

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOMINGO AGUSTIN-SIMON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

APPENDIXES TO
PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA United States Postal Service: April 7, 2025

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APPENDIX A

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America

v.

Domingo Agustin-Simon

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)

No. CR 11-01622-005-PHX-DGC

Adrian Fontes (CJA)
Attorney for Defendant

USM#: 49044-308 ICE#: A088355561

THERE WAS A verdict of guilty on 10/11/2012 as to Counts ONE, TWO, THREE, FOUR and FIVE of the Superseding Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18 U.S.C. §1203(a), Conspiracy to Commit Hostage Taking a Class A Felony offense, as charged in Count ONE of the Superseding Indictment; Title 18 U.S.C. §1203 (a) and 2, Hostage Taking, Aid and Abet a Class A Felony offense, as charged in Count TWO of the Superseding Indictment; Title 8 U.S.C. §1324(a)(2)(B)(ii) and 2, Bringing in Illegal Aliens for Financial Aid and Aid and Abet a Class C Felony offense, as charged in Count THREE of the Superseding Indictment; Title 8 U.S.C. §1324(a)(1)(A)(iii), (v)(II), and (B)(i), Harbor Illegal Aliens and Aid and Abet a Class C Felony offense, as charged in Count FOUR of the Superseding Indictment; Title 18 U.S.C. §924(c)(1)(A) and 2, Use and Carry a Firearm During and In Relation to a Crime of Violence and Aid and Abet a Class A Felony offense, as charged in Count FIVE of the Superseding Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **THIRTY- FIVE (35) YEARS** on Count ONE and **THIRTY-FIVE (35) YEARS** on Count TWO, **ONE HUNDRED TWENTY (120) MONTHS** on Count THREE and **ONE HUNDRED TWENTY (120) MONTHS** on Count FOUR, terms imposed as to Counts THREE and FOUR to be served concurrently to Counts ONE and TWO, and **EIGHTY-FOUR (84) MONTHS** on Count FIVE to be served consecutive to Counts ONE, TWO, THREE, and FOUR. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Counts ONE, TWO, and FIVE, and **THREE (3) YEARS** on Counts THREE AND FOUR, all terms to be served concurrently.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$500.00

FINE: \$0

RESTITUTION: \$0

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USA vs. Domingo Agustin-Simon

Page 2 of 4

The defendant shall pay a special assessment of \$500.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$500.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts ONE, TWO, THREE, FOUR and FIVE of the Superseding Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS** on Counts ONE, TWO, and FIVE, and **THREE (3) YEARS** on Counts THREE AND FOUR, all term to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that, pursuant to General Order 12-13, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions, of particular importance, you shall not commit another federal, state or local crime during the term of supervision and the defendant shall abstain from the use of illicit substances:

- 1) You shall not commit another federal, state, or local crime during the term of supervision.
- 2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
- 3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 5) You shall support your dependents and meet other family responsibilities.
- 6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
- 8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
- 10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
- 11) You 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 probation officer.
- 12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

A-003

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USA vs. Domingo Agustin-Simon

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- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
- 14) You 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.
- 15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
- 16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
- 17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);
- 18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.
- 19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- 20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. If deported, you shall not re-enter the United States without legal authorization.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the Clerk of the Court deliver two certified copies of this judgment to the United States Marshal of this district.

The Court orders commitment to the custody of the Bureau of Prisons.

Date of Imposition of Sentence: **Monday, January 14, 2013**

DATED this 17th day of January, 2013.



David G. Campbell
United States District Judge

A-004

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USA vs. Domingo Agustin-Simon

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RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the
institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

United States Marshal

By: _____
Deputy Marshal

CR 11-01622-005-PHX-DGC - Agustin-Simon

1/15/13 2:15pm

A-005

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 25 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DOMINGO AGUSTIN-SIMON,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 20-71747

ORDER

Before: PAEZ, NGUYEN, and OWENS, Circuit Judges.

