

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE LUIS SARMIENTO,

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/ Christy Posnett Martin

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INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, CA No. 23-10974, *United States v. Sarmiento*, 2024 WL 3219704 (5th Cir. June 28, 2024)(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered September 15, 2023. *United States v. Sarmiento*, Dist. Court 4:23-CR-165.

Appendix C Information

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10974
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
June 28, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE LUIS SARMIENTO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CR-165-1

Before SMITH, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Jose Luis Sarmiento pleaded guilty to illegal reentry and was sentenced above the guidelines range to 60 months of imprisonment, followed by a three-year term of supervised release. He challenges his sentence as substantively unreasonable, urging that the district court abused its discretion in varying upwardly from the applicable guidelines range of

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

No. 23-10974

eight to 14 months based on his uncounted prior convictions and prior removals.

We review a preserved objection to a sentence's substantive reasonableness for an abuse of discretion, examining the totality of the circumstances. *Gall v. United States*, 552 U.S. 38, 51, 56 (2007). An above-guidelines sentence is substantively unreasonable if it "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006).

As Sarmiento implicitly concedes, the district court was entitled to consider and place appropriate weight on his criminal history, which included not only his five previous unscored convictions for drug, theft, and assault offenses but also his eight prior illegal entries or reentries and three attempted illegal reentries. *See* 18 U.S.C. § 3553(a)(1); *see also United States v. Fraga*, 704 F.3d 432, 440-41 (5th Cir. 2013); *United States v. Lopez-Velasquez*, 526 F.3d 804, 807 (5th Cir. 2008); *United States v. Brantley*, 537 F.3d 347, 350 (5th Cir. 2008); *Smith*, 440 F.3d at 709. The district court was also entitled to conclude that a variance was warranted because Sarmiento's prior terms of incarceration and prior removals had no deterrent effect. *See* 18 U.S.C. § 3553(a)(2); *Brantley*, 537 F.3d at 350; *see also United States v. Lee*, 358 F.3d 315, 328-29 (5th Cir. 2004).

Sarmiento fails to show that the district court did not account for a factor that warranted significant weight or that it gave undue weight to an improper factor. *See Smith*, 440 F.3d at 708. His assertion that the district court erred in balancing the factors by placing too much weight on his uncounted convictions and repetitive reentries is essentially a request to have this court reweigh the 18 U.S.C. § 3553(a) factors, which it may not do. *See*

No. 23-10974

Gall, 552 U.S. at 51; *see also United States v. Rodriguez-Bernal*, 783 F.3d 1002, 1008 (5th Cir. 2015). Sarmiento has likewise not shown that the extent of the variance was unreasonable as it is similar to or smaller than other variances affirmed by this court. *See Brantley*, 537 F.3d at 348-50; *Lopez-Velasquez*, 526 F.3d at 805, 807; *Smith*, 440 F.3d at 706, 708-10.

Additionally, Sarmiento argues that because his indictment did not allege, nor did he admit, facts which would have triggered a statutorily enhanced sentence under 8 U.S.C. § 1326(b), his statutory maximum should have been two years. 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.

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*. *See United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019). Thus, Sarmiento is correct that his argument is foreclosed.

The district court's judgment is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

June 28, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 23-10974 USA v. Sarmiento
USDC No. 4:23-CR-165-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa B. Courseault

By:

Melissa B. Courseault, Deputy Clerk

Enclosure(s)

Mr. Daniel Gordon
Mr. Michael Arthur Lehmann
Ms. Christy Martin
Mr. Brian W. McKay

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

JOSE LUIS SARMIENTO

Case Number: 4:23-CR-00165-O(01)

U.S. Marshal's No.: 00908-280

Shawn Smith for Michael Levi Thomas, Assistant U.S. Attorney
Michael A Lehmann, Attorney for the Defendant

On June 7, 2023 the defendant, JOSE LUIS SARMIENTO, entered a plea of guilty as to Count One of the Information filed on June 2, 2023. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

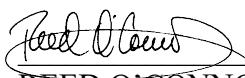
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. § 1326(a) and (b)(l)	Illegal Reentry After Deportation	04/16/2023	One

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 Information filed on June 2, 2023.

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 September 15, 2023.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed September 15, 2023.

Judgment in a Criminal Case
Defendant: JOSE LUIS SARMIENTO
Case Number: 4:23-CR-00165-O(1)

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IMPRISONMENT

The defendant, JOSE LUIS SARMIENTO, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **SIXTY (60) MONTHS** as to Count One of the Information filed on June 2, 2023.

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 Information filed on June 2, 2023.

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.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

- (1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- (2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- (3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- (4) You must answer truthfully the questions asked by your probation officer.
- (5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- (6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

Judgment in a Criminal Case
Defendant: JOSE LUIS SARMIENTO
Case Number: 4:23-CR-00165-O(1)

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- (7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- (8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- (9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- (10) You must 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) You must 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 you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- (13) You must 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 illegally possess controlled substances;

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

not possess a firearm, ammunition, destructive device, or any dangerous weapon;

refrain from any unlawful use of a controlled substance. You 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;

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

take notice that if this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment; and,

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

Judgment in a Criminal Case
Defendant: JOSE LUIS SARMIENTO
Case Number: 4:23-CR-00165-O(1)

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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

APPENDIX C

ORIGINAL

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

CLERK OF COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION
FILED

2023 JUN -2 PM 3:52

UNITED STATES OF AMERICA

DEPUTY CLERK *[Signature]*

v.

No.

JOSE LUIS SARIMENTO (01)

4-23 CR-165-0

INFORMATION

The United States Attorney Charges:

Count One

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

On or about April 16, 2023, in the Fort Worth Division of the Northern District of Texas, defendant **Jose Luis Sarimento**, an alien, was found in the United States having previously been deported and removed from the United States on or about February 8, 2013, 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.

In violation of 8 U.S.C. § 1326(a) and (b)(1).

LEIGHA SIMONTON
UNITED STATES ATTORNEY



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