

United States Court of Appeals
for the Fifth Circuit

No. 23-50350
CONSOLIDATED WITH
No. 23-50352

United States Court of Appeals
Fifth Circuit

FILED

October 16, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE CASTANEDA-ACEVEDO,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC Nos. 4:21-CR-50-1, 4:23-CR-30-1

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

PER CURIAM:*

Jose Castaneda-Acevedo appeals his conviction and sentence for illegal re-entry into the United States under 8 U.S.C. § 1326(a) and (b)(1), was well as the revocation of his term of supervised release related to a prior illegal re-entry conviction. Castaneda-Acevedo does not raise any issues in connection with the appeal of the revocation of his term of supervised release.

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

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Rather, he argues for the first time on appeal that the recidivism enhancement in § 1326(b) is unconstitutional because it permits a sentence above the otherwise-applicable statutory maximum established by § 1326(a), based on facts that are neither alleged in the indictment nor found by a jury beyond a reasonable doubt. While Castaneda-Acevedo acknowledges this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), he nevertheless seeks to preserve it for possible Supreme Court review. In addition, Castaneda-Acevedo has filed an unopposed motion for summary disposition.

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, Castaneda-Acevedo 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).

Castaneda-Acevedo's motion is GRANTED, and the judgments are AFFIRMED.