We have reviewed the application for authorization to file a second or successive 28 U.S.C. § 2255 motion in the district court, the supplemental application, and the government’s response. The application, as supplemented, makes a prima facie showing that *United States v. Davis*, 139 S. Ct. 2319 (2019), is applicable and supports the request for authorization. *See Munoz v. United States*, 28 F.4th 973, 975 (9th Cir. 2022) (accepting government’s concession that Davis is a new, constitutional rule made retroactive to cases on collateral review by the Supreme Court); *Henry v. Spearman*, 899 F.3d 703, 705-08 (9th Cir. 2018) (discussing prima facie showing necessary under 28 U.S.C. § 2244(b)(2)(A) to “rely on” a new, retroactive rule of Supreme Court law). *Compare* 28 U.S.C. § 2244(b)(2)(A) with 28 U.S.C. § 2255(h)(2). The application, as supplemented, is granted.

The Clerk will transfer the proposed § 2255 motion filed at Docket Entry No. 19, to the United States District Court for the District of Arizona, case number 2:11-cr-01622-DGC-5. The proposed motion is deemed filed in the district court on June 12, 2020, the date on which the original application was delivered to prison authorities for forwarding to this court. *See Butler v. Long*, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014) (assuming petitioner turned his petition over to prison authorities on the day it was signed and applying the mailbox rule); *Orona v. United States*, 826 F.3d 1196, 1198-99 (9th Cir. 2016) (AEDPA's statute of limitations period is tolled during pendency of an application).

The Clerk will also serve this order and the application (Docket No. 1), supplemental application (Docket Entry No. 19), and response (Docket Entry No. 21) directly on the chambers of the Honorable David G. Campbell.

Upon transfer of the proposed motion, the Clerk will close this original action.

No further filings will be entertained in this case.

GRANTED. PROPOSED MOTION transferred to the district court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff/Respondent,

vs.

Domingo Agustin-Simon,

Defendant/Movant.

No. CV-20-2508-PHX-DGC
CR-11-01622-05-PHX-DGC

ORDER

Defendant Domingo Agustin-Simon has filed a second motion to vacate his sentence under 28 U.S.C. § 2255. Doc. 24. The government concedes that Defendant's motion should be granted in light of *United States v. Davis*, 139 S. Ct. 2319 (2019), and the fact that hostage taking does not qualify as a crime of violence under § 924(c)(3)(A). Doc. 29. United States Magistrate Judge Eileen S. Willett recommends that Defendant's motion be granted. Doc. 30 (R&R). The Court will accept the R&R and grant the motion.

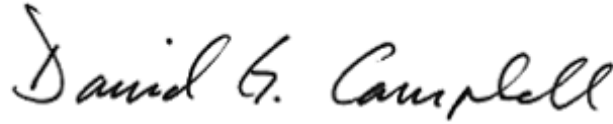
IT IS ORDERED:

1. The R&R (Doc. 30) is **accepted**.
2. The Court will schedule a resentencing hearing after determining Defendant's current location and the time it will take to transfer him here, if needed. At the hearing, the Court will vacate the portion of the Court's January 18, 2013 Judgment (CR Doc. 329) convicting Defendant of violating Title 18, U.S.C. §924(c)(1)(A)(ii), Possessing, Using and Carrying a Firearm During and in Relations to a Crime of Violence, as

1 charged in Count Five of the Superseding Indictment. The Court will
2 resentence Defendant on Counts One, Two, Three, and Four.

3 3. The Court directs the Probation Department to prepare an updated
4 presentence investigation report prior to the resentencing hearing.

5 Dated this 21st day of October, 2022.

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David G. Campbell
10 Senior United States District Judge
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff/Respondent,

vs.

Domingo Agustin-Simon,

Defendant/Movant.

No. CV-20-2508-PHX-DGC
CR-11-01622-05-PHX-DGC

ORDER

Defendant Domingo Agustin-Simon has filed a second motion to vacate his sentence under 28 U.S.C. § 2255. Doc. 24. The government concedes that Defendant's motion should be granted in light of *United States v. Davis*, 139 S. Ct. 2319 (2019), and the fact that hostage taking does not qualify as a crime of violence under § 924(c)(3)(A). Doc. 29. United States Magistrate Judge Eileen S. Willett recommends that Defendant's motion be granted. Doc. 30 (R&R). The Court will accept the R&R and grant the motion.

