

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE OCHOA-CALEDON, also known as Ramiro Cerna-Gonzalez,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

APPENDIX

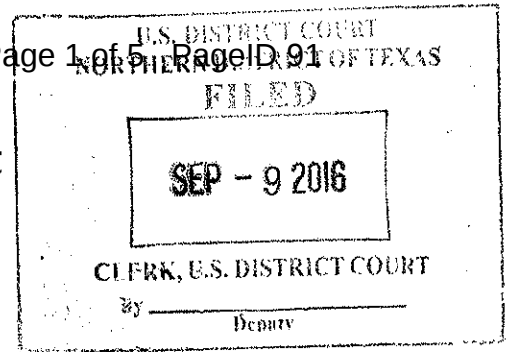
JASON HAWKINS
Federal Public Defender
Northern District of Texas

WILLIAM HERMESMEYER
Assistant Federal Public Defender
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Fort Worth, Texas 76102
Counsel of Record

APPENDIX

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United States District Court
Northern District of Texas
Fort Worth Division



UNITED STATES OF AMERICA §
v. §
JOSE OCHOA-CALEDON, a/k/a Ramiro §
Cerna-Gonzalez

Case Number: 4:16-CR-079-A(01)

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Michael Worley. The defendant, JOSE OCHOA-CALEDON, a/k/a Ramiro Cerna-Gonzalez, was represented by Federal Public Defender through Assistant Federal Public Defender William Hermesmyer.

The defendant pleaded guilty on May 27, 2016 to the one count indictment filed on April 13, 2016. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
8 U.S.C. §§ 1326(a) and (b)(1) and (b)(1)/(2) Illegal Reentry After Deportation	03/11/2016	1

As pronounced and imposed on September 8, 2016, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of \$100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 40 months.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years. The court imposed a term of supervised release because it will provide an added measure of deterrence and protection based on the facts and circumstances of this case.

Pursuant to 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 further 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 comply with the following conditions:

1. The defendant shall not possess illegal controlled substances.
2. The defendant shall not commit another federal, state, or local crime.
3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.
4. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.
3. The defendant shall provide to the U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.
5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.

7. The defendant shall support his or her dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.
9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

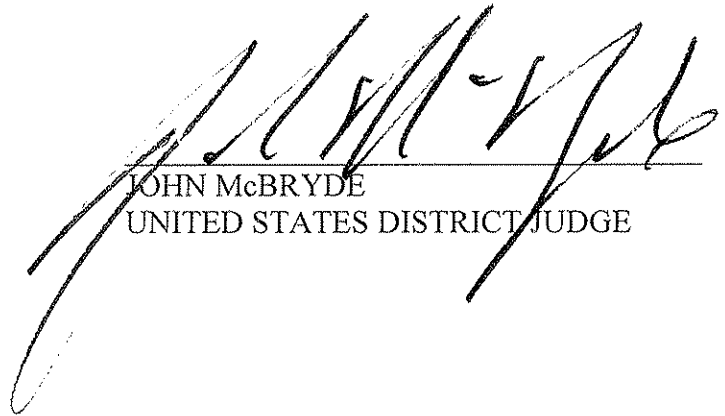
FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 9th day of September, 2016.



JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

Defendant delivered on _____, 2016 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal

DEFENDANT: Jose Ochoa-Caledo a/k/a Ramiro Cerna-Gonzalez

CASE NUMBER: 4:16-CR-079-A(01)

DISTRICT: NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

STATEMENT OF REASONS

(Not for Public Disclosure)

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

- A ☐ The court adopts the presentence investigation report without change.
- B ☒ The court adopts the presentence investigation report with the following changes.
(Check all that apply and specify court determinations, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.) (Use page 4 if necessary.)
- 1 ☐ Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level, or specific offense characteristics):
- 2 ☐ Chapter Three of the U.S.S.G. Manual determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):
- 3 ☐ Chapter Four of the U.S.S.G. Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):
- 4 ☐ Additional Comments or Findings (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions).
- 5 ☒ The court adopts as the fact findings of the court all facts set forth in the Presentence Report as modified or supplemented by any facts set forth in the Addendum and any facts found by the court during the sentencing hearing; and, the court adopts as the conclusions of the court all conclusions expressed in the Presentence Report as modified or supplemented by any conclusions expressed in the Addendum, and any conclusions expressed by the court during the sentencing hearing.
- C ☐ The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

- A ☒ No count of conviction carries a mandatory minimum sentence.
- B ☐ Mandatory minimum sentence imposed.
- C ☐ One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on
- ☐ findings of fact in this case
 - ☐ substantial assistance (18 U.S.C. § 3553(e))
 - ☐ the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES)

Total Offense Level: 17

Criminal History Category: 1

Imprisonment Range: 24 to 30 months

Supervised Release Range: 1 to 3 years

Fine Range: \$10,000 to \$95,000

DEFENDANT: Jose Ochoa-Caledo a/k/a Ramiro Cerna-Gonzalez

CASE NUMBER: 4:16-CR-079-A(01)

DISTRICT: NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

STATEMENT OF REASONS

(Not for Public Disclosure)

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

- A ☐ The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.
- B ☐ The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons. (Use page 4 if necessary.)
- C ☐ The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual. (Also complete Section V.)
- D ☒ The court imposes a sentence outside the advisory sentencing guideline system. (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (if applicable)

A The sentence imposed departs (Check only one.):

- ☐ below the advisory guideline range; or
- ☒ above the advisory guideline range.

B Departure based on (Check all that apply.):

1 Plea Agreement (Check all that apply and check reason(s) below.):

- ☐ 5K1.1 plea agreement based on the defendant's substantial assistance;
- ☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program;
- ☐ binding plea agreement for departure accepted by the court;
- ☐ plea agreement for departure, which the court finds to be reasonable;
- ☐ plea agreement that states that the government will not oppose a defense departure motion.

