

No. _____

In the Supreme Court of the United States

GILBERTO GONZALEZ-ENRIQUEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

PETITION APPENDIX

Fifth Circuit Opinion	1a
Sentencing Transcript	3a

United States Court of Appeals for the Fifth Circuit

No. 22-10199
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

January 11, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GILBERTO GONZALEZ-ENRIQUEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CR-268-1

Before BARKSDALE, ELROD, and HAYNES, *Circuit Judges*.

PER CURIAM: *

Gilberto Gonzalez-Enriquez appeals the below-Guidelines 52-months' sentence imposed following his guilty-plea conviction for illegal reentry after removal, in violation of 8 U.S.C. § 1326(a), (b)(1). He maintains the court erred by applying an additional 10-level enhancement under Sentencing Guideline § 2L1.2(b)(3)(A) for his 2019 felony-driving-while-

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

No. 22-10199

intoxicated conviction because instead, under Texas law and Application Note 5, only one 10-level enhancement under Guideline § 2L1.2(b)(2)(A) should have been applied.

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, as in this instance, 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).

We need not decide whether the court procedurally erred in applying the enhancement, because the Government has met its burden on appeal of showing that any error was harmless by demonstrating: the court “would have imposed the same sentence had it not made the error”; and it “would have done so for the same reasons it gave at . . . sentencing”. *United States v. Guzman-Rendon*, 864 F.3d 409, 411–12 (5th Cir. 2017) (citation omitted) (rejecting claim of error as harmless without deciding whether court erred).

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CASE NO. 3:20-cr-00268-X(1)

-----x

UNITED STATES OF AMERICA,

Plaintiff,

v.

GILBERTO GONZALEZ-ENRIQUEZ,

Defendant.

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TRANSCRIPT OF THE SENTENCING

BEFORE THE HONORABLE BRANTLEY STARR

UNITED STATES DISTRICT JUDGE

Dallas, Texas

February 16, 2022

10:06 a.m.

1 A P P E A R A N C E S:

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FOR THE PLAINTIFFS:

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15 Also Present: Alma Adriano, Interpreter

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1 COURT REPORTER: MS. KELLI ANN WILLIS, RPR, CRR, CSR
2 United States Court Reporter
3 1100 Commerce Street
4 Room 1528
5 Dallas, Texas 75242
6 livenotecrr@gmail.com

7 Proceedings reported by mechanical
8 stenography and transcript produced by computer.

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1 - P R O C E E D I N G S -

2 THE COURT SECURITY OFFICER: All rise.

3 THE COURT: Thank you.

4 You can be seated.

5 Okay. The Court calls Criminal Action No.

6 3:20-cr-268-X(1). That is the United States of

7 America versus Gilberto Gonzalez-Enriquez for

8 sentencing.

9 Let's do appearances, first for the
10 Government.

11 MS. DANA: Good morning, your Honor.

12 Nicole Dana for the Government.

13 THE COURT: Thank you, Ms. Dana.

14 And for the defense?

15 MS. KIME-GOODWIN: Your Honor, Shery
16 Kime-Goodwin for Mr. Gonzalez. I will note that he
17 will need the services of an interpreter, your
18 Honor.

19 THE COURT: Thank you.

20 And I understand the interpreter has been
21 sworn-in already.

22 THE INTERPRETER: Yes, your Honor.

23 THE COURT: Thank you.

24 Okay. And then Mr. Gonzalez-Enriquez, can
25 you state your name into the microphone for us?

1 THE DEFENDANT: Gilberto
2 Gonzalez-Enriquez.

3 THE COURT: Thank you.

4 Okay. Are the parties ready to proceed
5 with sentencing this morning?

6 MS. DANA: The Government is ready.

7 Your Honor, can I --

8 MS. KIME-GOODWIN: The defense is ready.

9 MS. DANA: Can I confirm that we should
10 remain seated?

11 THE COURT: That is next on my list.

12 So you can remain seated. We have got a
13 mask rule in place for the courthouse, but we can't
14 hear you through the mask. And so if you can, when
15 you are speaking, if you can have your mask down and
16 be close to the microphone, we can keep a very clean
17 transcript.

18 If you are nervous about being around
19 other people because counsel tables are closer to
20 other people, you can speak from the microphone when
21 we have the speaking sessions, right? When it is
22 lawyer argument or objections, feel free to speak
23 from the podium, which is far away from anyone in
24 this courtroom.

25 Any questions -- well, I should say, Ms.

1 Kime-Goodwin, you also can call a timeout at any
2 point you want to talk to your client. It is hard
3 to whisper six feet away, masks and all, so just
4 call a timeout and I will clear the room and you can
5 tell Mr. Frye when you are done, if you need to.

6 MS. KIME-GOODWIN: Thank you, your Honor.
7 I appreciate that.

8 THE COURT: You bet.

9 Any questions on COVID protocols?

10 MS. DANA: No, your Honor. Thank you.

11 THE COURT: Okay.

12 All right. So we need to talk about the
13 guilty plea.

14 Mr. Gonzalez-Enriquez, you appeared before
15 U.S. Magistrate Judge David Horan on July 6, 2021.
16 At that time you entered a plea of guilty to Count 1
17 of the single-count indictment that charged you with
18 illegal reentry after removal from the United States
19 in violation of 8 U.S. Code §§ 1326(a) and
20 1326(b)(1).

21 On that date, Judge Horan found that your
22 guilty plea was knowing and voluntary, and supported
23 by an independent basis in fact containing each of
24 the essential elements of the offense.

