

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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DANIEL VARGAS-HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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/s/ Maria Gabriela Vega

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## INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, CA No. 22-11128, dated August 8, 2023,  
*United States v. Vargas-Hernandez*, 2023 WL 5040940 (5<sup>th</sup> Cir. Aug. 8,  
2023)(unpublished).

Appendix B Judgment and Sentence of the United States District Court  
for the Northern District of Texas, entered October 17, 2022.  
*United States v. Vargas-Hernandez*, Dist. Court 4:22-CR-161-Y.

Appendix C Indictment *United States v. Vargas-Hernandez*, Dist. Court 4:22-CR-  
161-Y, June 7, 2022.

Appendix D Factual Resume *United States v. Vargas-Hernandez*, Dist. Court 4:22-  
CR-161-Y, filed June 15, 2022.

## APPENDIX A

# United States Court of Appeals for the Fifth Circuit

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No. 22-11128  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

August 8, 2023

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

DANIEL VARGAS-HERNANDEZ,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:22-CR-161-1

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

PER CURIAM:\*

For his guilty-plea conviction, Daniel Vargas-Hernandez challenges his 72-months' prison sentence for illegal reentry following removal, in violation of 8 U.S.C. § 1326(a), (b)(2). He maintains: the information in the presentence investigation report (PSR) concerning his gang affiliation was unreliable; and his sentence is unconstitutional because it is based on facts

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

No. 22-11128

neither alleged in the indictment nor found by a jury beyond a reasonable doubt.

Although post-*Booker*, the Sentencing 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, 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).

The information in the PSR regarding his gang affiliation was obtained through an investigation by law enforcement and immigration agents, which is generally considered reliable. *E.g., United States v. Fuentes*, 775 F.3d 213, 220 (5th Cir. 2014) (explaining PSR based on result of police investigation is sufficiently reliable). Absent rebuttal evidence showing the information in the immigration investigative report was “materially untrue, inaccurate or unreliable”, Vargas fails to demonstrate the court clearly erred in its reliance on the information in the PSR. *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (citation omitted).

Additionally, Vargas challenges the enhancement of his sentence pursuant to § 1326(b), for his having sustained a qualifying conviction prior to his removal. He contends his sentence exceeds the statutory maximum and is therefore unconstitutional because it was enhanced based on facts that were neither alleged in the indictment nor found by a jury beyond a reasonable doubt. Although he correctly concedes his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (ruling that prior

No. 22-11128

aggravating-felony conviction is sentencing factor court can determine), he presents the issue to preserve it for possible further review. (Subsequent Supreme Court decisions such as *Alleyne v. United States*, 570 U.S. 99 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not overrule *Almendarez-Torres*. E.g., *United States v. Pervis*, 937 F.3d 546, 553–54 (5th Cir. 2019) (discussing precedent preserving *Almendarez-Torres*).)

AFFIRMED.

Pet.App.a3

## APPENDIX B

**(UNITED STATES DISTRICT COURT**  
NORTHERN DISTRICT OF TEXAS  
Fort Worth Division

UNITED STATES OF AMERICA

**JUDGMENT IN A CRIMINAL CASE**

v.

Case Number: 4:22-CR-161-Y(1)

M. Levi Thomas, assistant U.S. attorney

DANIEL VARGAS-HERNANDEZ

Rachel M. Taft, attorney for the defendant

On June 15, 2022, the defendant, Daniel Vargas-Hernandez, entered a plea of guilty to count one of the one-count indictment. Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:


<u>TITLE &amp; SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE CONCLUDED</u>	<u>COUNT</u>
8 U.S.C. § 1326(a) and (b)(2)	Illegal Reentry After Deportation	May 8, 2022	1

The defendant is sentenced as provided in page two of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 for count one of the one-count indictment.

The defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed October 13, 2022.

  
TERRY R. MEANS  
UNITED STATES DISTRICT JUDGE

Signed October 17, 2022.

Pet.App.b-1

22-11128.41



Judgment in a Criminal Case

Defendant: Daniel Vargas-Hernandez

Case Number: 4:22-CR-161-Y(1)

Judgment -- Page 2 of 3

## IMPRISONMENT

The defendant, Daniel Vargas-Hernandez, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 72 months on count one of the one-count indictment. This sentence shall run consecutively to any future sentence that may be imposed in case no. 1729782 in Tarrant County Criminal Court No. 1, 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 3 years on count one of the one-count indictment.

Under 18 U.S.C. § 3583(d), as a condition of supervised release upon the completion of the sentence of imprisonment, the defendant shall be surrendered by the Federal Bureau of Prisons to a duly authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. As a condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of the term of supervised release, the defendant shall also comply with the standard conditions recommended by the U.S. Sentencing Commission at §5D1.3(c) of the United States Sentencing Commission Guidelines Manual, and shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapons;

cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004;

report in person to the probation office in the district to which the defendant is released from the custody of the Federal Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or entry;

not illegally re-enter the United States, if deported, removed, or allowed voluntary departure;

refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court; and

participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

Pet.App.b-2

**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.

**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

Pet.App.b-3

## APPENDIX C

U.S. DISTRICT COURT  
NORTHERN DIST. OF TX  
FILED

**ORIGINAL**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

2022 JUN -7 PM 1:30  
DEPUTY CLERK mb

UNITED STATES OF AMERICA

v.