2 Motion Not Addressed in a Plea Agreement (Check all that apply and check reason(s) below.):

- ☐ 5K1.1 government motion based on the defendant's substantial assistance;
- ☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program;
- ☐ government motion for departure;
- ☐ defense motion for departure to which the government did not object;
- ☐ defense motion for departure to which the government objected.

3 Other

- ☐ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C Reason(s) for Departure (Check all that apply other than 5K1.1 or 5K3.1.)

- | | | |
|--|--|---|
| ☐ 4A1.3 Criminal History Inadequacy | ☐ 5K2.1 Death | ☐ 5K2.11 Lesser Harm |
| ☐ 5H1.1 Age | ☐ 5K2.2 Physical Injury | ☐ 5K2.12 Coercion and Duress |
| ☐ 5H1.2 Education and Vocational Skills | ☐ 5K2.3 Extreme Psychological Injury | ☐ 5K2.13 Diminished Capacity |
| ☐ 5H1.3 Mental and Emotional Condition | ☐ 5K2.4 Abduction or Unlawful Restraint | ☐ 5K2.14 Public Welfare |
| ☐ 5H1.4 Physical Condition | ☐ 5K2.5 Property Damage or Loss | ☐ 5K2.16 Voluntary Disclosure of Offense |
| ☐ 5H1.5 Employment Record | ☐ 5K2.6 Weapon or Dangerous Weapon | ☐ 5K2.17 High-Capacity, Semiautomatic Weapon |
| ☐ 5H1.6 Family Ties and Responsibilities | ☐ 5K2.7 Disruption of Government Function | ☐ 5K2.18 Violent Street Gang |
| ☐ 5H1.11 Military Record, Charitable Service | ☐ 5K2.8 Extreme Conduct | ☐ 5K2.20 Aberrant Behavior |
| ☐ Good Works | ☐ 5K2.9 Criminal Purpose | ☐ 5K2.21 Dismissed and Uncharged Conduct |
| ☐ 5K2.0 Aggravating or Mitigating Circumstances | ☐ 5K2.10 Victim's Conduct | ☐ 5K2.22 Age or Health of Sex Offenders |
| | | ☐ 5K2.23 Discharged Terms of Imprisonment |
| | | ☐ Other guideline basis (e.g., 2B1.1 commentary) |

Explain the facts justifying the departure. (Use page 4.)

7a

16-11417.154

DEFENDANT: Jose Ochoa-Caledo a/k/a Ramiro Cerna-Gonzalez

CASE NUMBER: 4:16-CR-079-A(01)

DISTRICT: NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

STATEMENT OF REASONS

(Not for Public Disclosure)

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM

(Check all that apply.)

A The sentence imposed is (Check only one.):

- ☐ below the advisory guideline range; or
☒ above the advisory guideline range.

B Sentence imposed pursuant to (Check all that apply.):**1 Plea Agreement** (Check all that apply and check reason(s) below.):

- ☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the court;
☐ plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable;
☐ plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the guideline system.

2 Motion Not Addressed in a Plea Agreement (Check all that apply and check reason(s) below.):

- ☐ government motion for a sentence outside of the advisory guideline system,
☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object;
☐ defense motion for a sentence outside of the advisory guideline system to which the government objected.

3 Other

- ☒ Other than a plea agreement or motion by the parties for a sentence outside of the guideline system (Check reason(s) below.):

C Reason(s) for Sentence Outside the Advisory Guideline System (Check all that apply.)

- ☒ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1);
☒ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A));
☒ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B));
☒ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C));
☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D));
☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6));
☐ to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7)).

D Explain the facts justifying a sentence outside the advisory guideline system. (Use page 4 if necessary.)

DEFENDANT: Jose Ochoa-Caledo a/k/a Ramiro Cerna-Gonzalez
CASE NUMBER: 4:16-CR-079-A(01)
DISTRICT: NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

STATEMENT OF REASONS

(Not for Public Disclosure)

VII COURT DETERMINATIONS OF RESTITUTION

- A ☒ Restitution Not Applicable.
- B Total Amount of Restitution:
- C Restitution not ordered (Check only one.):
- 1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
- 2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
- 3 ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
- 4 ☐ Restitution is not ordered for other reasons. (Explain)
- D ☐ Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE

The court finds that an upward variance is warranted based on the nature and circumstances of the offense and the history and characteristics of the defendant; the seriousness of the offense; to promote respect for the law; to provide just punishment for the offense; and the need to protect the public from further crimes of the defendant based on his repetitive illegal return to the United States. A sentence of 40 months is sufficient, but not greater than necessary, to accomplish the objectives of sentencing as specified in 18 U.S.C. § 3553(a).

PERSONAL INFORMATION ABOUT DEFENDANT

Defendant's Residence Address: Tarrant County Jail
100 North Lamar Street
Fort Worth, Texas 76102

Defendant's Mailing Address: Tarrant County Jail
100 North Lamar Street
Fort Worth, Texas 76102

Defendant's USM No.: 54128-177

Defendant's SSN: None

Defendant's Date of Birth: October 16, 1969

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

UNITED STATES OF AMERICA . CRIMINAL ACTION NO.
V. . 4:16-CR-079-A-1
JOSE OCHOA-CALEDON . Fort Worth, Texas
. . September 8, 2016
.

TRANSCRIPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE JOHN MCBRYDE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: MR. J. MICHAEL WORLEY
United States Attorney's Office
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102-6897
(817) 252-5200

For the Defendant: MR. WILLIAM HERMESMEYER
Federal Public Defender
819 Taylor Street, Room 9A10
Fort Worth, Texas 76102
(817) 978-2753

Court Reporter: MS. ANA P. WARREN
U.S. District Court Reporter
501 W. 10th Street, Room 502
Fort Worth, Texas 76102-3637
(817) 850-6681

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

P R O C E E D I N G S

(Commencing, 2:00 p.m.)

THE COURT: Okay. We're going to start with Number 4:16-CR-079-A. It's United States of America versus Jose Ochoa-Caledo. Mr. Worley is here for the government, and Mr. Hermesmeyer is here for the defendant.

