

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OSMAR ALEXIS ALVAREZ,

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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Appendix A Opinion of Fifth Circuit, United States v. Alvarez, No. 23-11230, 2025 WL 943405 (5th Cir. Mar. 28, 2025)(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, United States v. Alvarez, No. 4:23-cr-000205-O-1 (Dec. 1, 2023).

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-11230
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

March 28, 2025

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

OSMAR ALEXIS ALVAREZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CR-205-1

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

PER CURIAM:*

Osmar Alexis Alvarez pleaded guilty to possession of a firearm following a felony conviction, in violation of 18 U.S.C. § 922(g)(1). The district court sentenced Alvarez to, *inter alia*, an above-Guidelines range of 84-months' imprisonment. He challenges his conviction under § 922(g)(1), contending the statute is facially unconstitutional, by claiming it: violates the Second Amendment; and exceeds Congress' powers under the Commerce Clause. In

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

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the alternative, he contends his sentence is substantively unreasonable in the light of the 18 U.S.C. § 3553(a) sentencing factors.

In challenging his conviction under 18 U.S.C. § 922(g)(1), Alvarez contends such a conviction is facially unconstitutional under the Second Amendment in the light of *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022). This challenge, however, is foreclosed by our court’s recent decision in *United States v. Diaz*, 116 F.4th 458, 471–72 (5th Cir. 2024), *petition for cert. docketed* (U.S. 24 Feb. 2025) (No. 24-6625), holding § 922(g)(1) is facially constitutional under *Bruen*. See, e.g., *United States v. French*, 121 F.4th 538, 538 (5th Cir. 2024) (holding same); *United States v. Barber*, 124 F.4th 354, 360 (5th Cir. 2024) (same). (Alvarez contends *Diaz* is in error. No authority need be cited for our being bound by circuit precedent.)

He also contends § 922(g)(1) is unconstitutional because it exceeds the scope of Congress’ authority under the Commerce Clause. As Alvarez correctly concedes, this contention is foreclosed by *United States v. Alcantar*, 733 F.3d 143, 145–46 (5th Cir. 2013); but, he presents the issue to preserve it for possible further review.

His challenge to his sentence also fails. 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).

Alvarez contends the court imposed a substantively-unreasonable, above-Guidelines sentence by relying upon prior convictions already accounted

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for, or specifically excluded, by the Guidelines. This contention is unavailing, however, as it is well-settled that the district court may rely on: factors already taken into account by the Guidelines, including defendant's criminal history, *see United States v. Brantley*, 537 F.3d 347, 350 (5th Cir. 2008); or other factors, such as defendant's criminal conduct that did not result in convictions, *see United States v. Lopez-Velasquez*, 526 F.3d 804, 807 (5th Cir. 2008).

Insofar as Alvarez' substantive-reasonableness challenge hinges on the extent of the variance, the court likewise did not abuse its discretion. *See, e.g., United States v. Key*, 599 F.3d 469, 475–76 (5th Cir. 2010) (upholding a 216-months' sentence based on factors already considered by Guidelines where applicable Guidelines range was 46 to 57 months); *United States v. Smith*, 417 F.3d 483, 492–93 (5th Cir. 2005) (upholding upward departure from 41-month Guidelines range maximum to 120-months' imprisonment based upon defendant's criminal history). When reviewing a non-Guidelines sentence for substantive reasonableness, we must give “due deference to the district court's decision that the § 3553(a) [sentencing] factors, on a whole, justify the extent of the variance”. *United States v. Broussard*, 669 F.3d 537, 551 (5th Cir. 2012) (citation omitted). Regarding those sentencing factors, because the record does not reflect that the court failed to “account for a factor that should have received significant weight”, gave “significant weight to an irrelevant or improper factor”, or committed “a clear error of judgment in balancing” the factors, there was no abuse of discretion. *United States v. Burney*, 992 F.3d 398, 399–400 (5th Cir. 2021) (citation omitted).

AFFIRMED.

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: 4:23-CR-00205-O(01)
OSMAR ALEXIS ALVAREZ U.S. Marshal's No.: 68473-510
Levi Thomas, Assistant U.S. Attorney
Andrenette Sullivan, Attorney for the Defendant

On August 23, 2023 the defendant, OSMAR ALEXIS ALVAREZ, entered a plea of guilty as to Count One of the Indictment filed on July 13, 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>
18 U.S.C. § 922(g)(1) and §924(a)(8)	Possession of a Firearm by a Convicted Felon	12/12/2022	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 July 13, 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 December 1, 2023.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed December 1, 2023.

Judgment in a Criminal Case
Defendant: OSMAR ALEXIS ALVAREZ
Case Number: 4:23-CR-00205-O(1)

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IMPRISONMENT

The defendant, OSMAR ALEXIS ALVAREZ, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **EIGHTY-SEVEN (87) MONTHS** as to Count One of the Indictment filed on July 13, 2023. This sentence shall run concurrently with any future sentence which may be imposed in Case Nos. 1754363D and 1760000D in the 432nd District Court, Tarrant County, Texas, as these offenses are related to the instant offense. This sentence shall run consecutive with any future sentence which may be imposed in Case Nos. 1759999D; 1760001D; 1767723D; and 1776412D in the 432nd District Court, Tarrant County, Texas; and in Case No. 1764983 in Tarrant County Criminal Court No. 4, as these offenses are unrelated to the instant offense.

The Court recommends to the BOP that the defendant be allowed to participate in the Residential Drug Treatment Program and the GED program, if eligible. The Court makes a non-binding recommendation to the BOP that Defendant, if appropriately classified, be allowed to serve his term of imprisonment as near as geographically possible to an FCI facility in Fort Worth, 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 **THREE (3) YEARS** as to Count One of the Indictment filed on July 13, 2023.

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.

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Defendant: OSMAR ALEXIS ALVAREZ
Case Number: 4:23-CR-00205-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;

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Defendant: OSMAR ALEXIS ALVAREZ
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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.

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