

No. 16-40388

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALFREDO MONSIVAIS-CORNELIO,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

BRIEF FOR APPELLANT

In accordance with *Anders v. California*, 386 U.S. 738 (1967)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

1. The Honorable Andy Hanen, United States District Judge.
2. The Honorable Ignacio Torteya, United States Magistrate Judge
3. Alfredo Monsivais-Cornelio, Defendant-Appellant.
4. United States of America, Plaintiff-Appellee.
5. Counsel for Plaintiff-Appellee:
Assistant United States Attorney Karen Betancourt (trial counsel), and Renata A. Gowie and Richard Berry (appellate counsels).
6. Counsel for Defendant-Appellant:
Assistant Federal Public Defender Sandra Zamora Zayas (trial counsel), Greg Ahlgren (appellate counsel), David Adler (appellate counsel).

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ David Adler

David Adler

PREAMBLE

This brief is submitted in accordance with *Anders v. California*, 386 U.S. 738 (1967). Counsel has carefully examined the facts and matters contained in the record on appeal and has researched the law in connection therewith and has concluded that the appeal does not present a nonfrivolous legal question. In reaching this conclusion, counsel has thoroughly read the record and has examined the record for any arguable violations of the Constitution, federal statutes, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Federal Sentencing Guidelines.

STATEMENT RESPECTING ORAL ARGUMENT

Counsel for the defendant-appellant has moved to withdraw as counsel based on *Anders v. California*; consequently, oral argument is not requested.

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS.	i
PREAMBLE.	ii
STATEMENT RESPECTING ORAL ARGUMENT.....	ii
TABLE OF CONTENTS.	iii
TABLE OF CITATIONS.	v
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.	1
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.	4
ARGUMENT.....	5
<u>ISSUE ONE RESTATED</u> : There is no nonfrivolous issue regarding Monsivais-Cornelio’s guilty plea.....	5
<u>ISSUE TWO RESTATED</u> : There is no nonfrivolous issue regarding Monsivais-Cornelio’s’s sentence.....	9

TABLE OF CONTENTS - (Cont'd)

	<u>Page</u>
CONCLUSION.	19
CERTIFICATE OF SERVICE.	19
CERTIFICATE OF COMPLIANCE..	20

TABLE OF CITATIONS

<u>CASES</u>	Page
Anders v. California, 386 U.S. 738 (1967).....	ii, 2, 4, 19
Gall v. United States, 552 U.S. 38 (2007).....	10
Peguero v. United States, 526 U.S. 23 (1999).	16
United States v. Alonzo, 435 F.3d 551 (5th Cir. 2006).	10, 17
United States v. Booker, 543 U.S. 220 (2005).	10, 16
United States v. Cooks, 589 F.3d 173 (5th Cir. 2009).	17
United States v. Cuevas-Andrade, 232 F.3d 440 (5th Cir. 2000).....	5
United States v. Dees, 125 F.3d 261 (5th Cir. 1997).	6
United States v. Dominguez Benitez, 542 U.S. 74 (2004).	6
United States v. Dominguez-Alvarado, 695 F.3d 324 (5th Cir. 2012).....	18
United States v. Esparza-Gonzalez, 268 F.3d 272 (5th Cir. 2001).....	15
United States v. Garcia-Vargas, 428 Fed. Appx. 386 (5th Cir. 2011) (unpublished).....	9
United States v. Lujano-Perez, 274 F.3d 219 (5th Cir. 2001).	5
United States v. Mares, 402 F.3d 511 (5th Cir. 2005).	16
United States v. Mondragon-Santiago, 564 F.3d 357 (5th Cir. 2009).	17
United States v. Myers, 150 F.3d 459 (5th Cir. 1998).	9

TABLE OF CITATIONS - (Cont'd)

Page

CASES - (Cont'd)

United States v. Reyes-Lugo, 238 F.3d 305 (5th Cir. 2001).	16
United States v. Rivas, 85 F.3d 193 (5th Cir. 1996)..	5
United States v. Ronquillo, 508 F.3d 744 (5th Cir. 2007).	10
United States v. Scott, 987 F.2d 261 (5th Cir. 1993).	5
United States v. Tapp, 276 Fed. Appx. 258 (4th Cir. 2007) (unpublished).	16
United States v. Torres-Aguilar, 352 F.3d 934 (5th Cir. 2003).	18
United States v. Trujillo, 502 F.3d 353 (5th Cir. 2007).	9
United States v. Vonn, 535 U.S. 55 (2002)..	6