25 You told him that you understood the

1 elements in the offense, agreed to the accuracy of
2 the factual resume, and admitted that you committed
3 all of the essential elements of the offense.

4 So on July 21st, 2021, I entered an order
5 accepting your plea and adjudging you guilty of the
6 crime alleged in the indictment.

7 There is no plea agreement in this case,
8 so the next thing we need to talk about is the
9 presentence report.

10 I will ask the Government some questions
11 first.

12 Ms. Dana, did the Government receive a
13 timely copy of the presentence report and the
14 addendum?

15 MS. DANA: Yes, your Honor.

16 THE COURT: I see your written acceptance
17 at Document No. 27.

18 Is there anything you want to lodge today,
19 objection or clarification-wise to the PSR or the
20 addendum?

21 MS. DANA: No, Your Honor. Thank you.

22 THE COURT: Okay.

23 Then I will ask you, Ms. Kime-Goodwin, did
24 you and your client receive a timely copy of the
25 presentence report and the addendum?

1 MS. KIME-GOODWIN: We did, your Honor.

2 THE COURT: Okay. You have reviewed and
3 explained them to your client in Spanish?

4 MS. KIME-GOODWIN: I have, your Honor.

5 THE COURT: Okay.

6 Are you certain your client understands
7 them?

8 MS. KIME-GOODWIN: Yes, your Honor, I'm
9 sure.

10 THE COURT: Okay.

11 So I see you have an objection at Docket
12 No. 26 to the 10-level enhancement under U.S.
13 Sentencing Guidelines § 2(1)1.2(b)(3)(A).

14 I have read that; I have read the
15 Government's response in the addendum. I'm happy to
16 hear whatever argument you want to make today on
17 that objection.

18 MS. KIME-GOODWIN: Thank you, your Honor.

19 Are you ready for argument?

20 THE COURT: I am. I am.

21 And we will pick up -- we will do
22 objection argument first, and then I will take up
23 separately any lawyer argument on what the right
24 sentence should be. But at this point, hit me with
25 whatever argument you have on the objection.

1 MS. KIME-GOODWIN: Thank you, your Honor.
2 Your Honor, the Court, of course, has read
3 my objection, so the Court is aware. You know, what
4 we have here is -- the question really comes down to
5 this interpretation of the language that is
6 contained in Application Note 5.

7 Specifically, at issue in this case is
8 what -- what is meant by this phrase "underlying
9 criminal conduct."

10 The Court should note -- I mean,
11 Application Note 5, it doesn't have a definition as
12 to what that phrase is supposed to mean.

13 So, your Honor, what we would argue is
14 that the Court should use the plain meaning of the
15 term "underlying criminal conduct." It means
16 exactly what it describes and that would be conduct
17 that results in the application of USSG 2L1.2(B)(2)
18 and (B)(3).

19 Application Note 5 indicates that if
20 underlying criminal conducted resulted in an
21 enhancement under (B)(2), then the same conduct
22 cannot be used again for enhancement under (B)(3).

23 So, your Honor, what, you know, what we
24 are asking the Court to do is -- the term means what
25 it means. We believe that the Government and the

1 probation office, by their responses that they have
2 files, essentially what they are doing is they are
3 suggesting that the Court create or interpret what
4 does "underlying criminal conduct" mean and they are
5 asking the Court to make a very narrow
6 interpretation of what that is supposed to mean.

7 Specifically, the Government, in its
8 argument, is arguing that the term "underlying
9 criminal conduct" would not include underlying
10 predicate offenses.

11 Specifically, what the Government is
12 arguing is that if it is an underlying predicate
13 offense, it is just a sentencing enhancement, and,
14 therefore, it would somehow fall out from underneath
15 this definition of underlying criminal conduct.

16 Your Honor, with regard to the definition,
17 I would point out to the Court, the Government cites
18 some case authority, but that case authority --
19 there is no case authority that directly supports
20 the position that -- that the Government is asking
21 this Court to adopt.

22 You know, specifically in support of their
23 objection, the Government points to two cases. And,
24 you know, essentially what the argument is arguing
25 is that this definition of "underlying criminal

1 conduct," that it would somehow mean that it would
2 just be conduct that would be considered, you know,
3 conduct that was ongoing with regard to the offense
4 itself.

5 And, specifically, they point to dicta
6 that is contained in two cases, the Medina-Anicacio
7 case and the Chapa-Garza case.

8 Just for the purpose of the record, I
9 would point out that both of those cases, they are
10 not on point as a whole with regard to this case.
11 Both of those cases have to do with guidelines that
12 were in effect prior to the guidelines that we have
13 now and concern the definition of "crime of
14 violence" that is under 18 USC 16(b) that was
15 interpreted under the old guidelines as it applied
16 to aggravated felonies.

17 So, really, I mean, when the Court is
18 looking at those two cases, we are talking just
19 about dicta that the Government has dragged out,
20 saying, okay, well, with the DWI offense, their
21 point that they made in their brief was, well, you
22 know, a DWI offense basically ends when the person
23 stops driving the car.

24 Your Honor, if you actually look at the
25 language of the Medina-Anicacio case, there is an

1 interesting statement that the Fifth Circuit made,
2 especially in light of what we are talking about
3 here, which is a felony DWI case, it says that the
4 flip side of that is that DWI begins in the felony
5 case once the person starts driving the car and when
6 the person has two prior DWIs.