Let's see. Does your client need an interpreter, Mr. Hermesmeyer?

MR. HERMESMEYER: He does, Your Honor.

THE COURT: Okay. Yovana Gonzalez is here to serve as the interpreter.

Have you been sworn in this case, Ms. Gonzalez?

THE INTERPRETER: Yes, I have, Your Honor.

THE COURT: Okay. This is directed to the defendant.

You appeared before me on May 27, 2016, when you pleaded guilty to the offense charged by a one count indictment in this case, and that offense was illegal reentry after deportation, and we're here today for sentencing based on the conviction resulting from that plea of guilty.

Mr. Hermesmeyer, did you and your client receive in a timely manner the presentence report?

MR. HERMESMEYER: Yes, Your Honor.

THE COURT: And the addendum to the presentence report?

1 MR. HERMESMEYER: Yes, Your Honor.

2 THE COURT: Were both of those items read to your
3 client in his language?

4 MR. HERMESMEYER: Yes, Your Honor.

5 THE COURT: And did the two of you discuss those
6 items in his language?

7 MR. HERMESMEYER: Yes, Your Honor.

8 THE COURT: Let's see. There were some objections to
9 the presentence report.

10 Were those objections, Mr. Hermesmeier, both directed to
11 the possibility of a sentence above the top of the advisory
12 guideline range?

13 MR. HERMESMEYER: Your Honor, in part, we did file
14 two objections, and they do -- are directed in part in that
15 regard.

16 THE COURT: What is the other aspect of those
17 objections if they don't -- are not directed to the
18 possibility of a sentence above the top of the advisory
19 guideline range?

20 MR. HERMESMEYER: Your Honor, I would direct the
21 Court to the case in this court of In Re: Discipline of
22 William Hermesmeier. It's Case Number 4:16-MC-017-A, and I
23 filed a number of written responses and other documents in
24 that case that would explain --

25 THE COURT: Is that the same case we're here on?

1 MR. HERMESMEYER: Your Honor, I'm referring to the
2 Court the legal arguments that in --

3 THE COURT: I'm asking if the case you gave the
4 number of is the case we're here on today?

5 MR. HERMESMEYER: Your Honor, no. What I was trying
6 to explain is that I was making reference to that case number
7 in support of the legal response that I'm making for the -- to
8 the Court's inquiry here today, and what I was stating to the
9 Court is my responses to your question today are explained in
10 the documents I submitted in that case.

11 THE COURT: What case are you referring to,
12 Mr. Hermesmeyer?

13 MR. HERMESMEYER: Your Honor, the case is titled "In
14 Re: Discipline of William Hermesmeyer." It's Case Number
15 4:16-MC-017-A. It's a case here in the Northern District of
16 Texas in the Fort Worth Division.

17 THE COURT: What I'm trying to find out,
18 Mr. Hermesmeyer, you have filed some objections in this case,
19 and I'm trying to find out if those objections are all
20 directed to the matter of the possibility of a sentence above
21 the top of the advisory guideline range. Now, I'm directing
22 you and ordering you to answer my question responsibly.

23 MR. HERMESMEYER: Your Honor, my response is, as I
24 was responding to the Court initially to that inquiry, that it
25 is, in part, directed in that regard, and the Court asked then

1 what they also were directed to, and I directed the Court to
2 the case I just referenced to explain --

3 THE COURT: I'm ordering you at this time,
4 Mr. Hermesmeier, to tell me directly what else your objection
5 is directed to other than the matter of the possibility of a
6 sentence above the advisory guideline range. What else are
7 your objections directed to? And I'm ordering you at this
8 time to answer that directly.

9 MR. HERMESMEYER: Yes, Your Honor. Thank you.

10 Your Honor, the objections in the largest part are
11 directed to whether or not there exists in this case legal
12 authority for a sentence above what has come out in the
13 sentencing guidelines in this case.

14 THE COURT: Okay. That's not a direct answer, but
15 it's close enough. So we'll move on.

16 There being no objections to anything in the presentence
17 report that bears on the calculation of the guideline ranges
18 or the applicable guideline provisions, the Court adopts as
19 the fact findings of the Court the facts set forth in the
20 presentence report as modified or supplemented by the
21 addendum, bearing in mind that the possibility of a sentence
22 above the top of the advisory guideline range is still an open
23 issue.

24 And the Court adopts as the conclusions of the Court the
25 conclusions expressed in the presentence report as modified or

1 supplemented by any conclusions expressed in the addendum,
2 again, bearing in mind that the issue of a possible sentence
3 above the top of the advisory guideline range is still an open
4 issue in this case.

5 The Court concludes that the Total Offense Level is 17.
6 That the Criminal History Category is I. That the
7 imprisonment range is 24 to 30 months. That the supervised
8 release range is one to three years. That the fine range is
9 \$10,000 to \$95,000, and that a special assessment of \$100 is
10 mandatory.

11 I issued an order on September 3, 2014 making known my
12 tentative conclusion that a sentence of imprisonment
13 significantly above the top of the advisory guideline range
14 would be appropriate in this case.

15 Do you have any evidence you want to present on that
16 subject, Mr. Hermesmeier?

17 MR. HERMESMEIER: Your Honor, we have no evidence to
18 present. Thank you.

19 THE COURT: Okay. You can go ahead and make whatever
20 statement you would like to make on behalf of your client, and
21 you can include in that statement anything -- well, let me
22 back up a minute.

23 I've also tentatively concluded and made this known to you
24 that the objections you made to the presentence report are
25 without merit. Do you want to offer any evidence in support

1 of those objections?

2 MR. HERMESMEYER: Your Honor, we have no evidence to
3 offer in support of those objections.

4 THE COURT: Do you have any argument you want to make
5 other than those made in the written filings you've made in
6 this case?

7 MR. HERMESMEYER: Your Honor, in the event that the
8 Court does impose a sentence over 30 months, we would request
9 an opportunity to articulate an objection prior to the close
10 of this hearing.

