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18 U.S.C. § 3553

## APPENDIX A

# United States Court of Appeals for the Fifth Circuit

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No. 22-50683  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

March 28, 2023

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

JOSE ALFREDO PEREZ,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 6:21-CR-111-1

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Before HIGGINBOTHAM, GRAVES, and HO, *Circuit Judges*.

PER CURIAM:\*

Jose Alfredo Perez appeals his 100-month sentence for possessing a firearm as a convicted felon. Although the advisory guidelines range was 30 to 37 months of imprisonment, the district court applied an upward variance to 100 months of imprisonment. Perez challenges the procedural and substantive reasonableness of his sentence.

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

First, Perez argues that the district court imposed a procedurally unreasonable sentence by failing to adequately explain the reasons for the upward variance. Perez failed to object to his sentence on this basis in the district court. Thus, we review for plain error. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 362-64 (5th Cir. 2009). Even if the district court had committed a clear or obvious error in failing to adequately explain the sentence, Perez has not shown that his substantial rights were affected. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). To show that the error affected his substantial rights, Perez must show that the error “affected the outcome in the district court.” *Mondragon-Santiago*, 564 F.3d at 364. To do so, he “must demonstrate a probability sufficient to undermine confidence in the outcome.” *Id.* (internal quotation marks and citation omitted). Since there is no evidence that the district court would have imposed a shorter sentence if it had further articulated its reasons for the variance, Perez has not shown that his substantial rights were affected. *See id.* at 364-65.

Second, Perez contends that his sentence is substantively unreasonable because it creates an unwarranted disparity between him and similarly situated defendants. Because Perez properly preserved his challenge to the reasonableness of his sentence, we review for an abuse of discretion. *See United States v. Burney*, 992 F.3d 398, 399-400 (5th Cir. 2021). In imposing a non-guidelines sentence, a district court may consider factors already taken into account by the Sentencing Guidelines, including a defendant’s criminal history. *United States v. Brantley*, 537 F.3d 347, 350 (5th Cir. 2008). Our review of the record does not reveal that the district court gave significant weight to an irrelevant or improper factor or otherwise abused its discretion by failing to account for a factor that should have received significant weight or committing a clear error of judgment in balancing the § 3553(a) factors. *See Burney*, 992 F.3d at 400. Moreover, as

to the extent of the variance, this court has upheld proportionately similar upward variances. *See, e.g., United States v. Jones*, 444 F.3d 430, 433, 441-43 (5th Cir. 2006).

Accordingly, the judgment of the district court is AFFIRMED.

## APPENDIX B

**FILED**

July 13, 2021

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXASIN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISIONBY: lad  
DEPUTY

UNITED STATES OF AMERICA

Plaintiff

V.

JOSE ALFREDO PEREZ

Defendant

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CRIMINAL NO. 6:21-CR-111

INDICTMENT[VIO: 18 U.S.C. 922(g)(1) & 924(a)(2) -  
Possession of a Firearm by a Convicted Felon]

## THE GRAND JURY CHARGES:

On or about January 5, 2021, in the Western District of Texas, Defendant,

**JOSE ALFREDO PEREZ,**being a person who knew he had previously been convicted of the following crime punishable by  
imprisonment for a term exceeding one year, to-wit:On June 2, 2010, JOSE ALFREDO PEREZ was convicted of *Burglary of a Habitation With Intent to Commit Assault* in the 27<sup>th</sup> Judicial District Court of Bell County, Texas, in Cause Number 66247;On May 5, 2015, JOSE ALFREDO PEREZ was convicted of *Possession of a Controlled Substance Less Than One Gram* in the 27<sup>th</sup> Judicial District Court of Bell County, Texas, in Cause Number 73218;On May 5, 2015, JOSE ALFREDO PEREZ was convicted of *Possession of a Controlled Substance Less Than One Gram* in the 27<sup>th</sup> Judicial District Court of Bell County, Texas, in Cause Number 73426;On May 5, 2015, JOSE ALFREDO PEREZ was convicted of *Assault on a Public Servant* in the 27<sup>th</sup> Judicial District Court of Bell County, Texas, in Cause Number 73452;

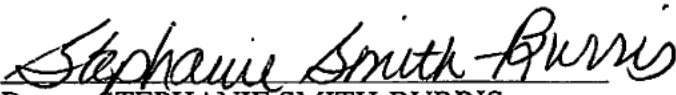
did knowingly possess the following firearm, to-wit:

A Ruer, P89DC, 9mm handgun bearing serial number 305-49574;  
said firearm having moved in commerce and affecting commerce, in violation of Title 18, United  
States Code, Sections 922(g)(1) and 924(a)(2).