CONSTITUTIONAL PROVISION

U.S. Const. art. III.	6
-------------------------------	---

STATUTES AND RULES

8 U.S.C. § 1326.	11
8 U.S.C. § 1326(a)..	1, 11
8 U.S.C. § 1326(b)(1).	1, 12
18 U.S.C. § 3553.	16
18 U.S.C. § 3553(a)..	8
18 U.S.C. § 3553(c)..	15

TABLE OF CITATIONS - (Cont'd)

Page

STATUTES AND RULES - (Cont'd)

18 U.S.C. § 3553(c)(1).	15
18 U.S.C. § 3553(c)(2).	16
18 U.S.C. § 3583(b)(2).	13
18 U.S.C. § 3583(d).	18
18 U.S.C. § 3742.	1
28 U.S.C. § 636(b)(3).	6
28 U.S.C. § 1291.	1
Fed. R. Crim. P. 11.	9
Fed. R. Crim. P. 11(b)(1)(A).	6
Fed. R. Crim. P. 11(b)(1)(B).	6
Fed. R. Crim. P. 11(b)(1)(C).	7
Fed. R. Crim. P. 11(b)(1)(D).	7
Fed. R. Crim. P. 11(b)(1)(E).	7
Fed. R. Crim. P. 11(b)(1)(F).	7
Fed. R. Crim. P. 11(b)(1)(G).	7
Fed. R. Crim. P. 11(b)(1)(H).	7
Fed. R. Crim. P. 11(b)(1)(I).	7
Fed. R. Crim. P. 11(b)(1)(J).	7
Fed. R. Crim. P. 11(b)(1)(K).	7

TABLE OF CITATIONS - (Cont'd)

Page

STATUTES AND RULES - (Cont'd)

Fed. R. Crim. P. 11(b)(1)(L)	7
Fed. R. Crim. P. 11(b)(1)(M)	8
Fed. R. Crim. P. 11(b)(1)(N)	8
Fed. R. Crim. P. 11(b)(1)(O)	8
Fed. R. Crim. P. 11(b)(2)	8
Fed. R. Crim. P. 11(b)(3)	5,8
Fed. R. Crim. P. 11(c)(1)(B)	8
Fed. R. Crim. P. 11(c)(2)	8
Fed. R. Crim. P. 11(c)(3)(B)	8
Fed. R. Crim. P. 32	9
Fed. R. Crim. P. 32(h)	13
Fed. R. Crim. P. 32(i)(1)(A)	13
Fed. R. Crim. P. 32(i)(1)(B)	14
Fed. R. Crim. P. 32(i)(1)(C)	14
Fed. R. Crim. P. 32(i)(3)(B)	14
Fed. R. Crim. P. 32(i)(4)(A)(i)	14
Fed. R. Crim. P. 32(i)(4)(A)(ii)	14
Fed. R. Crim. P. 32(j)(1)(A)	14, 15

TABLE OF CITATIONS - (Cont'd)

Page

STATUTES AND RULES - (Cont'd)

Fed. R. Crim. P. 32(j)(1)(B)	14, 15
Fed. R. Crim. P. 32(j)(1)(C)	14, 15
Fed. R. Crim. P. 32(k)(1)	14
Fed. R. Crim. P. 52(b)	5
USSG Ch.5, Pt.A, Sentencing Table.	12
USSG § 5D1.1, comment. (n.5)..	18
USSG § 2L1.2(a)	11
USSG § 2L1.2(c)	11
USSG § 3E1.1(a)	11
USSG § 5D1.2(a)(2)	13, 18
USSG § 5D1.3(a)(1).	18

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1291, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Southern District of Texas, Houston Division, and under 18 U.S.C. §3742, as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

ISSUE ONE: There is no nonfrivolous issue regarding Monsivais-Cornelio's guilty plea.

ISSUE TWO: There is no nonfrivolous issue regarding Monsivais-Cornelio's sentence.

STATEMENT OF THE CASE¹

On September 22, 2015, Defendant-Appellant Alfredo Monsivais-Cornelio was charged by a one-count indictment with being an alien who was found present in the United States after removal, in violation of 8 U.S.C. § 1326(a) and (b)(1).