7 As a matter of fact, the Chapa-Garza case
8 that they cited is actually the consenting opinion
9 of Judge Barksdale. The Chapa-Garza case is a case
10 that the Government moved for rehearing en banc and
11 it was denied. The opinion they are citing actually
12 goes to Judge Barksdale's dissent in that.

13 And Judge Barksdale -- I bring this up
14 because it is going to dovetail into my second
15 argument here, which is Judge Barksdale says, you
16 know, hey, there is a definition between plain
17 vanilla DWI, under the Texas statute, as a matter of
18 fact, not just Texas, but he's referring to some New
19 York statutes as well in felony DWI.

20 And so the court, even in its explanation
21 as its talking about this other issue is saying,
22 hey, felony DWI is different. And certainly, your
23 Honor, with regard to -- if we are looking at
24 underlying criminal conduct for this case and
25 looking at what that means, if you actually look at

1 the Texas statute, we would argue that the Texas
2 statutes support that it is not just a sentencing
3 enhancement. If the Court looks at the actual
4 statutes, for example, DWI, just plain old vanilla
5 DWI is a violation of Texas Penal Code § 4904. If
6 it is felony DWI, it is a violation of Texas Penal
7 Code § 4909.

8 And within the Texas Penal Code 4909, it
9 states that in order for the -- for it to be proven,
10 that the Government has to show at trial that the
11 individual has two prior convictions for DWI.

12 So we would argue that, you know, based on
13 how that statute is worded, this -- in this case, it
14 would certainly be underlying criminal conduct.

15 And, your Honor, just by way of argument
16 also, as far as it not being just a sentencing
17 enhancement, if you look at Texas Penal Code 4909,
18 there are actually some indications in the statute
19 itself that the State of Texas does have missing
20 enhancements in 4904.

21 Specifically, there is two. 4904 talks
22 about if you have an individual who is arrested for
23 DWI, also has an open container containing alcohol
24 with them, that the penalty increases as far as the
25 minimum penalty under that statute.

1 Additionally, it also makes reference to
2 the fact that if the blood alcohol content of the
3 individual is higher than .15, then, again, there is
4 another sentencing enhancement that would increase
5 the penalty that is available under DWI.

6 So, you know, for the purposes of this,
7 your Honor, if the Court is trying to make that
8 distinction, we would argue that Texas does not make
9 that distinction, that for the purpose of
10 considering underlying criminal conduct in this
11 case, most certainly the way the statute is written,
12 it would constitute underlying criminal conduct.

13 Finally, your Honor, you know, even making
14 that distinction, even, you know, you know,
15 assuming, you know, which we have, as far as the
16 Government trying to make that distinction, I would
17 also point out, though, again, that, you know, that
18 the language of 201.2 as far as that application
19 note, it doesn't make that distinction. And so, you
20 know, ultimately the Court shouldn't make that
21 distinction either.

22 This appears to be underlying criminal
23 conduct. It occurred before that first deportation,
24 which triggered 201.2(b)(2) and it also, the
25 underlying conduct also was used, as far as the most

1 recent conviction, because it triggered conduct that
2 would, you know, arguably apply under 201.2(b)(3).

3 This is exactly the type of criminal
4 conduct that is envisioned by that application note,
5 and the Court should not 201.2(b)(3).

6 Your Honor, I also would need to address
7 with regard to argument the response of the
8 probation office is a little bit different than the
9 response of the Government.

10 The probation office is also suggesting
11 the Court adopt a narrow definition. For lack of a
12 better explanation of it, the Government or the --
13 not the Government -- the probation office seems to
14 saying, that, well, yeah, actually, we could
15 envision an -- you know, where this application note
16 would apply, but we think it would have to be in a
17 situation where the prior sentence that -- the one
18 that was -- that the defendant received back in --
19 at the time that was associated with the first
20 removal. In this case, it was a four-year sentence;
21 he completed the sentence and was then deported.

22 But the probation office is saying, well,
23 if he came back and he was still, you know, they
24 used the term in the objection "supervised release,"
25 but I think what they would also infer is if the

1 person was probation or parole, that then they would
2 envision a situation where, you know, essentially
3 that (b)(3) would not apply as far as the
4 guidelines. And, your Honor, that's -- if I
5 understand the way that the probation office was
6 writing its response.

7 You know, so in -- in response to that,
8 again, your Honor, you know, quite frankly,
9 Application Note 5 doesn't make that distinction.
10 We don't have any language in Application Note 5
11 that says, well, you know, this is how you would
12 apply it under these circumstances.

13 So, your Honor, because, you know, that is
14 not what that Application Note 5 says, we would ask
15 the Court to essentially just look at the term, as
16 it is there within the application note, apply the
17 plain meaning to it, which would mean that it would
18 apply in this instance to those prior convictions,
19 and that the Court, you know, essentially because of
20 that, the Court should not apply 201.2(b)(3) in this
21 instance, your Honor.

22 So that is all that I have with regard to
23 my response to the Government's response to my
24 objection and the objection itself, your Honor.

25 THE COURT: Thank you.

1 So, Ms. Dana, what response do you have to
2 the objection?

3 MS. DANA: Your Honor, I really want to
4 fulsomely argue, but I think the Government's
5 written response and the addendum are pretty clear
6 in how the Government believes this particular
7 sentencing issue should be resolved.

8 I think -- I think Ms. Kime-Goodwin has
9 done a nice job of explaining what my position is,
10 which is that it is either a sentencing enhancement
11 or a predicate -- or a predicate offense.