A TRUE BILL:

FOREPERSON

ASHLEY C. HOFF  
United States Attorney

  
By: STEPHANIE SMITH-BURRIS  
Assistant United States Attorney

## APPENDIX C

United States Code Annotated  
Title 18. Crimes and Criminal Procedure (Refs & Annos)  
Part II. Criminal Procedure  
Chapter 227. Sentences (Refs & Annos)  
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018

[Currentness](#)

**(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to [section 994\(a\)\(1\) of title 28, United States Code](#), subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(ii) that, except as provided in [section 3742\(g\)](#), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [section 994\(a\)\(3\) of title 28, United States Code](#), taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#));

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to [section 994\(a\)\(2\) of title 28, United States Code](#), subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(B) that, except as provided in [section 3742\(g\)](#), is in effect on the date the defendant is sentenced.<sup>1</sup>

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

**(b) Application of guidelines in imposing a sentence.--**

**(1) In general.**--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

**(2) Child crimes and sexual offenses.--**

(A)<sup>2</sup> **Sentencing.**--In sentencing a defendant convicted of an offense under [section 1201](#) involving a minor victim, an offense under [section 1591](#), or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under [section 994\(a\) of title 28](#), taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

**(c) Statement of reasons for imposing a sentence.**--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under [section 994\(w\)\(1\)\(B\) of title 28](#), except to the extent that the court relies upon statements received in camera in accordance with [Federal Rule of Criminal Procedure 32](#). In the event that the court relies upon statements received in camera in accordance with [Federal Rule of Criminal Procedure 32](#) the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the

order of judgment and commitment, to the Probation System and to the Sentencing Commission,,<sup>3</sup> and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

**(d) Presentence procedure for an order of notice.**--Prior to imposing an order of notice pursuant to [section 3555](#), the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

- (1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;
- (2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and
- (3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

**(e) Limited authority to impose a sentence below a statutory minimum.**--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [section 994 of title 28, United States Code](#).

**(f) Limitation on applicability of statutory minimums in certain cases.**--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act ([21 U.S.C. 841, 844, 846](#)), section 1010 or 1013 of the Controlled Substances Import and Export Act ([21 U.S.C. 960, 963](#)), or [section 70503 or 70506 of title 46](#), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under [section 994 of title 28](#) without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

- (1) the defendant does not have--
  - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
  - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
  - (C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

**(g) Definition of violent offense.**--As used in this section, the term “violent offense” means a crime of violence, as defined in [section 16](#), that is punishable by imprisonment.

### CREDIT(S)

(Added [Pub.L. 98-473, Title II, § 212\(a\)\(2\)](#), Oct. 12, 1984, 98 Stat. 1989; amended [Pub.L. 99-570, Title I, § 1007\(a\)](#), Oct. 27, 1986, 100 Stat. 3207-7; [Pub.L. 99-646, §§ 8\(a\), 9\(a\), 80\(a\), 81\(a\)](#), Nov. 10, 1986, 100 Stat. 3593, 3619; [Pub.L. 100-182, §§ 3, 16\(a\), 17](#), Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; [Pub.L. 100-690, Title VII, § 7102](#), Nov. 18, 1988, 102 Stat. 4416; [Pub.L. 103-322, Title VIII, § 80001\(a\), Title XXVIII, § 280001](#), Sept. 13, 1994, 108 Stat. 1985, 2095; [Pub.L. 104-294, Title VI, § 601\(b\)\(5\), \(6\), \(h\)](#), Oct. 11, 1996, 110 Stat. 3499, 3500; [Pub.L. 107-273, Div. B, Title IV, § 4002\(a\)\(8\)](#), Nov. 2, 2002, 116 Stat. 1807; [Pub.L. 108-21, Title IV, § 401\(a\), \(c\), \(j\)\(5\)](#), Apr. 30, 2003, 117 Stat. 667, 669, 673; [Pub.L. 111-174, § 4](#), May 27, 2010, 124 Stat. 1216; [Pub.L. 115-391, Title IV, § 402\(a\)](#), Dec. 21, 2018, 132 Stat. 5221.)

### VALIDITY

<Mandatory aspect of subsec. (b)(1) of this section held unconstitutional by [United States v. Booker](#), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). >

[Notes of Decisions \(3105\)](#)

### Footnotes