¹ Undersigned counsel has prepared this brief in reliance on the electronic record on appeal, which includes the transcripts of the arraignment and sentencing proceeding in this case. As such, any reference to a document filed in this case, or to a portion of either of these transcripts, will be made by the record page number, or numbers, of the consecutively paginated electronic record, in the following manner: (ROA.16-40388. ____).

ROA.16-40388.13. On November 30, 2015, Mr. Monsivais-Cornelio entered a plea of guilty to the indictment. ROA.16-40388.25-29.

At the guilty-plea proceeding, the prosecutor proffered the following as the factual basis for the plea:

On July 17, 2015, the Defendant, Alfredo Monsivais-Cornelio, was found in the Cameron County Jail in Cameron County, Texas by Immigrations and Customs Enforcement. It was determined that he was an alien and citizen of Mexico who had entered the United States illegally. The defendant had been previously excluded, deported, or removed from the United States on May 11, 2006 after having been convicted of the felony of Alien Unlawfully Found in the United States on May 9, 2006. The defendant had not received consent of the Attorney General or Secretary of Homeland Security to re-apply for admission into the United States when found.

ROA.16-40388.118. Upon questioning by the court, Mr. Monsivais-Cornelio stated that these facts were true. ROA.16-40388.119.

On June 13, 2016, the district court sentenced Mr. Monsivais-Cornelio to serve 24 months in the custody of the Bureau of Prisons, followed by a three-year term of supervised release. The court did not impose a fine and granted the government's motion to remit the special assessment. ROA.16-40388.138-139. Mr. Monsivais-Cornelio filed a timely notice of appeal. ROA.16-40388.32.

Because there are no nonfrivolous issues for appeal of Mr. Monsivais-Cornelio's conviction or sentence, counsel moves to withdraw pursuant to *Anders v.*

California, 386 U.S. 738 (1967). All other facts relevant to this appeal are set forth in the Argument section below.

SUMMARY OF THE ARGUMENT

When Monsivais-Cornelio entered his plea of guilty, the court substantially complied with Federal Rule of Criminal Procedure 11 and ensured that his guilty plea was informed, free, and voluntary. Any arguable deviation from Rule 11's requirements does not amount to a nonfrivolous issue on appeal with regard to Monsivais-Cornelio's conviction.

Likewise, there is no nonfrivolous issue on appeal with regard to Monsivais-Cornelio's sentence. His guideline and criminal history scores were properly calculated, and he was sentenced within the guideline range. Therefore, there is no nonfrivolous issue on appeal with regard to Monsivais-Cornelio's sentence.

Accordingly, because there are no nonfrivolous issues on appeal, counsel moves to withdraw, pursuant to *Anders v. California*, 386 U.S. 738 (1967).

ARGUMENT

ISSUE ONE RESTATED: There is no nonfrivolous issue with regard to Mr. Monsivais-Cornelio's guilty plea.

A. Standard of Review

Whether the requirements of Federal Rule of Criminal Procedure 11 were satisfied is a conclusion of law and is therefore reviewable de novo. See United States v. Cuevas-Andrade, 232 F.3d 440, 443 (5th Cir. 2000) (citing United States v. Scott, 987 F.2d 261, 264 (5th Cir. 1993)). A district court's finding that there is an adequate factual basis for a plea of guilty, as required by Fed. R. Crim. P. 11(b)(3), is reviewed under the clearly erroneous standard. See United States v. Rivas, 85 F.3d 193, 194 (5th Cir. 1996).

However, before this Court will vacate a guilty plea, the Court must find both (1) that the district court varied from the procedures required by Rule 11; and (2) that the variance affected the substantial rights of the defendant. See United States v. Lujano-Perez, 274 F.3d 219, 224 (5th Cir. 2001). Where a claim of noncompliance with the requirements of Rule 11 is raised for the first time on appeal, however, it is subject only to review for plain error under Fed. R. Crim. P. 52(b). See United States

v. Dominguez Benitez, 542 U.S. 74, 79-83 (2004); United States v. Vonn, 535 U.S. 55, 59 & 62-74 (2002).