No. 4:22-cr-161-Y

DANIEL VARGAS-HERNANDEZ (01)

INDICTMENT

The Grand Jury Charges:

Count One

Illegal Reentry After Deportation  
(Violation of 8 U.S.C. § 1326(a) and (b)(2))

On or about May 08, 2022, in the Fort Worth Division of the Northern District of Texas, defendant **Daniel Vargas-Hernandez**, an alien, was found in the United States having previously been deported and removed from the United States on or about February 23, 2021, and the defendant had not received the consent of the Attorney General of the United States or the Secretary of the Department of Homeland Security, to reapply for admission to the United States.

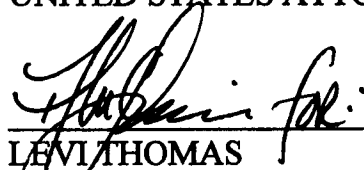
Pet.App.c-1

In violation of 8 U.S.C. § 1326(a) and (b)(2).

A TRUE BILL.

  
FOREPERSON

CHAD E. MEACHAM  
UNITED STATES ATTORNEY

  
LEVI THOMAS

Assistant United States Attorney  
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Facsimile: 817-252-5455  
Email: Levi.Thomas@usdoj.gov

Pet.App.c-2

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

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THE UNITED STATES OF AMERICA

v.

DANIEL VARGAS-HERNANDEZ (01)

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INDICTMENT

8 U.S.C. § 1326(a) and (b)(2)  
Illegal Reentry After Deportation  
Count 1

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A true bill rendered

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DALLAS

  
FOREPERSON

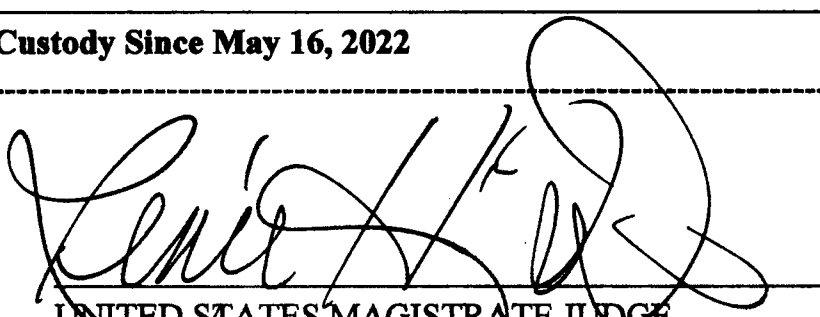
Filed in open court this 7th day of June, 2022.

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Defendant in Federal Custody Since May 16, 2022

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UNITED STATES MAGISTRATE JUDGE  
Magistrate Number: 4:22-MJ-365-BJ

Pet.App.c-3

22-11128.19

## APPENDIX D

ORIGINAL

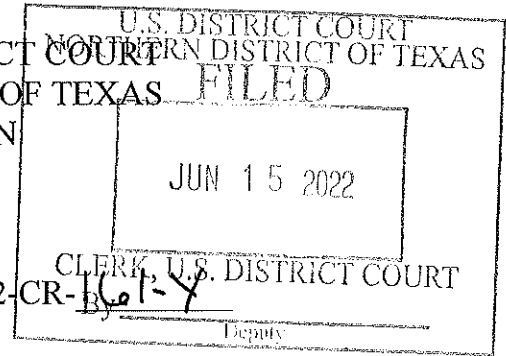
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

DANIEL VARGAS-HERNANDEZ (01)

No. 4:22-CR-



FACTUAL RESUME

I. Plea:

Count One: Illegal Reentry after Deportation, in violation of 8 U.S.C. § 1326(a) & (b)(2).

II. Penalties:

The penalties the Court can impose include:

- a. a term of imprisonment of not more than twenty (20) years;
- b. a fine of not more than \$250,000;
- c. a term of supervised release of not more than three (3) years. If the defendant violates the conditions of supervised release, he could be imprisoned for an additional term of imprisonment;
- d. a mandatory special assessment of \$100;
- e. costs of incarceration and supervision; and
- f. pleading guilty may have consequences with respect to the defendant's immigration status, including removal from the United States. Removal and other immigration consequences are the subject of a separate proceeding, however, and defendant understands that no one, including his attorney or the district court, can predict to a certainty the effect of his conviction on his status. Defendant nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequences include his automatic removal from the United States.



III. Essential Elements of the Offense:

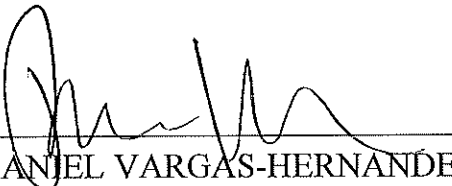
In order to establish the offense alleged in Count One, the government must prove the following elements beyond a reasonable doubt:


- First: That on or about the date alleged, the defendant was an alien;  
Second: That the defendant was previously removed from the United States;  
Third: That the defendant was found in the United States; and  
Fourth: That the defendant had not received the express consent of either the Attorney General of the United States or the Secretary of the Department of Homeland Security to reapply for admission to the United States since the time of the defendant's previous removal.

IV. Stipulation of Facts:

Daniel Vargas-Hernandez (Vargas) is a citizen and national of Mexico, born in Ciudad Acuna, Coahuila, Mexico. On about February 23, 2021, Vargas was deported and removed to Mexico through Brownsville, Texas. On May 08, 2022, Vargas was encountered by immigration authorities at the Tarrant County Jail in Fort Worth, Texas, within the Federal Northern District of Texas. Vargas had re-entered the United States illegally, and he had not applied for nor received permission from the Attorney General of the United States or the Secretary of the Department of Homeland Security to reapply for admission to the United States at any time after being deported.

SIGNED on this the 8 day of June, 2022.

  
DANIEL VARGAS-HERNANDEZ  
Defendant

  
Brook Antonio, II  
Attorney for Defendant