12 I think if we were to take this theory and
13 run with it, you could argue that any person
14 convicted of felon-in-possession is still committing
15 the original felony offense that was required to be
16 committed in order to commit the instant offense.

17 I think -- I think we are going to
18 extrapolate this note far beyond what its intent was
19 in the sentencing guidelines if we go with the
20 defense theory.

21 And I would also point out that while it
22 was stated that the Government doesn't have on point
23 case law for its position, it doesn't appear that
24 there is any on point case law for the defendant's
25 position either.

1 For the stated in the written response and
2 the addendum, we would ask the Court to deny the
3 objection.

4 THE COURT: Understood. I appreciate the
5 argument. I think it is an interesting one, Ms.
6 Kime-Goodwin. I think the Fifth Circuit should
7 speak clearly to it; I'm inclined to overrule it
8 today.

9 My thought is, I'm not really viewing any
10 of the cases cited as being directly on point. So
11 I'm not saying I'm bound by Medina-Anicacio at all
12 or by the Barksdale writing in Chapa-Garza. I think
13 it is an issue that we district courts are muddling
14 through until we get some clarity from the Fifth
15 Circuit.

16 I'm not viewing the Application Note 5,
17 combined with Texas felony DWI laws as viewing
18 felony DWI as a continuing offense. I believe that
19 it was an offense committed on the day that the
20 felony DWI occurred, and that it also has to prove a
21 predicate in that underlying case of the prior
22 convictions. But I don't believe it is a
23 continuation from the date of the prior conviction
24 through the date of the felony DWI conviction.

25 I appreciate your argument. I think you

1 made it really well. You may win in the Fifth
2 Circuit. So we will see.

3 But today, I'm overruling your objection,
4 but I appreciate the clarity with which you made it.

5 MS. KIME-GOODWIN: Thank you, your Honor.

6 THE COURT: Okay. So any other objections
7 you want to make today?

8 I will let everyone take a new bite of the
9 apple on the day of. Is there anything you thought
10 about addendum-wise or PSR-wise that you want to
11 bring up, Ms. Kime-Goodwin?

12 MS. KIME-GOODWIN: No, your Honor.

13 I will reserve other arguments. I think
14 it has to do with the application. We do have a
15 situation here where my client has been in custody
16 at this point, with the combined state and federal,
17 for over three years. Three years, four months and
18 22 days, to be exact.

19 So I will address the credit for that time
20 towards the sentence when appropriate, your Honor.

21 THE COURT: Thank you. I appreciate that
22 that. And I'm interested in that.

23 I never put in my judgments when I think
24 time should have started accruing, because I have
25 had wrestling matches with the Bureau of Prisons in

1 the past, but I do try to think through what I think
2 they will do when fashioning the appropriate number
3 that I put into the sentence.

4 So just a preview, when you make your
5 argument, keep in mind my previous struggles with
6 BOP and I can only control what I can control, which
7 is the number, not the start date.

8 MS. KIME-GOODWIN: Understood.

9 Right.

10 THE COURT: They are the ones that say
11 they have exclusive jurisdiction over calculating
12 the start date.

13 Okay. So before we get to the guideline
14 calculations, I need to ask about the third-point
15 deduction for acceptance of responsibility.

16 Ms. Dana, is Government moving for that
17 third-point deduction?

18 MS. DANA: Yes, your Honor. We so move.

19 THE COURT: I will grant it and I will
20 apply the third point in calculating the guidelines.

21 I have ruled on the Defendant's
22 objections. I'm adopting the remaining findings and
23 conclusions of the presentence report and the
24 addendum in their entirety.

25 Before I calculate the guidelines with the

1 relevant federal statutes in the 2018 Guidelines
2 Manual, I need to note the applicable statutory
3 maximum, the authorized maximum sentence by statute
4 is 10 years or 120 months and the statutory maximum
5 fine is \$250,000.

6 But I have considered the probation
7 officer's calculations and conclusions from the
8 presentence report and the addendum, and I have
9 ruled on the Defendant's objections, so I'm adopting
10 the presentence report and its calculations and
11 conclusions, I'm determining the total offense level
12 is 23; the criminal history category is 3. The
13 imprisonment range is 57 to 71 months; the
14 supervised release range is 1 to 3 years; and the
15 fine range is \$20,000 to \$200,000.

16 Ms. Dana, from the Government's
17 perspective, did I get any of those calculations
18 incorrect?

19 MS. DANA: No, your Honor. We agree with
20 them.

21 THE COURT: I'm not asking you to waive
22 any of your prior objections, Ms. Kime-Goodwin. But
23 did I get those calculations correct in light of my
24 prior ruling?

25 MS. KIME-GOODWIN: You have, your Honor.

1 THE COURT: Okay.

2 So now I would love to hear argument from
3 the lawyers on both sides.

4 I will ask the Government to go first on
5 what the appropriate sentence should be in this
6 case, and then, Ms. Kime-Goodwin, I will ask you to
7 go, and then I can read off my list of character
8 letters after you've told me what you think the
9 right sentence is and why in this case. And if you
10 have any live character witnesses, we can hear from
11 those before allocution.

12 So with that run of show, Ms. Dana, the
13 baton is now yours.

14 MS. DANA: Thank you, your Honor.

15 With respect to the appropriate sentence,
16 I have been an AUSA for 10 years now. The
17 guidelines with respect to the illegal reentry
18 offense, offenses have changed since that time.