B. There Is No Nonfrivolous Issue With Regard to Mr. Monsivais-Cornelio’s Guilty Plea.

A district court may delegate to a magistrate judge the responsibility of conducting a felony guilty-plea proceeding. See 28 U.S.C. § 636(b)(3); United States v. Dees, 125 F.3d 261, 264-66 (5th Cir. 1997) (holding that plea proceedings conducted by magistrate judges are authorized by statute and comport with Article III of the Constitution). Mr. Monsivais-Cornelio knowingly and voluntarily consented to have his guilty plea hearing conducted by the magistrate judge, ROA.14-40388.75-76, and, in so doing, validly waived his right to have an Article III judge conduct his guilty plea hearing. See Dees, 125 F.3d at 266.

The magistrate judge’s compliance with the requirements of Rule 11 is set forth in the following table:

Required Admonition or Determination	Where in Rule?	Where in Record?
That statements made under oath in plea proceeding may be used by the government in a prosecution for perjury or false statement	Fed. R. Crim. P. 11(b)(1)(A)	ROA.16-40388.65
That defendant may plead not guilty, or may persist in his previous plea of not guilty	Fed. R. Crim. P. 11(b)(1)(B)	ROA.16-40388.77

That defendant has the right to a jury trial	Fed. R. Crim. P. 11(b)(1)(C)	ROA.16-40388.79
That defendant has the right to be represented by counsel, and if necessary, to have the court appoint counsel, at trial and every other stage of the proceeding	Fed. R. Crim. P. 11(b)(1)(D)	ROA.16-40388.78
That defendant has the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses	Fed. R. Crim. P. 11(b)(1)(E)	ROA.16-40388.79-80
That defendant waives these trial rights if the court accepts his guilty plea	Fed. R. Crim. P. 11(b)(1)(F)	ROA.16-40388.82-82
Nature of the charge(s) to which defendant is pleading	Fed. R. Crim. P. 11(b)(1)(G)	ROA.16-40388.89-94
Maximum possible penalty, including imprisonment, fine, and term of supervised release	Fed. R. Crim. P. 11(b)(1)(H)	ROA.16-40388.95-96
Any mandatory minimum penalty	Fed. R. Crim. P. 11(b)(1)(I)	N/A
Any applicable forfeiture	Fed. R. Crim. P. 11(b)(1)(J)	N/A
The court's authority to order restitution	Fed. R. Crim. P. 11(b)(1)(K)	ROA.16-40388.96
The court's obligation to impose a special assessment	Fed. R. Crim. P. 11(b)(1)(L)	ROA.16-40388.96

The court's obligation to calculate the applicable Sentencing Guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)	Fed. R. Crim. P. 11(b)(1)(M)	ROA.16-40388.101-105
The terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence	Fed. R. Crim. P. 11(b)(1)(N)	N/A; <u>see</u> ROA.16-40388.106-018 (no plea agreement)
That, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future	Fed. R. Crim. P. 11(b)(1)(O)	ROA.16-40388.97-98
That the defendant's plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)	Fed. R. Crim. P. 11(b)(2)	ROA.16-40388.109-110 and 118
That there is a factual basis for the plea	Fed. R. Crim. P. 11(b)(3)	ROA.16-40388.118-119
Disclosure of the plea agreement in open court	Fed. R. Crim. P. 11(c)(2)	N/A
That if the plea is one where the government agrees to make a non-binding recommendation (Fed. R. Crim. P. 11(c)(1)(B)), the defendant will have no right to withdraw the plea if the court does not follow the recommendation	Fed. R. Crim. P. 11(c)(3)(B)	N/A

In sum, the district court substantially complied with the requirements of Fed. R. Crim. P. 11, as outlined above. Any arguable deviation from the requirements of Rule 11 was harmless and certainly not plain error under the circumstances of this case. There thus is no nonfrivolous issue under Rule 11 error concerning the taking of Mr. Monsivais-Cornelio's guilty plea, and the record shows that his guilty plea was knowingly, understandingly, and voluntarily made, as the district court explicitly found. ROA.16-40388.130. There thus is nothing in the record "to show that the district court's error, if any, in finding his guilty plea was knowing and voluntary affected his substantial rights." United States v. Garcia-Vargas, 428 Fed. Appx. 386, 387 (5th Cir. 2011) (unpublished).

ISSUE TWO RESTATED: There is no nonfrivolous issue with regard to Mr. Monsivais-Cornelio's sentence.