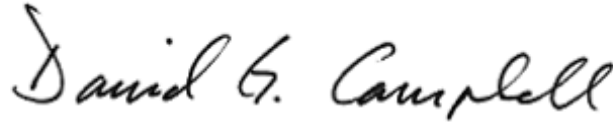
IT IS ORDERED:

1. The R&R (Doc. 30) is **accepted**.
2. The Court will schedule a resentencing hearing after determining Defendant's current location and the time it will take to transfer him here, if needed. At the hearing, the Court will vacate the portion of the Court's January 18, 2013 Judgment (CR Doc. 329) convicting Defendant of violating Title 18, U.S.C. §924(c)(1)(A)(ii), Possessing, Using and Carrying a Firearm During and in Relations to a Crime of Violence, as

1 charged in Count Five of the Superseding Indictment. The Court will
2 resentence Defendant on Counts One, Two, Three, and Four.

3 3. The Court directs the Probation Department to prepare an updated
4 presentence investigation report prior to the resentencing hearing.

5 Dated this 21st day of October, 2022.

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David G. Campbell
10 Senior United States District Judge
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APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America

v.

Domingo Agustin-Simon

**SECOND AMENDED
JUDGMENT IN A CRIMINAL CASE**

(For Offenses Committed On or After November 1, 1987)

No. CR-11-01622-005-PHX-DGC

Michael J Bresnehan (CJA)
Attorney for Defendant

USM#: 49044-308

ICE# A088355561

THERE WAS A VERDICT OF guilty on 10/11/2012 as to Counts 1, 2, 3, 4 of the Superseding Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §1203(a), Conspiracy to Commit Hostage Taking, a Class A Felony offense, as charged in Count 1 of the Superseding Indictment; Title 18, U.S.C. §1203(a) and 18, U.S.C. §2, Hostage Taking and Aid & Abet, a Class A Felony offense, as charged in Count 2 of the Superseding Indictment; Title 8, U.S.C. §1324(a)(2)(B)(ii) and 18, U.S.C. §2, Bringing In Illegal Aliens and Aid & Abet, a Class C Felony offense, as charged in Count 3 of the Superseding Indictment; Title 8, U.S.C. §1324(a)(1)(A)(iii), 1324(a)(1)(A)(v)(II), and 1324(a)(1)(B)(i), Harboring Illegal Aliens and Aid & Abet, a Class C Felony offense, as charged in Count 4 of the Superseding Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **THIRTY-FIVE (35) YEARS** as to Counts 1 and 2; defendant is committed to the custody of the Bureau of Prisons for a term of **TEN (10) YEARS** as to Counts 3 and 4. All counts to be served concurrently, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 2. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THREE (3) YEARS** on Counts 3 and 4. All terms of supervised release to run concurrently.

IT IS ORDERED that the previous judgment on Count 5 is vacated and Count 5 of the superseding indictment is dismissed.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$400.00 FINE: WAIVED RESTITUTION: N/A

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

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USA vs. Domingo Agustin-Simon

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The defendant shall pay a special assessment of \$400.00 which shall be due immediately.

The defendant shall pay a total of \$400.00 in criminal monetary penalties, due immediately. Having assessed the defendant's ability to pay, payments of the total criminal monetary penalties are due as follows: Balance is due in equal monthly installments of \$25.00 over a period of 20 months to commence 60 days after the date of this judgment.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$400.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 3, 4 of the Superseding Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, (10) costs, including cost of prosecution and court costs.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

It is ordered that while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision as adopted by this court, in General Order 17-18, which incorporates the requirements of USSG §§ 5B1.3 and 5D1.2. Of particular importance, the defendant must not commit another federal, state, or local crime during the term of supervision. Within 72 hours of sentencing or release from the custody of the Bureau of Prisons the defendant must report in person to the Probation Office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, you must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- 4) You must answer truthfully the questions asked by your probation officer.
- 5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- 7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- 10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you

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USA vs. Domingo Agustin-Simon

Page 4 of 5

must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

- 13) You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

- 1) If deported, you must not re-enter the United States without legal authorization.