19 And we used to base our enhancements on
20 crimes of violence and the nature of the underlying
21 convictions, and there was an attempt to kind of
22 streamline the guidelines and make it, you know,
23 have you committed a new offense? How many prior
24 1326 convictions do you have, to try to -- to try to
25 even out some of the sentences.

1 Some people were getting incredibly high
2 guideline ranges from only having one criminal
3 conviction, whereas some people with multiple DWIs
4 were only looking at a guidelines range of two
5 years.

6 In my experience, the change in the
7 guidelines has benefited most defendants. This
8 would not be one of those cases. I'm surprised,
9 actually, to see such a high guidelines range in a
10 case where the defendant has only driving while
11 intoxicated convictions.

12 I find those to be serious, I find those
13 to be dangerous, but they are not assault cases,
14 they are not crimes against children.

15 I have seen other 1326 defendants with
16 those prior offenses, but because of when they
17 happened, not getting the types of enhancements that
18 this Defendant is getting today.

19 I say that to say that my perspective is
20 actually somewhere in the low to mid range as the
21 appropriate sentence. I know there is a discussion
22 of potential factors for departure, both an issue of
23 recidivism and an issue of time served for a state
24 offense.

25 I want to address the issue of recidivism

1 specifically, and I would ask the Court to impose a
2 term of supervised release for this defendant. I
3 think that is going to take care any of the concerns
4 we have that is going to return to the United
5 States, that he's going to commit more crimes that
6 might jeopardize other people.

7 I know that he has a wife and children
8 here. That is going to be a strong pull to bring
9 him back to the United States, but I think that
10 issue can be resolved with a term of supervised
11 release. And then if he does return, my argument is
12 going to be very different.

13 But for a defendant that has only driving
14 while intoxicated convictions, so a problem with
15 alcohol, that is getting the downside of every
16 change in the guidelines, that only has one prior
17 formal removal -- I actually confirmed that with Ms.
18 Kime-Goodwin because I was so surprised to see that.

19 It has been a long time since I have had a
20 file with just one removal.

21 That A significant term of supervised
22 release and a low to mid range of the guideline
23 sentence is going to satisfy the 3553(a) factors in
24 this case. And that would be my argument, your
25 Honor.

1 THE COURT: Thank you. Ms. Dana.
2 Okay. Ms. Kime-Goodwin, it is to you.
3 What do you think the right sentence is in
4 this case?

5 MS. KIME-GOODWIN: Well, your Honor, I
6 would argue that given the history of this
7 individual as far as their, you know, just their
8 background and history and characteristics, that a
9 sentence at the bottom of the guideline range is
10 appropriate in this instance.

11 Specifically, your Honor, with regard to
12 the conduct in this case, as the Government points
13 out, I'm not taking away from the seriousness of the
14 DWI convictions. But, your Honor, the state is the
15 one that has dealt with those punishments and has
16 addressed what is the correct punishment with regard
17 to the DWIs. And really what we are talking about
18 here is illegal entry and what is the appropriate
19 punishment here.

20 And, your Honor, for -- I would point out
21 that with regard to the guideline range, the 57 to
22 71 months, some of the conduct that we are talking
23 about here, essentially, that that DWI that resulted
24 in having him the conviction and the DWI for which
25 he was arrested for in 2018, the period of time

1 between those two that the original arrest for the
2 first one was in 2003 and this one was in 2018.

3 So we are talking about a 15-year period
4 between those two felony convictions in which
5 there's no arrests, no convictions. Mr.
6 Gonzalez-Enriquez -- Mr. Gonzalez-Enriquez was just
7 living his life doing what he's supposed to do.

8 Your Honor, there is no question that my
9 client has issues with alcohol. You don't have the
10 DWI convictions that he does without having, you
11 know, lifelong issues with alcohol.

12 However, your Honor, he -- you know, the
13 fact that there is length of time between the two
14 does show the Court that he's able to maintain
15 sobriety for long periods of time. And so that is
16 certainly something the Court should take into
17 account with regard to the upward departure portions
18 of the presentence report that the Court would have
19 to address.

20 Additionally, your Honor, we would agree,
21 I mean, the Government has different reasons, but
22 they have also stated on the record that they don't
23 think an upward departure is necessary in this case
24 and that a sentence at the low, the middle end of
25 the guideline range would be appropriate here.

1 We would argue, that based on our argument
2 and what the Government has said, a sentence at the
3 bottom end of the range is appropriate.

4 Additionally, your Honor, while we are
5 talking about it, we do have to, at this point, also
6 look at this time that Mr. Gonzalez-Enriquez has
7 been serving in state custody.

8 He entered into federal custody on, I
9 believe it was, according to the Presentence Report
10 on September 11, 2020. So we do have a situation
11 where he's been in federal custody for 17 months and
12 five days.

13 So, you know, we have to take into
14 account, it is a total of 40 months, but, you know,
15 quite frankly, 17 months of that he's already been
16 in federal custody.

17 So really what we are talking about here
18 as far as time that he's been in state custody where
19 the Court has to decide, what do I do with that
20 time, we are really -- we are really talking about
21 at that point it would be 23 months, is what we are
22 talking about here.

23 So what we are asking the Court to do in
24 this instance is go ahead and grant the downward
25 departure that is noted within the presentence

1 report as far as in paragraph 81, you know, with
2 regard to that time that he spent in state custody.

