

United States Court of Appeals  
for the Fifth Circuit

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No. 23-50087  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

June 1, 2023

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

HERMENEGILDO GARCIA-GUTIERREZ,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 4:22-CR-636-1

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Before STEWART, DENNIS, and WILLETT, *Circuit Judges.*

PER CURIAM:\*

Hermenegildo Garcia-Gutierrez appeals his sentence for illegal reentry into the United States under 8 U.S.C. § 1326(a) and (b)(1). Garcia-Gutierrez argues that the recidivism enhancement in § 1326(b) is unconstitutional because it permits a sentence above the applicable maximum in § 1326(a), based on facts neither alleged in the indictment nor

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

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found by a jury beyond a reasonable doubt. Garcia-Gutierrez acknowledges that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he nevertheless seeks to preserve it for possible Supreme Court review. Accordingly, Garcia-Gutierrez has filed an unopposed motion for summary disposition.

We have 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). As Garcia-Gutierrez concedes that his argument is foreclosed, summary disposition is appropriate. See *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Garcia-Gutierrez's motion is GRANTED, and the district court's judgment is AFFIRMED.