11 THE COURT: I'll give you the opportunity now to
12 articulate whatever objection you want to make on the subject
13 of the possibility of a sentence above the top of the advisory
14 guideline range. Do you have any objection you wish to make
15 on that subject that you would like to articulate?

16 MR. HERMESMEYER: Your Honor, the objection that I
17 was asking for an opportunity to articulate would be more
18 appropriately -- would more appropriately occur after whatever
19 the Court does with respect to sentencing. However, if the
20 Court is not intending to make any additional legal
21 conclusions or take in any more evidence, then my objection
22 would be as follows:

23 Section 3553(a)(4) of Title 18 of the United States Code
24 requires that the Court take into consideration the guidelines
25 sentencing range. The Court, should it impose a sentence in

1 excess of the guideline range under the circumstances that I
2 just referenced, the Court would be considering that a
3 sentence in excess of the guideline range is greater than
4 necessary to meet the statutory purposes of sentencing in the
5 imposition of a sentence greater than 30 months, and the Court
6 would also be considering that a sentence in excess of the
7 guideline sentencing range is not necessary to meet the
8 statutory purposes of sentencing by whatever sentence above 30
9 months that the Court would impose.

10 I do need to back up and correct this. What I should have
11 stated previously was that the Court in considering a sentence
12 in excess of the guideline -- the Court in considering the
13 guideline range -- I'm sorry -- is considering that any
14 sentence in excess of 30 months is, in fact, greater than
15 necessary to meet the statutory purposes of sentencing. And
16 if the Court decides in its own right that the sentence its
17 going to impose is a sentence of greater than 30 months, the
18 Court would also be determining that a sentence in excess of
19 30 months is also not greater than necessary to meet those
20 same purposes.

21 It is the defense's objection that it is not logical,
22 rational, or reasonable to consider that a sentence in excess
23 of the guideline sentencing range is both greater than
24 necessary and not greater than necessary to meet the same
25 statutory purposes of sentencing. We would object to the

1 sentence being imposed under such unreasonable determinations
2 by the Court.

3 We do make these objections for all the reasons stated in
4 the written objections as well as those stated at this hearing
5 by the defense, not inconsistent with our objections.

6 Your Honor, it's premature to make this statement in some
7 reports, but insofar as the Court has asked that I make these
8 objections at this point, I would state that the appropriate
9 remedy for such determinations if made by the Court would be
10 either conforming the Court's determinations with the
11 guideline's determinations, and that is, as previously stated,
12 that any sentence greater than 30 months would be greater than
13 necessary and to conform a sentence to be 30 months or less,
14 or explaining how the guidelines as applied to this case would
15 fail as a general matter to properly reflect the 3553(a)
16 considerations as has been required by the Supreme Court in
17 the case of Kimbrough versus United States. The citation for
18 that is 552 US 85, specifically on Page 110, and that is a
19 2007 case.

20 THE COURT: Okay. Your objections to the presentence
21 report on the subject of a possible sentence above the top of
22 the advisory guideline range have been in Paragraphs 97 and 98
23 of the presentence report, and I'll overrule those
24 objections.

25 At this time, you can make whatever statement or

1 presentation you would like to make on behalf of your client,
2 and in doing so, you're certainly entitled to make whatever
3 statement you would like to make or presentation you would
4 like to make on the possibility of a sentence above the top of
5 the advisory guideline range.

6 MR. HERMESMEYER: Thank you, Your Honor.

7 And, Your Honor, by way of clarification, the objection
8 that I just stated is an objection to the sentence imposed and
9 not just merely a presentence report objection.

10 THE COURT: Okay. Well, then you won't have to
11 repeat that after the sentence is imposed if it's above the
12 top of the advisory guideline range.

13 You may proceed at this time.

14 MR. HERMESMEYER: Thank you, Your Honor.

15 Your Honor, with respect to this particular case, it is
16 one that is exceptional in some regards.

17 Mr. -- I'm sorry, Mr. Cerna, which would be his legal name
18 but it's listed as an a/k/a in this case, he has had some
19 criminal problems in the past but hasn't had any criminal
20 convictions for offenses that would be harmful directly to
21 others or others' property for well over 20 to 25 years, and
22 even those, when you go back into the mid and early '90s and
23 late '80s, those handful of cases that he got in trouble for
24 were not aggravated-type cases and were relatively minor-type
25 offenses for those type of cases as indicated by the sentence

1 that he received for those.

2 He did have a conviction for a drug trafficking-type of
3 offense. Here again, that occurred well over 20 years ago,
4 and he did get a ten year sentence for that, but when you look
5 at the timing of the release to parole or to immigration as
6 indicated in the presentence report, he was released within
7 three years of that sentence having been imposed, which it is
8 the defense's position or argument that that sort of ten year
9 offense would have been fashioned in order to result in a
10 period of imprisonment of three years.

11 He did have, also, a burglary offense, and that occurred
12 just a hair under 30 years ago, and he did get a three year
13 sentence on that after a revocation of probation that he was
14 ordered as part of the sentence in that case to serve and,
15 yet, was released within a few months. I think the sentence
16 was imposed in September, and he was released by January of
17 that following year after the sentence was imposed.

18 The only other criminal convictions are a handful of
19 relatively minor convictions, especially as indicated by the
20 sort of sentences that he received, and it is in no way that
21 we would be trying to indicate that that is somehow indicative
22 of lenient treatment. It is the defense's position that that
23 would be indicative of the type of circumstances that formed
24 the basis for those prosecutions.

25 Like I said, there was a handful of those, all at least

1 around 10 years and going back 20 years ago. In one sentence
2 he got almost 30 years -- or over 30 years ago was 120 days on
3 a couple of theft cases. He received another 45 day sentence.
4 It looks like it was a little over -- quite a bit over ten
5 years ago for an assault, and then a nine day sentence for a
6 failure to identify himself, and then another probated
7 sentence for an immigration, illegal entry. The last time he
8 was even prosecuted or brought before a criminal court was
9 over ten years ago.