3 A huge issue in determining whether or not
4 to grant that -- that departure and to go ahead and,
5 you know, basically credit Mr. Gonzalez-Enriquez
6 with the 23 months that he's been in state custody
7 is whether or not that this individual is going to
8 pose further risk -- increased risk to the public,
9 whether he's going to be a further danger to the
10 public based on his prior history.

11 Your Honor, we understand, we are dealing
12 with someone that has multiple DWI convictions.
13 But, your Honor, I think a very telling factor in
14 this case is the fact that from the time that he had
15 that felony DWI, you know, and the arrest for it in
16 2003, and then this most recent one in 2018, there
17 was a 15-year period there between those
18 convictions.

19 Additionally, your Honor, I would argue to
20 the Court that, you know, Mr. Gonzalez-Enriquez, you
21 know, quite frankly, this past -- this term that
22 he's been incarcerated, this past 40 months is the
23 longest time that he's ever been incarcerated and
24 away from his family.

25 He hasn't served, you know, as far as the

1 state custody sentence that he received, in the
2 past, you know, he didn't serve -- you know, he was
3 paroled before he ended up serving the full
4 sentence.

5 So we are talking about that he's already
6 being punished because he's already been
7 incarcerated for this 40-month period. And that in
8 turn also affects him as far as the decisions that
9 he knows that he needs to make for the future.

10 You know, specifically, your Honor, he
11 knows that once he serves a sentence in this federal
12 case, you know, that essentially he's going to be
13 deported to Mexico. And that, you know, he's seen
14 the flip side of what happens because this will be
15 his second, you know, deportation or removal.

16 And he knows that he doesn't want to face
17 a situation where he's going to be coming in front
18 of this court again. He doesn't want to be in a
19 situation where he is incarcerated ever again.

20 He has a close family. He knows that he's
21 going to have to take changes to where his family
22 will need to join him in Mexico and make a life in
23 Mexico rather than here.

24 He pointed out to me -- well, he's in a
25 little bit of a different situation as far as

1 returning to the United States than he was last
2 time.

3 The last time that he was deported, your
4 Honor, in 2004, his children were much younger. His
5 youngest child right now is 15 years old. So I
6 mean, at the time that the original deportation
7 occurred, he had these very young children, one that
8 was a baby that, you know, basically, the impetus to
9 return is that, I have young children that I have to
10 support, I have a wife that I have to support. You
11 know, that duty and that calling for that is
12 stronger than the risk that I take by returning.

13 So, you know, if the Court keeps that in
14 mind, that it is not the same situation where he's
15 going to be compelled, that his children are older,
16 they are adults, they have grown, this time as far
17 as the punishment that he's received that he's going
18 to stay over in Mexico.

19 That weighs in favor of the Court going
20 ahead and doing a departure in this case and giving
21 him credit for 23 months. If the Court does give
22 him credit for the 23 months, your Honor, I, too,
23 have in been position with the Bureau of Prisons. I
24 know that there is, you know, as far as the Court's
25 judgment, that they, you know, that there is

1 struggles as far as the language that the Court puts
2 within the judgment.

3 My understanding with the Bureau of
4 Prisons is that if the Court truly wishes to give
5 him credit for the 23 months that he was over in
6 state custody, the only way that the Court can
7 assure that that is going to happen is that the
8 Court just needs to basically grant the departure
9 and take that 23 months off of whatever sentence
10 that the Court is intending to impose.

11 So, for example, if the Court does decide
12 to give a 57-month sentence, then essentially what
13 the Court would do would be to subtract 23 from
14 that. And then the actual sentence that the Court
15 would impose would be 34 months, as far as what the
16 actual judgment would read.

17 And, of course, you know, for the purposes
18 of the judgment, it would be a departure. You know,
19 as far as, as recommended under 2L1.2, as far as
20 Application Note 7.

21 So that, of course, would be in the
22 judgment itself that the Court had departed from
23 that guideline range sentence.

24 THE COURT: Understood.

25 Can I ask the Government, Ms. Dana, do you

1 have any Government position on credit for time
2 served on the felony DWI from 2018?

3 MS. DANA: Candidly, no, your Honor.

4 I want the Court to do what it would
5 typically do in these circumstances. I know each
6 judge handles these issues differently, but I don't
7 have a position, a specific position on that issue.

8 THE COURT: Understood.

9 Okay. Do we have any character statements
10 in the form of live witness testimony to take up
11 today, Ms. Kime-Goodwin?

12 MS. KIME-GOODWIN: I don't, your Honor. I
13 just have the letters that the family wrote.

14 Your Honor, and just -- I would like to
15 comment as far as the Government's position because
16 I know, your Honor, a lot of times, I want to assure
17 the Court, I'm not -- I'm not here asking the Court
18 to take this departure position as far as credit for
19 time served in immigration cases.

20 If the Court does make a ruling, you know,
21 in this instance, we understand that it is heavily
22 fact based and it is not a position where the Court,
23 just because the Court decides to do that in this
24 case, that it is something that this Court has to do
25 in every case.

1 You know, we, you know, make this argument
2 to the Court that it is appropriate in this case
3 under these circumstances, given the type of
4 background, history, and characteristics that we
5 have in this case.

6 So I just want to make sure that the Court
7 understands that, that we understand that, you know,
8 we don't want to put the Court in the position where
9 we are saying that the Court does need to do that in
10 every single 1326 case where this comes up, because
11 it comes up a lot. But we do think that that
12 appropriate in this particular case, given the facts
13 and circumstances.

