

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN OCHOA-PEREZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

/s/ Taylor Wills Edwards "T.W." Brown
Taylor Wills Edwards "T.W." Brown
Assistant Federal Public Defender
Northern District of Texas
P.O. Box 17743
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Taylor_W_Brown@fd.org
Texas Bar No. 24087225

INDEX TO APPENDICES

Appendix A	Judgment and Opinion of Fifth Circuit (Pet.App.a1-a4)
Appendix B	Judgment and Sentence of the United States District Court for the Northern District of Texas (Pet.App.a5-a9)

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10458
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

March 13, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MARTIN OCHOA-PEREZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:22-CR-68-1

Before JOLLY, ENGELHARDT, and DOUGLAS, *Circuit Judges*.

PER CURIAM: *

Martin Ochoa-Perez, under a written agreement, pleaded guilty to illegal reentry following a prior removal, in violation of 8 U.S.C. § 1326(a) and (b)(1). His 115-month prison sentence was within the advisory guidelines sentencing range. Ochoa-Perez has timely appealed this sentence.

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

Ochoa-Perez first argues that the district court’s treatment of his prior convictions as a sentencing factor rather than an element of the offense under § 1326(b)(1) violated the Sixth Amendment. He concedes, however, that this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998). He raises the issue only to preserve it for possible further review.

Ochoa-Perez next challenges the substantive reasonableness of his within-guidelines sentence. Such a sentence is presumptively reasonable. *See United States v. Hernandez*, 876 F.3d 161, 166 (5th Cir. 2017). In challenging the substantive reasonableness of his sentence, however, he assigns two points of error: (1) the district court erroneously found that his prior Texas convictions for delivery of a controlled substance under TEXAS HEALTH AND SAFETY CODE § 481.112(a) were aggravated felonies under 8 U.S.C. § 1101(a)(43)(B), and (2) the district court improperly sentenced him at the top end of the guidelines range because the district court considered his “reduced sentencing exposure”.¹ In other words, Ochoa-Perez asserts that he should have received a sentence at the bottom of the guidelines range and the district court erred by sentencing him to the top end of guidelines range. He attributes this error to the district court’s passing comment that his attorney reduced his sentencing exposure.

As Ochoa-Perez concedes, our review is for plain error. *See United States v. Zarco-Beiza*, 24 F.4th 477, 481-82 (5th Cir. 2022). Our review persuades us that the district court did not clearly err in observing that

¹ The presentence report (“PSR”) noted that Ochoa-Perez could have faced a maximum penalty of twenty years imprisonment pursuant to § 1326(b)(2). He avoided this lengthy sentencing provision by agreeing to plead to § 1326(b)(1), a statute that was also applicable but provided for only ten years imprisonment. Ochoa-Perez is correct that the district court, at the sentencing hearing, noted that Ochoa-Perez’s attorney had negotiated with the government a plea bargain with the lesser penalty.

Ochoa-Perez could have been sentenced to a 240-month maximum under § 1326(b)(2) absent the terms of his plea agreement because his convictions under § 481.112(a) are aggravated felonies. *See Puckett v. United States*, 556 U.S. 129, 135 (2009); *Ochoa-Salgado v. Garland*, 5 F.4th 615, 620–22 (5th Cir. 2021); *Alexis v. Barr*, 960 F.3d 722, 726–29 (5th Cir. 2020). To be clear, Ochoa-Perez was neither indicted nor sentenced under § 1326(b)(2). The PSR and the district court merely noted that, based on Ochoa-Perez’s prior convictions under § 481.112(a), he could have been indicted under this statute.

Additionally, Ochoa-Perez has not shown that the district court’s consideration of his reduced sentence under § 1326(b)(1) was clearly erroneous. *See United States v. Gozes-Wagner*, 977 F.3d 323, 348 (5th Cir. 2020); *United States v. Dunigan*, 555 F.3d 501, 506 (5th Cir. 2009). Ochoa-Perez speculates that he received a sentence at the higher end of the guidelines range because the district court commended his attorney for negotiating a plea bargain that reduced the maximum penalty he faced from 240 months to 120 months. This factor, he alleges, influenced the judge to sentence him at the top end of the guidelines range.² This argument, however, lacks support from the record.

The district court properly relied on the 18 U.S.C. § 3553(a) factors to determine the proper sentence. In explaining its choice of sentence, the district court identified three aggravating § 3553(a) factors: Ochoa-Perez’s criminal history, the nature and circumstances of the offense, and providing just punishment for the offense. The district court stated that it had balanced

² According to the PSR, the calculated range of imprisonment was 92–115 months under the Sentencing Guidelines. As we noted above, the district court sentenced Ochoa-Perez to an imprisonment term of 115 months.