10 Your Honor, I would point out that in addition to not
11 having any contact with the criminal justice system for nearly
12 ten years, in this particular instance, Mr. -- I'm sorry. I
13 keep looking at the case title -- Mr. Cerna, was picked up on
14 a warrant for -- that was issued by immigration to just go out
15 and pick him up. He wasn't picked up going out and doing
16 anything else wrong or having got arrested on any other
17 offenses.

18 Your Honor, the Court has also been presented in this case
19 by a number of letters, one from a Billy Johnson, one from a
20 Robert Royals, another from Kailyn Broadford (phonetic), and
21 another from Michael Page. All of those letters indicate that
22 those people consider Mr. Cerna as a hard working and trusted
23 person even to the extent that one of those persons was asking
24 this Court to see what this Court could do to help fix
25 Mr. Cerna's immigration status so he can stay here.

1 Your Honor, we're not under any illusions about that, but
2 it is indicative of the sort of character that a person who is
3 willing to write a letter to this Court on behalf of
4 Mr. Cerna, it's indicative of the sort of character that he
5 perceives Mr. Cerna to have.

6 As the Court has indicated, the guidelines comes out of a
7 sentencing range of 24 to 30 months, and we're requesting the
8 Court impose a sentence not in excess of 24 months. Thank
9 you.

10 THE COURT: This is directed to the defendant.

11 You have the right to make any statement or presentation
12 you would like to make on the subject of mitigation, that is,
13 the things you think the Court should take into account in
14 determining what sentence to impose or on the subject of
15 sentencing more generally, and at this time I'll invite you to
16 do that.

17 DEFENDANT OCHOA: Yes, Your Honor. Thank you.

18 Everything is fine. I'm prepared for you to follow
19 through with the process.

20 THE COURT: Okay. Anything else?

21 DEFENDANT OCHOA: No, thank you, Your Honor.

22 THE COURT: Okay. You, apparently, have been -- have
23 illegally entered the United States on a large number of
24 occasions. You were allowed voluntarily to return to Mexico
25 on one occasion. That was in 1996. You were administratively

1 removed from the United States after illegal entries on at
2 least four occasions, 1997, 2003, 2006, and 2008.

3 Your last deportation occurred on September 10, 2008 in
4 Laredo, Texas. That was subsequent to your conviction of
5 illegal reentry after -- illegal reentry, and that conviction
6 was in the United States District Court for the Southern
7 District of Texas, the Laredo Division.

8 You've got quite a criminal history. It goes all the way
9 back to age 18 when you were convicted of burglary of a
10 building. Then at age 20, you were convicted of theft.
11 Again, at age 20, you were convicted of theft. It was your
12 second theft conviction at age 20. Age 22, you were convicted
13 of delivery of a controlled substance. That was cocaine.

14 Let me go back a minute. At age 18, you admitted your
15 guilt to the offense of theft of property as a part of a plea
16 in bar of prosecution. At age 22 -- no, this is another --
17 yes, at age 22, you admitted possession with intent to deliver
18 a controlled substance, again, cocaine. That was a plea in
19 bar of prosecution. That was in addition to the other cocaine
20 offense I mentioned.

21 Then at age 29, you were convicted of assault with bodily
22 injury. At age 33, you were convicted of attempted illegal
23 entry. That was the Southern District of Texas offense. Age
24 37 you were convicted of failure to identify and provided
25 false information. I don't believe you got any criminal

1 history points in your calculations from any of those
2 convictions.

3 So, obviously, your criminal history doesn't adequately
4 portray -- your criminal history score doesn't adequately
5 portray your true criminal history.

6 MR. HERMESMEYER: I'm sorry, Your Honor. I didn't
7 understand that last bit after the Court indicated that
8 Mr. Cerna didn't have any criminal history points.

9 THE COURT: I've concluded that a sentence above the
10 top of the advisory guideline range isn't necessary and
11 appropriate in this case to accomplish the objectives of
12 sentencing and to satisfy the sentencing factors contemplated
13 by 18, United States Code, Section 3553(a).

14 The Court's concluded that a sentence of 40 months
15 combined with imprisonment, combined with a term of supervised
16 release of three years to commence once the term of
17 imprisonment has been served, and I would impose that term of
18 supervised release because it will provide an added measure of
19 deterrence and protection based on the facts and circumstances
20 of this case, and that would be combined with an obligation to
21 pay a special assessment of \$100. That would be payable at
22 the time of sentencing.

23 A sentence of that kind, the kind I've described, would be
24 appropriate to satisfy the objectives of sentencing.
25 Actually, a sentence greater than that would be appropriate

1 when I consider all the factors, but I'm going to limit it to
2 what I've just described.

3 So the Court's ordering and adjudging that the Court --
4 that the defendant be committed to the custody of the Bureau
5 of Prisons to serve a term of imprisonment of 40 months. I'm
6 also ordering that the defendant serve a term of supervised
7 release of three years that will start when he's completed his
8 sentence of imprisonment.

9 Now, the conditions of that supervised release -- well,
10 we'll start, pursuant to 18, United States Code, Section
11 3583(d), as a condition of supervised release once the
12 defendant has completed his sentence of imprisonment, he is to
13 be surrendered by the Federal Bureau of Prisons to a duly
14 authorized immigration official for deportation in accordance
15 with the established procedures provided by the Immigration
16 and Nationality Act.

17 As a further condition of supervised release, if the
18 defendant is ordered deported, he shall remain outside the
19 United States. Now, in the event the defendant is not
20 deported immediately upon release from imprisonment or should
21 he ever be within the United States during any portion of his
22 term of supervised release, he shall comply with the standard
23 conditions that will be set forth in the judgment of
24 conviction and sentence and the following additional
25 conditions:

1 He shall not possess illegal controlled substances. He
2 shall not commit another federal, state, or local crime. He
3 shall cooperate in the collection of DNA as directed by the
4 probation officer.

