

No. 17-\_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

---

ORLANDO PINA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

---

## INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the  
Northern District of Texas

## APPENDIX A

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

---

No. 17-10388  
Summary Calendar

---

United States Court of Appeals  
Fifth Circuit

**FILED**

February 21, 2018

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ORLANDO PINA,

Defendant - Appellant

---

Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:16-CR-218-1

---

Before BARKSDALE, PRADO, and OWEN, Circuit Judges.

PER CURIAM:\*

Orlando Pina challenges his guilty-plea conviction, and upward-variance sentence of 100 months' imprisonment, for being a convicted felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He claims: his statute of conviction is unconstitutional and his indictment should have been otherwise dismissed; and his sentence is substantively unreasonable. Each claim fails.

---

\* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Although Pina contends his statute of conviction, 18 U.S.C. § 922(g)(1), is unconstitutional under the Commerce Clause, in the light of *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 530–35 (2012), he concedes his claim is foreclosed. *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013). Our precedent likewise forecloses his claim that, in the light of *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), his indictment should have been dismissed because it failed to allege he knew the firearm he possessed had, at some point, traveled in interstate commerce. *United States v. Rose*, 587 F.3d 695, 705–06 & n.9 (5th Cir. 2009). Both issues are presented only to preserve them for possible further review.

In challenging the substantive reasonableness of his upward variance, 100-month sentence, Pina asserts the court abused its discretion by improperly giving significant weight to his criminal history, failing to account for the mitigating factors he presented, balancing the sentencing factors in a clearly erroneous manner, and imposing a prison sentence greater than necessary to achieve the goals of 18 U.S.C. § 3553(a) (sentencing factors). More particularly, regarding his criminal history, Pina contends the court failed to confirm any of his prior convictions fit within the examples set forth in the commentary to Sentencing Guideline § 4A1.3 (departures); the court failed to determine, pursuant to § 4A1.3, whether his criminal history category substantially underrepresented the seriousness of his criminal history or the likelihood of his recidivism; and his criminal history had already been taken into account under the Guidelines.

Although post-*Booker*, the 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, 48–51 (2007). If no such procedural error exists, a properly preserved objection to an

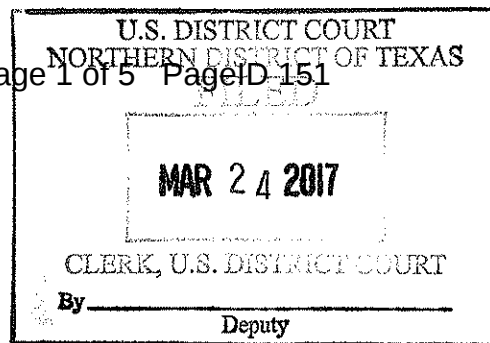
ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). As noted, Pina asserts only substantive unreasonableness.

Pina’s sentence, a variance based on the 18 U.S.C. § 3553(a) factors, not an upward departure, is 13 months above the top of his advisory Guidelines sentencing range. Because the court imposed a variance sentence, Pina’s assertions concerning § 4A1.3 (departures) are inapposite. *United States v. Mejia-Huerta*, 480 F.3d 713, 723 (5th Cir. 2007).

In making its sentencing decision, the court considered permissible factors under 18 U.S.C. § 3553(a), including Pina’s criminal history and the mitigating factors presented by him regarding his personal history, characteristics, and recidivism risk. Essentially, Pina invites us to adopt his assessment of the factors rather than the district court’s. This is contrary to the deference owed “to the district court’s decision that the 18 U.S.C. § 3553(a) factors, on a whole, justify the extent of the variance”. *Gall*, 552 U.S. 38, 51. We have upheld more substantial variances based on permissible factors when the court, as here, has provided “thorough justification” for the variance. *United States v. McElwee*, 646 F.3d 328, 344–45 (5th Cir. 2011).

AFFIRMED.

## APPENDIX B

**United States District Court**Northern District of Texas  
Fort Worth Division

UNITED STATES OF AMERICA

§

v.

§

Case Number: 4:16-CR-218-A(01)

ORLANDO PINA

§

**JUDGMENT IN A CRIMINAL CASE**

The government was represented by Assistant United States Attorney Christopher Wolfe. The defendant, ORLANDO PINA, was represented by Federal Public Defender through Assistant Federal Public Defender Michael A. Lehmann.

The defendant pleaded guilty on November 4, 2016 to the one count indictment filed on September 14, 2016. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

**Title & Section / Nature of Offense**

18 U.S.C. §§ 922(g)(1) and 924(a)(2) Felon in Possession of a Firearm

**Date Offense Concluded**

August 8, 2016

**Count**

1

As pronounced and imposed on March 24, 2017, 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 100 months. This sentence shall run concurrently with any sentence in Case Nos. 1474128D, 1462276D, 1474126D, 1474130D, 1474133D in 297<sup>th</sup> District Court of Tarrant County, and consecutively to any sentence in Case No. 1466056D in the 372<sup>nd</sup> District Court of Tarrant County, Texas.

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 and that while on supervised release, the defendant shall comply with the following conditions:

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
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 participate in 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 at a rate of at least \$20 per month.
5. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.
6. The defendant shall participate in a 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 at the rate of at least \$25 per month.
7. 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 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 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.

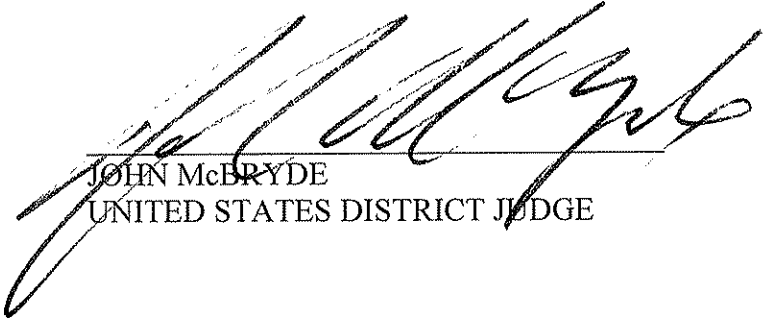
FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), the Court ordered that the defendant's interest in the following property is condemned and forfeited to the United States of America: a Diamond Back Arms, Model DB380, .380-caliber firearm, bearing Serial No. ZC5214, and any ammunition recovered with the firearm.

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 24th day of March, 2017.



JOHN McBRYDE  
UNITED STATES DISTRICT JUDGE

RETURN

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_, 2017 to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this Judgment.

United States Marshal for the  
Northern District of Texas

By \_\_\_\_\_  
Deputy United States Marshal