A. Standard of Review

A district court's compliance with the sentencing procedures of Federal Rule of Criminal Procedure 32 is reviewed de novo. See, e.g., United States v. Myers, 150 F.3d 459, 465 (5th Cir. 1998). This Court "review[s] the district court's interpretation or application of the Sentencing Guidelines de novo and its factual findings for clear error." United States v. Trujillo, 502 F.3d 353, 356 (5th Cir. 2007) (footnote and

italics omitted). If a defendant fails to object in the district court, this Court reviews the sentence only for plain error. See, e.g., United States v. Ronquillo, 508 F.3d 744, 748 (5th Cir. 2007).

After United States v. Booker, 543 U.S. 220 (2005), federal courts of appeals review sentences for reasonableness. See Booker, 543 U.S. at 261-62. Under the reasonableness review mandated by Booker, “[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard.” Gall v. United States, 552 U.S. 38, 51 (2007). This Court has held that sentences within a properly calculated Guidelines range are entitled to a rebuttable presumption of reasonableness. See United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006).

B. There Are No Reversible Errors with Respect to Mr. Monsivais-Cornelio’s Sentence.

1. There Is No Nonfrivolous Issue Arising from the District Court’s Sentencing Guideline Calculations.

Using the 2015 edition of the United States Sentencing Guidelines (“USSG”), see ROA.16-40388.153 (¶ 11), the district court correctly calculated Mr. Monsivais-Cornelio’s total offense level as shown in the table and discussion below:

Calculation	Levels	USSG §	Description	Where in Record?
Base Offense Level	8	2L1.2(a)	8 U.S.C. § 1326	ROA.16-40388.153 (¶ 12)
Specific Offense Characteristic	+4	2L1.2(c)	Deported after felony conviction	ROA.16-40388.153 (¶ 13)
Adjustment to Offense Level	-2	3E1.1(a)	Acceptance of responsibility	ROA.16-40388.153 (¶ 18)
Total Offense Level	10			ROA.16-40388.153 (¶ 20)

Under the plain language of the Guidelines, the PSR's calculation of Mr. Monsivais-Cornelio's base offense level and application of the two-level reduction for acceptance of responsibility were plainly correct. See USSG §§ 2L1.2(a) & 3E1.1(a). Nor did the district court err in applying a four-level enhancement for prior conviction of a felony. At his arraignment, Mr. Monsivais-Cornelio admitted that he had been removed from the United States on May 11, 2006. ROA.16-40388.119. Earlier in 2006, he had been convicted of being an alien unlawfully found in the United States in violation of 8 U.S.C. § 1326(a). See docket entry 20 in 1:06-CR-00149 in the Southern District of Texas (judgment of conviction) and

ROA.16-40388.164-168. As this offense was punishable by up to two years' imprisonment, there is no nonfrivolous argument that it was not a prior felony conviction and thus not a basis for the four-level enhancement. And, for this same reason, there is no nonfrivolous argument that the district court erred in finding that the punishment provisions of 8 U.S.C. § 1326(b)(1) applied in the instant proceeding. See ROA.16-40388.137-138 and 160 (¶ 66).

The PSR correctly calculated Mr. Monsivais-Cornelio's criminal history score and category by assessing points as follows:

- 2 points for a 2003 DWI with a 2 month sentence;
- 2 points for a 2004 assault with a 2 month sentence;
- 2 points for a 2004 possession of marijuana case with a 3 month sentence;
- 1 point for a 2005 illegal reentry case with a 20 day sentence;
- 2 points for a 2006 alien unlawfully found in the U.S. case with a 104 day sentence; and
- 2 points for a 2015 assault case with a 90 day sentence.

ROA.16-40388.154-156 (¶ 22-27). With eleven criminal history points, the PSR correctly placed Mr. Monsivais-Cornelio in criminal history category V. See ROA.16-40388.156 (¶ 28); see also USSG Ch.5, Pt.A, Sentencing Table.

A total offense level of ten and a criminal history category of V resulted in a Guideline imprisonment range of 21 to 27 months. ROA.16-40388.160 (¶ 67); see also USSG Ch.5, Pt.A, Sentencing Table.