5 The Court further orders that the defendant pay a special
6 assessment of \$100. That's payable immediately to the United
7 States of America through the office of the clerk of the Court
8 here in Fort Worth.

9 You have the right to appeal from the sentence I've
10 imposed if you're dissatisfied with it. That appeal would be
11 to the United States Court of Appeals for the Fifth Circuit.
12 You have the right to appeal in forma pauperis. That means
13 without any cost to you if you were to qualify for it. You
14 have the right to have the clerk of the Court file a notice of
15 appeal for you, and the clerk will do that forthwith if you
16 were to specifically request it.

17 You and your attorney have been given a form that outlines
18 certain rights and obligations in reference to an appeal. If
19 you haven't already done so, I want the two of you to review
20 it in your language, be sure you understand it, and once both
21 of you are satisfied you understand it, I want both of you to
22 sign it and return it to the Court coordinator.

23 Has that been done, Mr. Hermesmeier?

24 MR. HERMESMEYER: Yes, Your Honor.

25 THE COURT: Okay. The defendant's remanded to

1 custody, and the attorneys are excused.

2 (End of proceedings, 2:35 p.m.)

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20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the record of proceedings in the above-entitled matter, and
23 that the transcript was prepared by me and under my
supervision.

24 s/ Ana P. Warren
25 Ana P. Warren, CSR #2302
U.S. District Court Reporter

November 15, 2016
Date

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-11417
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
September 7, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE OCHOA-CALEDON, also known as Ramiro Cerna-Gonzalez,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CR-79-1

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Jose Ochoa-Caledon pleaded guilty to illegal reentry in violation of 8 U.S.C. § 1326(a) and (b)(1)-(2). The presentence report (PSR) recommended an advisory guidelines range of 24 to 30 months of imprisonment. The district court sentenced Ochoa-Caledon to 40 months of imprisonment and three years of supervised release. On appeal, Ochoa-Caledon challenges the procedural reasonableness of his sentence. In evaluating whether a district court

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

committed a procedural error in the sentencing determination, we employ a de novo standard of review. *United States v. Garcia Mendoza*, 587 F.3d 682, 688 (5th Cir. 2009).

Ochoa-Caledo argues that the district court committed procedural error by misapplying the provisions of the Guidelines governing departures in determining that an upward departure was warranted under U.S.S.G. § 4A1.3, p.s. However, the record reflects that the district court imposed a non-guidelines sentence or upward variance based on the 18 U.S.C. § 3553(a) sentencing factors. *See United States v. Brantley*, 537 F.3d 347, 349 (5th Cir. 2008). Therefore, Ochoa-Caledo's arguments are inapposite.

He also contends that the district court committed procedural error by failing to adequately explain its decision to impose an upward variance. At sentencing, the district court listened to the arguments and statements made by defense counsel and Ochoa-Caledo. The district court also adopted the PSR and the PSR Addendum, considered the § 3553(a) sentencing factors, and stated reasons in support of the upward variance. Specifically, the district court noted the "large number of occasions" in which Ochoa-Caledo "illegally entered the United States." The district court also stated that Ochoa-Caledo had "quite a criminal history" and that none of his prior convictions received criminal history points. Even if the district court "might have said more," the record makes clear that the court considered all of "the evidence and arguments," and its statement of reasons for the sentence imposed was "legally sufficient." *Rita v. United States*, 551 U.S. 338, 358-59 (2007).

The judgment of the district court is AFFIRMED.

8 U.S.C.

United States Code, 2015 Edition

Title 8 - ALIENS AND NATIONALITY

CHAPTER 12 - IMMIGRATION AND NATIONALITY

SUBCHAPTER II - IMMIGRATION

Part VIII - General Penalty Provisions

Sec. 1326 - Reentry of removed aliens

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§1326. Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.¹ or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)² of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.

(June 27, 1952, ch. 477, title II, ch. 8, §276, 66 Stat. 229; Pub. L. 100–690, title VII, §7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub. L. 101–649, title V, §543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub. L. 103–322, title XIII, §130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub. L. 104–132, title IV, §§401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub. L. 104–208, div. C, title III, §§305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009–606, 3009–618 to 3009–620, 3009–629.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a)(2), was in the original a reference to this Act, meaning act June 27, 1952, ch. 477, 66 Stat. 163, known as the Immigration and Nationality Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1101 of this title and Tables.

Section 1252 of this title, referred to in subsec. (c), was amended generally by Pub. L. 104–208, div. C, title III, §306(a)(2), Sept. 30, 1996, 110 Stat. 3009–607, and, as so amended, does not contain a subsec. (h). For provisions similar to those formerly contained in section 1252(h)(2) of this title, see section 1231(a)(4) of this title.

AMENDMENTS

1996—Pub. L. 104–208, §308(e)(14)(A), amended section catchline.

Subsec. (a)(1). Pub. L. 104–208, §308(d)(4)(J)(i), substituted "denied admission, excluded, deported, or removed" for "arrested and deported, has been excluded and deported," and "exclusion, deportation, or removal" for "exclusion or deportation".

Pub. L. 104–208, §324(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "has been arrested and deported or excluded and deported, and thereafter".

Subsec. (a)(2)(B). Pub. L. 104–208, §308(d)(4)(J)(ii), substituted "denied admission and removed" for "excluded and deported".

Subsec. (b). Pub. L. 104–208, §324(b), inserted "(or not during)" after "during" in concluding provisions.

Pub. L. 104–208, §308(e)(1)(K), substituted "removal" for "deportation" wherever appearing in pars. (1) and (2) and in concluding provisions.

Subsec. (b)(2). Pub. L. 104–208, §305(b)(1), struck out "or" at end.

Subsec. (b)(3). Pub. L. 104–208, §305(b)(2), inserted "or" at end.

Pub. L. 104–132, §401(c), added par. (3).