THE DEFENDANT IS ADVISED OF HIS RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

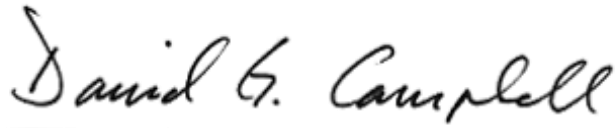
The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons.

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

Date of Imposition of Sentence: **Monday, January 14, 2013** (Amended: 6/21/2023)

Signed this 21st day of June, 2023.



David G. Campbell
Senior United States District Judge

CR-11-01622-005-PHX-DGC
USA vs. Domingo Agustin-Simon

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RETURN

I have executed this Judgment as follows:

_____ , the institution
defendant delivered on _____ to _____ at _____
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal

By:

Deputy Marshal

CR-11-01622-005-PHX-DGC- Agustin-Simon

4/4/2023 - 9:08 AM

APPENDIX E

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 4 2024

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 23-1323

Plaintiff-Appellee,

D.C. No. 2:11-cr-01622-DGC-5

v.

MEMORANDUM*

DOMINGO AGUSTIN-SIMON,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona

David G. Campbell, District Judge, Presiding

Argued and submitted October 24, 2024*
Phoenix, Arizona

Before: M. SMITH, BADE, and FORREST, Circuit Judges.

As relevant here, a jury convicted Defendant-Appellant Domingo Agustin-Simon of hostage taking, conspiracy to commit hostage taking, and bringing in and harboring noncitizens. Agustin-Simon challenges his 35-year sentence on multiple grounds. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review criminal sentences for “reasonableness” in a two-step analysis.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

United States v. Barsumyan, 517 F.3d 1154, 1157 (9th Cir. 2008) (citation omitted).

First, we consider whether the district court committed procedural error. *United States v. Cherer*, 513 F.3d 1150, 1159 (9th Cir. 2008). In doing so, we “review the district court’s identification of the correct legal standard *de novo*, its factual findings for clear error, and its application of the legal standard to the facts for abuse of discretion.” *United States v. Rodriguez*, 44 F.4th 1229, 1234 (9th Cir. 2022) (citing *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc)). Second, we review “the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Gall v. United States*, 552 U.S. 38, 51 (2007).

1. Agustin-Simon argues the district court procedurally erred by applying § 2A4.1 of the Sentencing Guidelines. We disagree. Agustin-Simon was convicted of hostage taking under 18 U.S.C. § 1203. The Guidelines expressly provide that § 2A4.1 applies to convictions under § 1203. U.S.S.G. App’x A; see *Barsumyan*, 517 F.3d at 1159 (alteration in original) (quoting *Kimbrough v. United States*, 552 U.S. 85, 111 (2007)) (clarifying that a district court may deviate from the Guidelines only “*after* the advisory Guidelines range has been determined, when the district court examines the final advisory sentencing range dictated by the Guidelines in light of all relevant § 3553(a) factors and the ‘particular circumstances of [the defendant’s] case’”).

2. Agustin-Simon contends that the district court procedurally erred by applying enhancements for sexual exploitation of a victim, ransom demand, vulnerable victim, and aggravating role. “[T]o reverse a district court’s factual findings as clearly erroneous, we must determine that the district court’s factual findings were illogical, implausible, or without support in the record.” *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010). We conclude the district court’s factual findings supporting each of the challenged enhancements were not clearly erroneous.

In applying a six-level enhancement for sexual exploitation of a victim under U.S.S.G. § 2A4.1(b)(5), the district court credited the testimony of multiple victims who testified that Agustin-Simon raped one victim and sexually assaulted other victims. “[W]here testimony is taken, we give special deference to the district court’s credibility determinations,’ and generally ‘cannot substitute [our] own judgment of the credibility of a witness for that of the fact-finder.’” *United States v. Bontemps*, 977 F.3d 909, 917 (9th Cir. 2020) (alteration in original) (first quoting *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008); and then quoting *United States v. Durham*, 464 F.3d 976, 983 n.11 (9th Cir. 2006)). The district court found by “clear and convincing evidence” that Agustin-Simon raped one victim and sexually assaulted others; thus, the district court’s decision to apply the § 2A4.1(b)(5) enhancement was not clearly erroneous.

