

## APPENDIX

Decision of the court of appeals

*United States v. Manuel Del Cid Bran*, No. 22-4370 (4th Cir., 2023)..... 1a

Excerpt of Sentencing Transcript ..... 6a

2023 WL 3734985

Only the Westlaw citation is currently available.

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Manuel De Jesus DEL CID  
BRAN, Defendant - Appellant.

No. 22-4370

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Submitted: April 26, 2023

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Decided: May 31, 2023

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. [David J. Novak](#), District Judge. (3:22-cr-00031-DJN-1)

#### Attorneys and Law Firms

ON BRIEF: [Jeremy C. Kamens](#), Federal Public Defender, Alexandria, Virginia, Joseph S. Camden, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Richmond, Virginia, for Appellant. Jessica D. Aber, United States Attorney, Kaitlin G. Cooke, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Before [NIEMEYER](#) and [HEYTENS](#), Circuit Judges, and [Max O. COGBURN, Jr.](#), United States District Judge for the Western District of North Carolina, sitting by designation.

#### Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

\*1 Manuel Del Cid Bran pleaded guilty to illegally re-entering the United States after being removed following a felony conviction. See [8 U.S.C. §§ 1326\(a\) & \(b\)\(1\)](#). On appeal, Del Cid Bran challenges both the length of his prison sentence and the duration of his supervised release. Seeing no reversible error, we affirm.

The advisory Sentencing Guidelines recommended a prison sentence between 24 and 30 months. Del Cid Bran requested a sentence of 24 months, citing a need to support his family and to raise funds to pay a Guatemalan cartel that was allegedly threatening him. The government argued for a 30-month sentence based on Del Cid Bran's criminal history and pattern of recidivism, including multiple convictions for driving while intoxicated. The district court varied upward, imposing a 50-month prison sentence and a three-year term of supervised release.

This Court “review[s] a defendant's sentence under a deferential abuse-of-discretion standard.” [United States v. Collins](#), 982 F.3d 236, 244 (4th Cir. 2020) (quotation marks omitted). Having reviewed the record, we conclude the district court did not abuse its discretion in varying upward.

Del Cid Bran's primary argument is that the district court violated [18 U.S.C. § 3582\(a\)](#) and [Tapia v. United States](#), 564 U.S. 319 (2011), by “imposing or lengthening a prison term in order to promote [his] rehabilitation.” [Id.](#) at 321. The parties disagree whether this argument was preserved for appellate review. We need not reach that question, however, because we conclude the district court did not err and that any error would have been harmless.

Having scrutinized the sentencing transcript, we do not believe the district court violated *Tapia*. Del Cid Bran is correct that—in responding to defense counsel's argument that there was no way to eliminate the risk of recidivism because the statutory maximum sentence was 10 years—the district court noted the possibility that Del Cid Bran might “sober[ ] up” while incarcerated. JA 86. And later—after defense counsel questioned the marginal benefits of a sentence longer than the Guidelines’ recommendation—the court said “[t]he longer [Del Cid Bran] is in custody the more likely he is to sober up,” and “at some point, he's going to mature and understand the inherent dangers of him drinking and driving.” JA 96.

But even taken in isolation, the district court's statements are a far cry from those at issue in *Tapia* or in this Court's unpublished decision in [United States v. Bunting](#), 694 Fed. Appx. 112 (4th Cir. 2017), which Del Cid Bran cites in support of his claim. In *Tapia*, the district court said: “I am going to impose a 51-month sentence, ... and one of the factors that affects this is *the need to provide treatment. In other words, so she is in long enough to get the 500 Hour*

*Drug Program*, number one.” 564 U.S. at 322 (emphasis added). And in *Bunting*, the district court said the defendant “needs to be in the BOP and not in the county jail” because “I don’t think a county facility or a state run facility is going to provide him any of the acute care that he needs in order to save his life.” 694 Fed. Appx. at 114.

\*2 The district court said nothing similar here. Rather, from its first words at the sentencing hearing, the court made clear its decision to vary upward was “driven, really, by [Del Cid Bran’s] recidivism, both in terms of returning to our country despite being ordered out, but even more importantly, when he does return, the DUIs, which I count four prior convictions for DUIs, even though he’s only 38 years of age.” JA 82. Again and again, the court stressed public safety, citing “the need to protect the public from future crimes of [Del Cid Bran] and, specifically the DUIs and the likelihood that he’s going to kill somebody sooner or later behind the wheel.” *Id.* at 85–86; see *id.* at 90 (“The problem is, it’s the same conduct over and over again, which, to me, represents a real danger to the community when he shouldn’t be here.”). Even in the quoted excerpts highlighted by Del Cid Bran, the district court immediately returned to its dominant theme: “this is *all* about protecting the public” and “*what’s driving this* is the fear that he’s going to kill somebody.” JA 86, 96 (emphasis added); see *United States v. McKinnie*, 21 F.4th 283, 289 (4th Cir. 2021) (district courts may vary upward from the Guidelines if justified by Section 3553(a) factors); 18 U.S.C. § 3553(a) (factors to be considered include “the need ... to protect the public from further crimes of the defendant”).