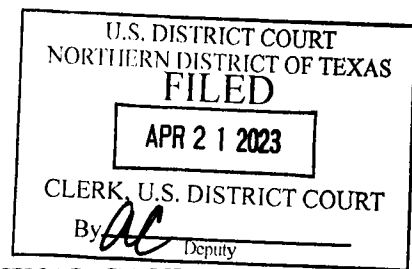
those factors with other, “significant mitigating factors” and imposed the sentence it felt was appropriate irrespective of the advisory guidelines range.

On plain-error review, Ochoa-Perez has not met his burden of overcoming the presumption of reasonableness afforded to his within-guidelines sentence. *See Puckett*, 556 U.S. at 135; *Hernandez*, 876 F.3d at 166; *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). Nor has he shown that any error affected his substantial rights. *See United States v. Escalante-Reyes*, 689 F.3d 415, 424 (5th Cir. 2012) (en banc). Accordingly, the judgment of the district court is, in all respects,

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Amarillo Division



UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 2:22-CR-068-Z-BR-(1)

U.S. Marshal's No.: 46719-177

MARTIN OCHOA-PEREZ

Anna Marie Bell, Assistant U.S. Attorney

Felipe Zavala, Attorney for the Defendant

On December 1, 2022 the defendant, MARTIN OCHOA-PEREZ, entered a plea of guilty as to Count One of the Indictment filed on June 22, 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); and 6 U.S.C. §§ 202(3), 202(4), and 557	ILLEGAL RE-ENTRY AFTER DEPORTATION	05/23/2022	One

The defendant is sentenced as provided in pages 2 through 4 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 June 22, 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 April 20, 2023.

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

Signed April 21, 2023.

IMPRISONMENT

The defendant, MARTIN OCHOA-PEREZ, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **One Hundred Fifteen (115) months as to Count One** of the Indictment filed on June 22, 2022. The sentence shall *run consecutively* to any sentence that may be imposed in Case # 2:13-CR-023-Z-BR-(1) pending in the U.S. District Court for the Northern District of Texas, Amarillo Division for Supervised Release Revocation that is unrelated to the instant offense.

The Court makes the following recommendations to the Bureau of Prisons:

1. that the Defendant be allowed to continue his current medication regimen to address the cardiac issues reflected in the PSR; and be allowed to participate in any and all substance abuse treatment and rehabilitation programs, including the Residential Drug Abuse Program, while in the custody of the Federal Bureau of Prisons, if eligible, if consistent with security classification;
2. that the Defendant be allowed to participate in continued vocational training in the fields of construction, oil and gas, electrical, plumbing and HVAC, if possible, if eligible, if consistent with security classification; and
3. that the Defendant be allowed to serve his term of incarceration nearest Amarillo, Texas, if possible, if eligible, if consistent with security classification.

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 June 22, 2022.

While on supervised release, in compliance with the Standard Conditions of supervision adopted by the United States Sentencing Commission at Section 5D1.3(c), the defendant shall:

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 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 observes 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 officer 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 work (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 any 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.
13. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

Also, as set forth in the Notice of Intent to Impose Conditions of Supervised Release signed and dated April 20, 2023, the Defendant shall comply with the below-listed other conditions of supervised release, which are derived from Sections 5D1.3(a), (b), (d), and (e), in relevant part:

1. The defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3583(d)).
2. The defendant shall not unlawfully possess a controlled substance (*see* 18 U.S.C. § 3583(d)).

3. The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (*see* 18 U.S.C. § 3583(d)).
4. The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3583(d)).
5. If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)).
6. The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.
7. If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).
8. The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (34 U.S.C. § 40702).
9. The defendant shall not illegally reenter the United States if deported or allowed voluntary departure.
10. As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered 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 further condition of supervised release, if ordered deported, the defendant shall remain outside the United States unless legally authorized to reenter. In the event the defendant is not deported upon release from imprisonment or surrendered to a duly authorized immigration officer for deportation as described above, or should the defendant ever be within the United States during any portion of the term of supervised release, the defendant shall comply with the standard conditions recommended by the U.S. Sentencing Commission and shall comply with the mandatory and special conditions stated in the Judgment.
11. In the event the defendant is not deported upon release from imprisonment or surrendered to a duly authorized immigration official, the defendant must immediately report, continue to report, or surrender to U.S. Immigration and Customs Enforcement and follow all of their instructions and reporting requirements until any deportation proceedings are completed.

12. The defendant shall participate in an outpatient program approved by the probation officer for treatment of narcotic, 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, and contributing to the costs of services rendered (copayment) at the rate of at least \$20 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.

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