

United States Court of Appeals for the Fifth Circuit

No. 23-50548
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

January 8, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SELVIN YOBANY FUENTES-AYALA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:21-CR-1638-1

Before JONES, SOUTHWICK, and HO, *Circuit Judges.*

PER CURIAM:*

Selvin Yobany Fuentes-Ayala appeals his conviction and 46-month sentence for illegal re-entry into the United States under 8 U.S.C. § 1326. For the first time on appeal, he argues 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

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

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facts that are neither alleged in the indictment nor found by a jury beyond a reasonable doubt. While Fuentes-Ayala 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, Fuentes-Ayala 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, Fuentes-Ayala 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).

Fuentes-Ayala's motion is GRANTED, and the district court's judgment is AFFIRMED.