We also conclude any possible *Tapia* error would have been harmless. See Fed. R. Crim. P. 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”). The record shows the district court’s overriding sentencing motivation was incapacitation and that

it would have imposed the same sentence regardless of whether it considered the possibility that Del Cid Bran might sober up while incarcerated.

Finally, we conclude the district court did not improperly impose a punitive supervised release term. Del Cid Bran cites the district court’s statement: “I am going to [impose a term of supervised release]. Because if he comes back [before the court], I’m going to give him an even harsher sentence.” JA 94. True, a court “may not take account of retribution ... when imposing a term of supervised release.” *Tapia*, 564 U.S. at 326 (emphasis omitted) (citing 18 U.S.C. § 3583(c)). But the district court’s statement here does not suggest it imposed a term of supervised release to punish Del Cid Bran. Rather, the court’s remark is best characterized as a warning about the uncontroversial reality that repeat offenders often serve longer sentences. The court said nothing else that could be read, expressly or impliedly, to show an intent to punish Del Cid Bran with a supervised release term. And given the deferential abuse of discretion standard, we conclude the district court made no reversible error in imposing that three-year term.

We have reviewed Del Cid Bran’s remaining arguments and conclude none warrants upsetting the district court’s judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before us, and argument would not aid the decisional process. The judgment of the district court is

*AFFIRMED.*

## All Citations

Not Reported in Fed. Rptr., 2023 WL 3734985

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1 you know, under *Setser versus United States*, I run it  
2 consecutive. I wanted to make sure you know that and give you  
3 a chance to be heard on that.

4 MS. GRADY: I did read that case in your notice, and  
5 it does appear that you are allowed to run this consecutive to  
6 any future state sentence. I don't know -- he's been violated  
7 in the past. You know, he has a violation, I think, from '06,  
8 the early ones. I don't know if they just don't bother. I  
9 don't know what's up with the state in terms of that.

10 He had a violation in -- the only time he had a  
11 violation, he was revoked in 2011, and then he was deported  
12 thereafter. So I don't know whether he's going to get time.  
13 The Court certainly can do that under the *Setser* case, but --

14 THE COURT: I generally do it. I just want to give  
15 you a chance to be heard in case.

16 MS. GRADY: Yes, sir.

17 THE COURT: What else did you want -- you wanted to  
18 say something else and I cut you off before.

19 MS. GRADY: I think I did in regards to whether  
20 there's any need for supervision by this court, because the  
21 first time that he was convicted of a felony in the court in  
22 Texas, I believe, he was asked to stay out for -- he was  
23 placed on supervision for 12 months but deported, and he  
24 stayed out for almost two years.

25 So I think he followed the spirit of it, that's what

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1 I wrote in my position paper, and I don't think there's any  
2 need for any supervision to follow whatever sentence Your  
3 Honor gives.

4 THE COURT: No, because -- I am going to do that.  
5 Because if he comes back, I'm going to give him an even  
6 harsher sentence.

7 MS. GRADY: Right.

8 THE COURT: That's exactly why I'm going to do it,  
9 so --

10 MS. GRADY: I was trying to head off that --

11 THE COURT: I know what you're doing. I'm just  
12 telling you, that's why I'm going to do it.

13 MS. GRADY: -- thought process.

14 Well, then, Judge --

15 THE COURT: That tells me what you already know and I  
16 already know. He's going to come back and he's going to do  
17 the same conduct. And I'm not willing to risk the safety of  
18 the community when his record, since age 18, is telling me  
19 exactly what's going to happen. They're going to remove him  
20 whenever he gets out of custody. He's going to go back for a  
21 little bit, then he's going to want to make money. He's going  
22 to come back here, and he's going to drink, and he's going to  
23 drive, and, ultimately, something bad is going to happen.  
24 That's what's driving my view of the need for a variance. It  
25 is not the recidivism on the illegal reentry. I'm actually

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1 quite sympathetic, I think you know that, on the poverty  
2 issue.

3 MS. GRADY: Yes, sir.

4 THE COURT: Even if it was one DUI, that would be one  
5 thing. You have four DUIs. He's going to keep doing the same  
6 thing. He's going to do what you just said he's going to do.  
7 He's going to get paid, he's going to go out, he's going to be  
8 homesick, miss his family, he's going to get drunk, and he's  
9 going to make the bad decision, as he's done repeatedly, of  
10 getting behind a wheel, and sooner or later somebody else is  
11 going to pay that price, if not him. He could kill himself.

12 MS. GRADY: That is, indeed, a possibility, Judge.

13 THE COURT: Right.

14 MS. GRADY: So the issue is how much time is  
15 sufficient but not greater than necessary, because you have  
16 gone to the variance route, which is, in some sense, easier to  
17 talk about, and there's less case law and less guidelines and  
18 all that as opposed to an upward departure.

19 And I would encourage Your Honor to consider all of  
20 the factors. But with, you know, the guidelines at two years  
21 to two and a half years, which is, basically, 24 months to 30  
22 months, you know, what is that extra time going to do? Yes,  
23 it's going to warehouse him. But what is that really going to  
24 do to him? He's still going to be in a situation where he's  
25 going to get out, and --