Subsec. (b)(4). Pub. L. 104–208, §305(b)(3), added par. (4).

Subsec. (c). Pub. L. 104–132, §438(b), added subsec. (c).

Subsec. (d). Pub. L. 104–132, §441(a), added subsec. (d).

1994—Subsec. (b). Pub. L. 103–322, in par. (1), inserted "three or more misdemeanors involving drugs, crimes against the person, or both, or" after "commission of" and substituted "10" for "5", in par. (2), substituted "20" for "15", and added concluding sentence.

1990—Subsec. (a). Pub. L. 101–649 substituted "shall be fined under title 18, or imprisoned not more than 2 years" for "shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than \$1,000".

1988—Pub. L. 100–690 designated existing provisions as subsec. (a), substituted "Subject to subsection (b), any alien" for "Any alien", and added subsec. (b).

EFFECTIVE DATE OF 1996 AMENDMENTS

Amendment by sections 305(b) and 308(d)(4)(J), (e)(1)(K), (14)(A) of Pub. L. 104–208 effective, with certain transitional provisions, on the first day of the first month beginning more than 180 days after Sept. 30, 1996, see section 309 of Pub. L. 104–208, set out as a note under section 1101 of this title.

Pub. L. 104–208, div. C, title III, §324(c), Sept. 30, 1996, 110 Stat. 3009–629, provided that: "The amendment made by subsection (a) [amending this section] shall apply to departures that occurred before, on, or after the date of the enactment of this Act [Sept. 30, 1996], but only with respect to entries (and attempted entries) occurring on or after such date."

Pub. L. 104–132, title IV, §401(f), Apr. 24, 1996, 110 Stat. 1268, provided that: "The amendments made by this section [enacting sections 1531 to 1537 of this title and amending this section and section 1105a of this title] shall take effect on the date of enactment of this Act [Apr. 24, 1996] and shall apply to all aliens without regard to the date of entry or attempted entry into the United States."

Pub. L. 104–132, title IV, §441(b), Apr. 24, 1996, 110 Stat. 1279, provided that: "The amendment made by subsection (a) [amending this section] shall apply to criminal proceedings initiated after the date of enactment of this Act [Apr. 24, 1996]."

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–649 applicable to actions taken after Nov. 29, 1990, see section 543(c) of Pub. L. 101–649, set out as a note under section 1221 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–690, title VII, §7345(b), Nov. 18, 1988, 102 Stat. 4471, provided that: "The amendments made by subsection (a) [amending this section] shall apply to any alien who enters, attempts to enter, or is found in, the United States on or after the date of the enactment of this Act [Nov. 18, 1988]."

ABOLITION OF IMMIGRATION AND NATURALIZATION SERVICE AND TRANSFER OF FUNCTIONS

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under section 1551 of this title.

REFERENCES TO ORDER OF REMOVAL DEEMED TO INCLUDE ORDER OF EXCLUSION AND DEPORTATION

For purposes of carrying out this chapter, any reference in law to an order of removal is deemed to include a reference to an order of exclusion and deportation or an order of deportation, see section 309(d)(2) of Pub. L. 104–208, set out in an Effective Date of 1996 Amendments note under section 1101 of this title.

¹ *So in original. The period probably should be a semicolon.*

² *See References in Text note below.*

18 U.S.C.

United States Code, 2015 Edition

Title 18 - CRIMES AND CRIMINAL PROCEDURE

PART II - CRIMINAL PROCEDURE

CHAPTER 227 - SENTENCES

SUBCHAPTER A - GENERAL PROVISIONS

Sec. 3553 - Imposition of a sentence

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§3553. Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress

(regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.¹

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) CHILD CRIMES AND SEXUAL OFFENSES.—

(A) ² SENTENCING.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28,

except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,³ and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

- (1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;
- (2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and
- (3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(Added Pub. L. 98–473, title II, §212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub. L. 99–570, title I, §1007(a), Oct. 27, 1986, 100 Stat. 3207–7; Pub. L. 99–646, §§8(a), 9(a), 80(a), 81(a), Nov. 10,

1986, 100 Stat. 3593, 3619; Pub. L. 100–182, §§3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub. L. 100–690, title VII, §7102, Nov. 18, 1988, 102 Stat. 4416; Pub. L. 103–322, title VIII, §80001(a), title XXVIII, §280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub. L. 104–294, title VI, §§601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub. L. 107–273, div. B, title IV, §4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub. L. 108–21, title IV, §401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub. L. 111–174, §4, May 27, 2010, 124 Stat. 1216.)

REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in subsec. (c)(2), are set out in the Appendix to this title.

Section 408 of the Controlled Substances Act, referred to in subsec. (f)(4), is classified to section 848 of Title 21, Food and Drugs.

CONSTITUTIONALITY

For information regarding constitutionality of certain provisions of this section, as amended by section 401(a)(1) of Pub. L. 108–21, see Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

AMENDMENTS

2010—Subsec. (c)(2). Pub. L. 111–174 substituted "a statement of reasons form issued under section 994(w)(1)(B) of title 28" for "the written order of judgment and commitment".

2003—Subsec. (a)(4)(A). Pub. L. 108–21, §401(j)(5)(A), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or".

Subsec. (a)(4)(B). Pub. L. 108–21, §401(j)(5)(B), inserted before semicolon at end ", taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)".

Subsec. (a)(5). Pub. L. 108–21, §401(j)(5)(C), amended par. (5) generally. Prior to amendment, par. (5) read as follows: "any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;"

Subsec. (b). Pub. L. 108–21, §401(a), designated existing provisions as par. (1), inserted par. heading, substituted "Except as provided in paragraph (2), the court" for "The court", and added par. (2) and concluding provisions.

Subsec. (c). Pub. L. 108–21, §401(c)(2), (3), in concluding provisions, inserted ", together with the order of judgment and commitment," after "the court's statement of reasons" and "and to the Sentencing Commission," after "to the Probation System".