The PSR correctly noted that, under the Guidelines, supervised release ordinarily should not be imposed upon a deportable alien. ROA.16-40388.161 (¶ 72). The PSR also correctly noted, however, that if the district court chose to impose supervised release, then, pursuant to USSG § 5D1.2(a)(2), the Guideline range for the supervised-release term was from one to three years, ROA.16-40388.161 (¶ 72), with a statutory maximum supervised-release term of three years under 18 U.S.C. § 3583(b)(2). ROA.16-40388.160 (¶ 70).²

2. There Is No Nonfrivolous Procedural Issue Arising from the Imposition of Mr. Monsivais-Cornelio’s Sentence.

The district court substantially complied with the relevant procedural requirements of sentencing, as set forth in the following table:

Requirement	Source of Requirement	Where in Record?
Notice of possibility of departure on ground not identified in PSR or prehearing submissions by parties	Fed. R. Crim. P. 32(h)	N/A
Verify that the defendant and the defendant’s attorney have read and discussed the PSR and any addendum	Fed. R. Crim. P. 32(i)(1)(A)	ROA.16-40388.135; <u>see also</u> discussion below

²

Any error in the PSR’s calculation of the fine range could not have affected Mr. Monsivais-Cornelio’s substantial rights because the district court did not impose a fine. See ROA.16-40388.139.

Give the defendant a written summary of – or summarize <u>in camera</u> – any information excluded from the PSR on which court will rely at sentencing and give defendant a reasonable opportunity to comment	Fed. R. Crim. P. 32(i)(1)(B)	N/A
Allow defendant’s attorney to comment on probation officer’s determinations and other matters relating to an appropriate sentence	Fed. R. Crim. P. 32(i)(1)(C)	ROA.16-40388.135
For any disputed portion of the PSR or other controverted matter, rule on the dispute or determine that a ruling is not necessary	Fed. R. Crim. P. 32(i)(3)(B)	N/A; <u>see</u> ROA.16-40388.135 (no objections)
Allow defendant’s attorney to speak on defendant’s behalf	Fed. R. Crim. P. 32(i)(4)(A)(i)	ROA.16-40388.136-137
Address defendant personally in order to allow him/her to speak on his/her own behalf (allocution)	Fed. R. Crim. P. 32(i)(4)(A)(ii)	ROA.16-40388.137
Advise defendant of his/her right to appeal his conviction and sentence, and to do so <u>in forma pauperis</u> if necessary	Fed. R. Crim. P. 32(j)(1)(A)-(C)	<u>See</u> discussion below
Judgment correctly sets forth the plea or verdict, adjudication of guilt, and sentence	Fed. R. Crim. P. 32(k)(1)	Yes. <u>Compare</u> ROA.16-40388.47-51 <u>with</u> ROA.16-40388.138-139

State in open court the reasons for the imposition of the particular sentence	18 U.S.C. § 3553(c)	ROA.16-40388.137-139; <u>see also</u> discussion below
If the applicable Guideline range exceeds 24 months, state the reason for imposing a sentence at a particular point within the range	18 U.S.C. § 3553(c)(1)	N/A
If a departure sentence is imposed, state the specific reason for such departure	18 U.S.C. § 3553(c)(2)	N/A

Although the district court asked Mr. Monsivais-Cornelio whether he and his counsel had reviewed the PSR together, see ROA.16-40388.135, the district court did not ask the same question with respect to the addendum to the PSR. This error does not present any nonfrivolous issue on appeal, however, because the record does not reflect any prejudice to Mr. Monsivais-Cornelio as a result of this error.³ See United States v. Esparza-Gonzalez, 268 F.3d 272, 274 (5th Cir. 2001).

The district court failed to advise Mr. Monsivais-Cornelio of his right to appeal his conviction and sentence, and his right to do so in forma pauperis, as required by Fed. R. Crim. P. 32(j)(1)(A)-(C). This omission, however, presents no nonfrivolous issue on appeal. Because Mr. Monsivais-Cornelio did, with the

³

Neither party filed objections to the PSR. ROA.16-40388.170.

assistance of court-appointed counsel, perfect a timely in forma pauperis appeal he cannot present a nonfrivolous argument that the district court's error prejudiced him. See United States v. Tapp, 276 Fed. Appx. 258, 260 (4th Cir. 2007) (unpublished) (“Any failure by the district court to advise Tapp of his right to appeal is clearly harmless as his attorney timely filed a notice of appeal.”); see also Peguero v. United States, 526 U.S. 23, 24 (1999) (holding that habeas corpus petitioner could not show prejudice arising from the failure to advise him of his right to appeal where he knew of his right to appeal).