14 THE COURT: Understood. I appreciate
15 that.

16 So let me read off the character letters
17 that I have, make sure I have covered all of them
18 that you have sent to me.

19 So I have letters from Virginia Villa
20 Nueva, Joe Felix Vasquez, Juan Vasquez, Maria
21 Vasquez, Belisa Martinez, Blanca Villa Nueva, Eric
22 Fernandez, and Crystal Gonzalez.

23 Is my list complete, Ms. Kime-Goodwin? Is
24 there any letter that I am missing that you know of?

25 MS. KIME-GOODWIN: It is, your Honor.

1 That is correct. That is all there are.

2 THE COURT: Okay. Got it.

3 In light of that, I think I need to hear
4 from you, Mr. Gonzalez-Enriquez, if you wish to
5 speak to me. You can speak to me, if you want to.
6 You do not have to. It is your choice.

7 THE DEFENDANT: I apologize. And I will
8 not come back here illegally. And I believe that is
9 all. I will never do what I did again. I know that
10 I did wrong, but I will never do that again.

11 THE COURT: Okay. So before I set a
12 sentence, I need to address the downward departure
13 or variance request.

14 So I know it flows from the presentence
15 report; you made the argument here today. I will
16 construe that as a motion.

17 So here's what I plan on doing with that
18 request.

19 I hate departures. I'm not saying I hate
20 all requests for departures; but departures always
21 get us in trouble. I'm going to vary down, not as
22 much as you want me to, but I'm going to construe
23 this as a variance instead of a departure.

24 I know the basis in 2L1.2 is the state
25 time giving credit for the federal sentence. I get

1 that. And I get that me, adjusting my ultimate
2 sentence, is really the only way I can accomplish
3 what my sentencing objectives would be. But I'm
4 going to do though a variance instead of a departure
5 under 2L1.2.

6 Here I think 52 months is the right
7 number, in my mind. And so I'm varying down, but
8 only giving you part of what you are asking for. So
9 I'm essentially construing it as a variance and
10 granting it in part.

11 I'm still looking at the 3553(a) factors,
12 which I flush out in a moment and also looking at
13 those three factors from 2L1.2. And I think it is
14 mixed bag in 2L1.2. There was engaging in felony
15 conduct after re-entering the U.S., which I find
16 concerning.

17 On the flip side, as Ms. Dana has pointed
18 out, this is not the most serious of crimes that we
19 see in cases like this, but there was a high number
20 of them, right? It is the quantity that concerns
21 me. So I'm not going to do one-to-one credit on
22 time served, if that makes sense.

23 So I think those factors certainly do
24 factor, but they don't get me down to 34 months. I
25 think 52 months is the right number in this case.

1 So I'm construing the request for a downward
2 departure as a request for a variance and granting
3 it in part.

4 Based on that ruling, is there anything
5 prohibiting me from moving to set a sentence at this
6 time, Ms. Dana?

7 MS. DANA: No, your Honor.

8 THE COURT: Anything stopping me from
9 setting a sentence at this time, Ms. Kime-Goodwin?

10 MS. KIME-GOODWIN: Not at this time, your
11 Honor.

12 THE COURT: Okay. So I have looked at the
13 factors from 18 U.S. Code § 3553(a), the advisory
14 sentencing guideline, the conduct from the factual
15 resume, and all the mitigating and aggravating
16 factors, it is my judgment that the Defendant
17 Gilberto Gonzalez-Enriquez should be committed to
18 the custody of the Federal Bureau of Prisons for a
19 period of 52 months.

20 I'm not ordering a fine because the
21 Defendant lacks the financial resources or future
22 earning capacity to pay a fine.

23 I'm ordering the mandatory, special
24 assessment of \$100. We order it in every case and
25 it is due and payable immediately.

1 On the restitution, I don't believe
2 restitution is applicable in this case.

3 On supervised release, I am ordering that
4 upon release from imprisonment that the Defendant
5 shall be placed on supervised release for a
6 three-year term. This is what helped bring me down
7 to the 52-month sentence that I set, in part because
8 of what Ms. Dana was arguing.

9 Under 18 US Code § 3583(d), as a condition
10 of supervised release, upon the completion of the
11 sentence of imprisonment, the Defendant shall be
12 surrendered by the Federal Bureau of Prisons to a
13 dually-authorized immigration official for
14 deportation in accordance with the established
15 procedures provided by the Immigration and
16 Nationality Act at 8 US Code § 1101.

17 As a condition supervised release, the
18 defendant shall remain outside the United States.
19 If the defendant is not deported immediately, upon
20 release from imprisonment, or should the defendant
21 ever be within the United States during any portion
22 of the time of supervised release, the defendant
23 shall also comply with the standard conditions
24 recommended by the U.S. Sentencing Commission and
25 shall comply with the mandatory, discretionary,

1 special, and additional conditions set forth in the
2 written Notice of Intent to Impose Conditions of
3 Supervised Release.

