

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALFONSO GARCIA-VELA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

/s/ Adam Nicholson

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Appendix A Judgment and Opinion of Fifth Circuit, CA No. 23-10173,
United States v. Garcia-Vela, 2023 WL 6172018 (5th Cir. Sept. 22, 2023)
(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the
Northern District of Texas, entered Feb. 17, 2023.
United States v. Garcia-Vela, Dist. Court 4:22-CR-265-P.

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10173
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
September 22, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Petitioner—Appellee,

versus

ALFONSO GARCIA-VELA,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CR-265-1

Before KING, HAYNES, and GRAVES, *Circuit Judges*.

PER CURIAM:*

Alfonso Garcia-Vela pleaded guilty to illegally reentering the United States after having been previously deported, in violation of 8 U.S.C. § 1326. He was sentenced to 82 months of imprisonment, which the district court stated was the result of an upward departure, pursuant to U.S.S.G. § 4A1.3(a), or, alternatively, an upward variance under 18 U.S.C. § 3553(a).

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

No. 23-10173

On appeal, Garcia contends that his above-guidelines sentence was substantively unreasonable. His appellate argument is perfunctory and conclusory, consisting of a single paragraph in which he complains that the district court erroneously relied on facts surrounding his criminal history which were already accounted for in the guideline calculations and that the upward variance represented a clear error of judgment in balancing the sentencing factors.

Although he acknowledges that his sentence was the result of a guidelines-authorized upward departure or, alternatively, an upward variance, Garcia briefs no argument challenging his sentence as an upward departure under § 4A1.3(a). He has therefore abandoned any such challenge. *See United States v. Still*, 102 F.3d 118, 122 n.7 (5th Cir. 1996); *Beasley v. McCotter*, 798 F.2d 116, 118 (5th Cir. 1986).

Even were that not so, and assuming that his perfunctory briefing is sufficient to preserve an appellate substantive reasonableness challenge, *cf.* FED. R. APP. P. 28(a)(8)(A); *United States v. Scroggins*, 599 F.3d 433, 446-47 (5th Cir. 2010); *Beasley*, 798 F.2d at 118, Garcia fails to demonstrate any abuse of discretion on the district court's part. *See United States v. Cano*, 981 F.3d 422, 427 (5th Cir. 2020). His argument to the contrary notwithstanding, the district court was permitted to consider factors already incorporated by the Guidelines—including criminal history—in concluding that an upward variance was appropriate. *See United States v. Brantley*, 537 F.3d 347, 350 (5th Cir. 2008); *United States v. Williams*, 517 F.3d 801, 809 (5th Cir. 2008). Here, the district court cited Garcia's lengthy and violent criminal history which had not been deterred by prior prison terms to conclude that a variance was warranted based on the need to protect the public and provide adequate deterrence, which are appropriate factors under § 3553(a).

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Garcia's complaint that the district court committed a clear error of judgment in balancing the § 3553(a) factors is no more than a request to have this court reweigh those factors and conclude that a different sentence was appropriate, which this court will not do. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Heard*, 709 F.3d 413, 435 (5th Cir. 2013). His disagreement with the district court's assessment of the factors and the selected sentence does not show that his sentence is substantively unreasonable. *See United States v. Gutierrez*, 635 F.3d 148, 154 (5th Cir. 2011).

For the first time on appeal, Garcia also challenges the enhancement of his sentence pursuant to § 1326(b). He contends that 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. He acknowledges this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but seeks to preserve it for possible Supreme Court review. Garcia is correct that his argument is foreclosed. *See United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019).

The district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.
ALFONSO GARCIA-VELA

Case Number: 4:22-CR-00265-P(01)
U.S. Marshal's No.: 10938-379
Michael Levi Thomas, Assistant U.S. Attorney
Maria Pedraza, Attorney for the Defendant

On October 5, 2022 the defendant, ALFONSO GARCIA-VELA, entered a plea of guilty as to Count One of the Indictment filed on September 8, 2022. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. §1326(a) and (b)(1)	Illegal Reentry After Deportation	7/11/2022	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on September 8, 2022.

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

Sentence imposed February 16, 2023.



MARK T. PITTMAN
U.S. DISTRICT JUDGE

Signed February 17, 2023.

Judgment in a Criminal Case
Defendant: ALFONSO GARCIA-VELA
Case Number: 4:22-CR-00265-P(1)

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IMPRISONMENT

The defendant, ALFONSO GARCIA-VELA, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Eighty-Two (82) months** as to Count One of the Indictment filed on September 8, 2022. This sentence shall run consecutively to any future sentence which may be imposed in Case nos. 1738985D and 1738987D in the 371st Judicial District Court, Tarrant County, Texas.

The Court recommends to the Bureau of Prisons that the defendant be able to participate in any Substance Abuse Treatment Programs that are available. The Court further recommends to the BOP that the defendant be incarcerated at a facility within the Dallas, Fort Worth, TX area, if possible.

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 **Three (3) years** as to Count One of the Indictment filed on September 8, 2022.

As a condition of supervised release, upon the completion of the sentence of imprisonment, the defendant shall be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 USC § 1101 et seq. As a further condition of supervised release, if ordered deported or removed, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of the term of supervised release, the defendant shall also comply with the standard conditions contained in the Judgment and shall comply with the mandatory and special conditions stated herein:

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

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Defendant: ALFONSO GARCIA-VELA
Case Number: 4:22-CR-00265-P(1)

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becoming aware of a change or expected change;

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

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

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

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cooperate in the collection of DNA as directed by the U.S. probation officer;

submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court;

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

not illegally reenter the United States if deported or allowed voluntary departure;

participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least \$25 per month; 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.

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.

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RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY _____
Deputy Marshal