Agustin-Simon challenges the six-level enhancement for ransom demand under U.S.S.G. § 2A4.1(b)(1) because the victims agreed to pay the defendants and because no one was “kidnapped” or held for “ransom” as “those terms are commonly understood.” But the enhancement “applies anytime a defendant demands money from a third party for a release of a victim, regardless of whether that money is already owed to the defendant.” *United States v. Sierra-Velasquez*, 310 F.3d 1217, 1221 (9th Cir. 2002). After crediting both the jury’s verdict convicting Agustin-Simon of hostage taking and witness testimony indicating that the release of some victims was conditional upon payment to smugglers, the district court held that “there was more than clear and convincing evidence to support the finding that a ransom demand was made.” This determination was not clearly erroneous.¹

3. Agustin-Simon alleges the district court committed procedural error by failing to consider his arguments under § 3553(a) related to rehabilitation efforts, familial needs, and sentencing disparities. Because he raises this argument for the first time on appeal, plain error review applies. *United States v. Autery*, 555 F.3d 864, 869 (9th Cir. 2009) (citing *United States v. Sylvester Norman Knows His Gun, III*, 438 F.3d 913, 918 (9th Cir. 2009)). The district court made clear that it reviewed

¹ Because we conclude that the district court did not err in its application of the two six-level enhancements, we need not address the remaining enhancements because any potential error was harmless. *See United States v. Garro*, 517 F.3d 1163, 1169 (9th Cir. 2008). Agustin-Simon’s base offense level was 32, and his highest total offense level was limited to 43. *See* U.S.S.G. ch. 5, pt. A cmt. n.2.

Agustin-Simon’s attachments in support of his sentencing memorandum, and it acknowledged its obligation to “consider the sentencing guidelines and to avoid unwarranted sentencing disparities.” Although the district judge did not directly respond to each of Agustin-Simon’s arguments, it “need not tick off each of the § 3553(a) factors to show that it has considered them.” *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008). Accordingly, we conclude that the district court did not err in addressing the § 3553(a) factors.

4. Agustin-Simon’s final procedural argument is that the district court erred by not *sua sponte* applying a downward departure under U.S.S.G. § 5K2.10 to account for the victims’ contribution to the illegal conduct as “co-conspirators.” Agustin-Simon did not request this downward departure in the district court, nor did he object to the district court’s failure to apply it. We thus decline to review this issue for the first time on appeal. *See United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994) (“Issues not presented to the district court cannot generally be raised for the first time on appeal.”).

5. Finally, Agustin-Simon contends that the district court imposed a substantively unreasonable sentence. We review this issue for abuse of discretion. *Gall*, 552 U.S. at 51. We already considered and rejected this argument in Agustin-Simon’s initial appeal. *United States v. Agustin-Simon*, 623 Fed. Appx. 310 (9th Cir. 2015) (“The district court carefully considered all relevant factors, and imposed a

below-Guidelines sentence.”). Because the district court imposed the same below-Guidelines sentence on Counts 1–4 for the same reasons discussed at Agustin-Simon’s initial sentencing, we see no reason to reach a different conclusion.

AFFIRMED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 8 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DOMINGO AGUSTIN-SIMON, AKA
Pedro Sanchez-Mendez,

Defendant - Appellant.

No. 23-1323

D.C. No.

2:11-cr-01622-DGC-5

District of Arizona,

Phoenix

ORDER

Before: M. SMITH, BADE, and FORREST, Circuit Judges.

The panel has unanimously voted to deny Appellant's Petition for Panel Rehearing. The full court has been advised of the Petition for Rehearing En Banc, and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. The Petition for Panel Rehearing and Rehearing En Banc is **DENIED**.