4 Ms. Kime-Goodwin, have you reviewed those
5 terms of release with your client in Spanish?

6 MS. KIME-GOODWIN: I have, your Honor.

7 THE COURT: You have explained them to
8 him?

9 MS. KIME-GOODWIN: I did, your Honor.

10 THE COURT: Do you think your client
11 understands them?

12 MS. KIME-GOODWIN: I do.

13 THE COURT: Okay. Any objections that you
14 want to make any of those specific terms?

15 MS. KIME-GOODWIN: No, your Honor.

16 THE COURT: Okay.

17 Then I need to ask you, Mr.
18 Gonzalez-Enriquez, do you understand the terms of
19 supervised release?

20 THE DEFENDANT: Yes. She explained that
21 to me and I understand.

22 THE COURT: Okay. Thank you, Mr.
23 Gonzalez-Enriquez.

24 I have this document that you have both
25 signed. I need to ask before signing if the

1 Government has any objections to it?

2 MS. DANA: No, your Honor.

3 THE COURT: Okay. Then I will sign it.

4 It is dated today. And I'm ordering these
5 conditions of release imposed as stated in the
6 written notice.

7 Now I need to explain why I set the
8 52-month and three-year sentence that I set.

9 The 3553(a) factors are, first, the
10 history and characteristics of the Defendant. Here
11 it includes six arrests and convictions for DWI, and
12 the longest term of imprisonment was five years.

13 The second factor is the nature and
14 circumstances of the offense, to reflect the
15 seriousness of and provide just punishment for the
16 offense, which involved the Defendant being found
17 illegally in the U.S., subsequent to his arrest on
18 September 25th, 2018, for driving while intoxicated.

19 That is Case No. F-1857919 in Dallas,
20 Texas.

21 And then the final factor is promoting
22 respect for the law, affording adequate deterrence
23 to criminal conduct and protecting the public from
24 further crimes of the Defendant. Here the Defendant
25 has not been deterred by his prior terms of

1 imprisonment and has shown little respect for the
2 laws of the United States.

3 These factors are why I granted in part
4 your request for a downward variance.

5 Finally, I will say that I'm expressing,
6 adopting, imposing, and ordering the discretionary
7 conditions of supervised release in the written
8 notice, because they are consistent with the factors
9 in 18 U.S. Code §§ 3583(d)(1), (d)(2), and (d)(3),
10 and they involve no greater deprivation of liberty
11 than is reasonably necessary.

12 On deportation, paragraph 69 of the
13 presentence report notes that the Defendant is
14 deportable under the following conditions: First,
15 he's a citizen of Mexico and an alien; and second,
16 he's the subject of a prior order of removal.

17 Based on this information, I'm finding
18 that the presentence report bears sufficient indicia
19 of reliability to determine by a preponderance of
20 the evidence that the Defendant is deportable from
21 the United States pursuant to 8 US Code § 1227.

22 So I have stated the sentence and the
23 reasons for it.

24 Are there any objections from the
25 Government?

1 MS. DANA: No, your Honor.

2 THE COURT: Okay. Are there any
3 objections from the defense? You are not waiving
4 any of your prior objections or your request for a
5 full downward departure?

6 MS. KIME-GOODWIN: Understood, your Honor.
7 No objection.

8 THE COURT: Okay.

9 So I am ordering the sentence imposed as
10 stated. I will say that even if I had gotten the
11 guidelines range wrong, I would have imposed that
12 same 52-month and three-year sentence as evidenced
13 by the fact that I threw out the guidelines and
14 granted a variance.

15 So, Ms. Kime-Goodwin, are there any
16 requests you want to make on placement, close by
17 because of family, or medical treatment or
18 vocational training?

19 MS. KIME-GOODWIN: We would like a
20 recommendation for place at FCI Segoville, your
21 Honor, so that he can be close to his family who
22 lives within this area.

23 THE COURT: Understood. I will make that.

24 I assume, Ms. Dana, the Government has no
25 objection.

1 MS. DANA: No objection, your Honor.

2 THE COURT: Okay.

3 So, Ms. Dana, it is a one-count
4 indictment. I assume there is nothing to dismiss,
5 but I'm just making sure.

6 MS. DANA: No. I checked as well, your
7 Honor. There is nothing.

8 THE COURT: Let's talk about appeal.

9 So if you decide to appeal, you need to
10 follow your notice of appeal within 14 days of when
11 I enter a written judgment in this case.

12 I should get that written judgment on file
13 by tomorrow.

14 Or if the Government decides to appeal,
15 then you have 14 days from when the Government
16 appeals to file your notice of appeal.

17 If you decide to appeal, you have the
18 right to apply for leave to appeal in forma
19 pauperis, which means the Government pays the cost
20 of appeal.

21 Ms. Kime-Goodwin, I'm sure you can help
22 Mr. Gonzalez-Enriquez with those forms, if he needs.

23 MS. KIME-GOODWIN: We will, your Honor.

24 THE COURT: So I have the separate Notice
25 of Right to Appeal form that you, Mr.

1 Gonzalez-Enriquez have signed and you, Ms.

2 Kime-Goodwin. I will sign it. It is dated today.

3 And I will just remind you both that that
4 is your notice of your right to file an appeal, not
5 your actual notice of appeal.

6 I don't have anything further in my files.
7 Is there anything further, Ms. Dana, from the
8 Government's perspective?

9 MS. DANA: No, your Honor. Thank you.

10 THE COURT: Okay. Anything further, Ms.
11 Kime-Goodwin, for the defense?

12 MS. KIME-GOODWIN: Not at this time, your
13 Honor.

14 THE COURT: Okay.

15 Mr. Gonzalez-Enriquez, you are hereby
16 remanded into the custody of the United States
17 Marshal.

18 Thank you for the good argument today.
19 Court is in recess.

20 THE COURT SECURITY OFFICER: All rise.
21 (Proceedings concluded at 10:51 a.m.)

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