

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

United States Court of Appeals
Fifth Circuit

FILED

April 30, 2013

Lyle W. Cayce
Clerk

No. 12-50753

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ELVIS OCTAVIO HERNANDEZ-ALVARES,

Defendant - Appellant

Appeals from the United States District Court
for the Western District of Texas
USDC No. 2:11-CR-1324-1

Before DAVIS, BARKSDALE, and ELROD, Circuit Judges.

PER CURIAM:*

Elvis Octavio Hernandez-Alvares challenges his 46-month imprisonment sentence imposed after pleading guilty to illegally reentering the United States after deportation. He contends the sentence is greater than necessary to satisfy the sentencing factors of 18 U.S.C. § 3553(a) because: the advisory Sentencing Guidelines overstate the seriousness of his instant and prior offenses; and the court gave inadequate consideration to his personal circumstances and benign motive for reentry.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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Although post-*Booker*, the Sentencing Guidelines are advisory only, and a properly preserved objection to an ultimate sentence is reviewed for reasonableness under an abuse-of-discretion standard, the district court must still properly calculate the Guideline-sentencing range for use in deciding on the sentence to impose. *Gall v. United States*, 552 U.S. 38, 48-51 (2007). 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); *United States v. Villegas*, 404 F.3d 355, 359 (5th Cir. 2005).

Hernandez essentially asks to substitute his assessment of the relevant sentencing factors for the district court's thoroughly reasoned assessment, which is contrary to the deferential review dictated by *Gall* and *Rita v. United States*, 551 U.S. 338, 351 (2007). (Hernandez concedes his challenge to Guideline § 2L1.2 as lacking an empirical basis is foreclosed by our precedent; he presents this issue only to preserve it for possible further review.)

AFFIRMED.