

United States Court of Appeals for the Fifth Circuit

No. 23-50045
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

October 16, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MARIO ASTUDILLO-HERRERA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:22-CR-166-1

Before DAVIS, WILLETT, and OLDHAM, *Circuit Judges.*

PER CURIAM:*

Mario Astudillo-Herrera appeals his conviction and sentence under 8 U.S.C. § 1326 for illegal entry into the United States after removal. He argues for the first time on appeal that § 1326(b) is unconstitutional. Astudillo-Herrera has filed an unopposed motion for summary disposition acknowledging that his argument is foreclosed by *Almendarez-Torres v.*

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

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United States, 523 U.S. 224 (1998), but he seeks to preserve it for possible Supreme Court review.

This court has held that subsequent Supreme Court decisions such as *Alleyne v. United States*, 570 U.S. 99 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not overrule *Almendarez-Torres*. See *United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019). Thus, Astudillo-Herrera is correct that his argument is foreclosed, and summary disposition is appropriate. See *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Astudillo-Herrera's motion is GRANTED, and the district court's judgment is AFFIRMED.