Subsec. (c)(2). Pub. L. 108–21, §401(c)(1), substituted "described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements" for "described".

2002—Subsec. (e). Pub. L. 107–273 inserted "a" before "minimum sentence".

1996—Subsec. (f). Pub. L. 104–294, §601(h), amended directory language of Pub. L. 103–322, §80001(a). See 1994 Amendment note below.

Pub. L. 104–294, §601(b)(5), in introductory provisions, substituted "section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963)" for "section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963)".

Subsec. (f)(4). Pub. L. 104–294, §601(b)(6), substituted "section 408 of the Controlled Substances Act" for "21 U.S.C. 848".

1994—Subsec. (a)(4). Pub. L. 103–322, §280001, amended par. (4) generally. Prior to amendment, par. (4) read as follows: "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;"

Subsec. (f). Pub. L. 103–322, §80001(a), as amended by Pub. L. 104–294, §601(h), added subsec. (f).

1988—Subsec. (c). Pub. L. 100–690 inserted "or other appropriate public record" after "transcription" in second sentence and struck out "clerk of the" before "court" in last sentence.

1987—Subsec. (b). Pub. L. 100–182, §3(1), (2), substituted "court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result" for "court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result".

Pub. L. 100–182, §3(3), inserted after first sentence "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

Pub. L. 100–182, §16(a), substituted "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." for "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission, and the purposes of sentencing set forth in subsection (a)(2)."

Subsec. (c)(1). Pub. L. 100–182, §17, inserted "and that range exceeds 24 months,".

1986—Subsec. (a)(7). Pub. L. 99–646, §81(a), added par. (7).

Subsec. (b). Pub. L. 99–646, §9(a), inserted provision relating to sentencing in the absence of applicable guidelines.

Subsec. (c). Pub. L. 99–646, §8(a), substituted "If the court does not order restitution, or orders only partial restitution" for "If the sentence does not include an order of restitution".

Subsec. (d). Pub. L. 99–646, §80(a), struck out "or restitution" after "notice" in heading, and struck out "or an order of restitution pursuant to section 3556," after "section 3555," in introductory text.

Subsec. (e). Pub. L. 99–570 added subsec. (e).

EFFECTIVE DATE OF 1994 AMENDMENT

Pub. L. 103–322, title VIII, §80001(c), Sept. 13, 1994, 108 Stat. 1986, provided that: "The amendment made by subsection (a) [amending this section] shall apply to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act [Sept. 13, 1994]."

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100–182 applicable with respect to offenses committed after Dec. 7, 1987, see section 26 of Pub. L. 100–182, set out as a note under section 3006A of this title.

EFFECTIVE DATE OF 1986 AMENDMENTS

Pub. L. 99–646, §8(c), Nov. 10, 1986, 100 Stat. 3593, provided that: "The amendments made by this section [amending this section and section 3663 of this title] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Pub. L. 99–646, §9(b), Nov. 10, 1986, 100 Stat. 3593, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Pub. L. 99–646, §80(b), Nov. 10, 1986, 100 Stat. 3619, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98–473, effective Nov. 1, 1987]."

Pub. L. 99–646, §81(b), Nov. 10, 1986, 100 Stat. 3619, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98–473, effective Nov. 1, 1987]."

Pub. L. 99–570, title I, §1007(b), Oct. 27, 1986, 100 Stat. 3207–7, provided that: "The amendment made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

REPORT BY ATTORNEY GENERAL

Pub. L. 108–21, title IV, §401(l), Apr. 30, 2003, 117 Stat. 674, provided that:

"(1) **DEFINED TERM.**—For purposes of this section [amending this section, section 3742 of this title, and section 994 of Title 28, Judiciary and Judicial Procedure, enacting provisions set out as a note under section 991 of Title 28, and enacting provisions listed in a table relating to sentencing guidelines set out under section 994 of Title 28], the term 'report described in paragraph (3)' means a report, submitted by the Attorney General, which states in detail the policies and procedures that the Department of Justice has adopted subsequent to the enactment of this Act [Apr. 30, 2003]—

"(A) to ensure that Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law;

"(B) to ensure that Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal;

"(C) to delineate objective criteria, specified by the Attorney General, as to which such cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge;

"(D) to ensure that Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and

"(E) to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions.

"(2) **REPORT REQUIRED.**—

"(A) **IN GENERAL.**—Not later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities pursuant to section 5K1.1 of the United States Sentencing Guidelines, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing the information described under subparagraph (B).

"(B) **CONTENTS.**—The report submitted pursuant to subparagraph (A) shall set forth—

"(i) the case;

"(ii) the facts involved;

"(iii) the identity of the district court judge;

"(iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and

"(v) the position of the parties with respect to the downward departure, whether or not the United States has filed, or intends to file, a motion for reconsideration.

"(C) **APPEAL OF THE DEPARTURE.**—Not later than 5 days after a decision by the Solicitor General regarding the authorization of an appeal of the departure, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate that describes the decision of the Solicitor General and the basis for such decision.

"(3) **EFFECTIVE DATE.**—Paragraph (2) shall take effect on the day that is 91 days after the date of enactment of this Act [Apr. 30, 2003], except that such paragraph shall not take effect if not more than 90 days after the date of enactment of this Act the Attorney General has submitted to the Judiciary Committees of the House of Representatives and the Senate the report described in paragraph (3)."

AUTHORITY TO LOWER A SENTENCE BELOW STATUTORY MINIMUM FOR OLD OFFENSES

Pub. L. 100–182, §24, Dec. 7, 1987, 101 Stat. 1271, provided that: "Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 [section 235 of Pub. L. 98–473, set out as a note under section 3551 of this title]—

"(1) section 3553(e) of title 18, United States Code;

"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act [set out in the Appendix to this title]; and

"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code, shall apply in the case of an offense committed before the taking effect of such guidelines."

¹ *So in original. The period probably should be a semicolon.*

² *So in original. No subpar. (B) has been enacted.*

³ *So in original.*