With respect to the reasons requirement of 18 U.S.C. § 3553, this Court had held, prior to Booker, that this requirement is generally satisfied when the court indicates the applicable Guideline range and how it is chosen (including by adoption of the PSR in which the Guideline calculations and resulting range are set forth), see United States v. Reyes-Lugo, 238 F.3d 305, 310 (5th Cir. 2001), and the district court adopted the PSR here. ROA.130. Even after Booker, this Court has held that “little explanation is required” when a judge elects to sentence within the Guidelines. United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005). Here, the district court imposed a prison sentence and supervised release term within the advisory Guidelines range. However, even if the court's explanation was not sufficient, because Mr. Monsivais-Cornelio did not object to the sufficiency of this explanation, he must

show that, had the district court provided a more thorough explanation, he would have received a shorter sentence. See United States v. Mondragon-Santiago, 564 F.3d 357, 364-65 (5th Cir. 2009). Mr. Monsivais-Cornelio.

Accordingly, the district court committed no reversible procedural error in sentencing Mr. Monsivais-Cornelio.

3. There Is No Nonfrivolous Substantive Issue with Respect to Mr. Monsivais-Cornelio's Sentence.

This Court presumes on appeal that sentences imposed within a properly calculated advisory Guideline imprisonment range are reasonable. See Alonzo, 435 F.3d at 554. Mr. Monsivais-Cornelio cannot overcome that presumption here.

As detailed above, the district court correctly calculated Mr. Monsivais-Cornelio's Guideline imprisonment range, and then sentenced him within that range. See ROA.16-40388.172. Nothing in the record shows that Mr. Monsivais-Cornelio's within-Guideline sentence "does not account for a factor that should receive significant weight, [that] it gives significant weight to an irrelevant or improper factor, or [that] it represents a clear error of judgment in balancing sentencing factors." United States v. Cooks, 589 F.3d 173, 186 (5th Cir. 2009) (citation omitted). There is thus no nonfrivolous argument that Mr. Monsivais-Cornelio's prison sentence was substantively unreasonable.

Moreover, there are no nonfrivolous issues with respect to the remaining aspects of Mr. Monsivais-Cornelio's sentence. The three-year term of supervised release that he received was within the correct range provided in the Guidelines for his offense, see USSG § 5D1.2(a)(2), and the district court specifically mentioned that it was imposing the term of supervised release "as an added measure of deterrence." ROA.16-40388.138; see USSG § 5D1.1, comment. (n.5); see also United States v. Dominguez-Alvarado, 695 F.3d 324, 330 (5th Cir. 2012). Moreover, the first special condition of supervised release – prohibiting Mr. Monsivais-Cornelio from illegally reentering the United States, see ROA.16-40388.50 – is simply a reiteration of the mandatory condition "that the defendant not commit another Federal . . . crime during [his] term of supervision." See 18 U.S.C. § 3583(d); USSG § 5D1.3(a)(1), (c)(2); see also United States v. Torres-Aguilar, 352 F.3d 934, 937 (5th Cir. 2003). And the second special condition – prohibiting Mr. Monsivais-Cornelio from driving a vehicle or drinking alcoholic beverages while in the United States without the permission of his Probation Officer – is justified by Mr. Monsivais-Cornelio's substance abuse issues, see ROA.16-40388.158 (¶ 43 - 47), and his driving while intoxicated conviction. ROA.16-40388.154 (¶ 22).

Finally, the district court did not impose a fine, and it remitted the \$100 special assessment. In sum, this case presents no nonfrivolous issue on appeal.

CONCLUSION

After examining the facts of the case in light of the applicable law, counsel on appeal believes there is no basis for presenting any legally nonfrivolous issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served on the AUSA by ECF to AUSA Renata Gowie, on December 14, 2016.

In accordance with the Fifth Circuit's Anders Guidelines, I further certify that a copy of the brief for appellant is being mailed on the same day to Alfredo Monsivais-Cornelio, 43861-179, USP Atlanta, P.O. Box 150160, Atlanta, Georgia, 30315, and that counsel has reasonably attempted to communicate, in a manner and a language understood by the defendant: (i) that counsel has fully examined the

record and reviewed the relevant law, and there are no meritorious issues for appeal; (ii) that counsel has therefore moved to withdraw; (iii) that if granted, the motion will result in dismissal of the appeal; but (iv) that the defendant has the right to file a response in English, opposing counsel's motion, within 30 days.

/s/ David Adler

David Adler

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 5,012 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect 12.0 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.
3. An electronic copy of this brief has been filed with the court through ECF.

/s/ David Adler

David Adler