number: 4:21-CR-00290-P(1)

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IMPRISONMENT

The defendant, SERGIO GARCIA-LARA, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Twelve (12) months** as to Count One of the Indictment filed on October 19, 2021. This sentence shall run consecutively to any future sentences which may be imposed in Case No. CP-02-CR-0015227-2006, before the Court of Common Pleas, Allegheny County, Pennsylvania; and Case Nos. 1697075D and 1697080D, before the 432nd District Court, Tarrant County, Texas.

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 **Two (2) years** as to Count One of the Indictment filed on October 19, 2021.

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 USC § 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 contained in the Judgment and shall comply with the mandatory and special conditions stated herein:

- 1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame;
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed;
- 3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer;
- 4) The defendant shall answer truthfully the questions asked by the probation officer;
- 5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;

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Defendant: SERGIO GARCIA-LARA
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- 6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observed in plain view;
- 7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her employment (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;
- 8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer;
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours;
- 10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed , or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers);
- 11) The defendant shall not act or make an agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court;
- 12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk; and,
- 13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

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;

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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;

pay the assessment imposed in accordance with 18 U.S.C. § 3013; and,

not illegally reenter the United States if deported 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
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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