

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 16, 2021

Lyle W. Cayce
Clerk

No. 21-50126
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

WILLIAMS RODRIGUEZ-AGUILERA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:20-CR-326-1

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

Williams Rodriguez-Aguilera appeals his conviction and sentence for illegal reentry into the United States. He argues that judgment should be reformed to reflect a conviction under 8 U.S.C. § 1326(a) and (b)(1) rather than § 1326(b)(2). He further argues that the recidivism enhancement in

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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§ 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 Rodriguez-Aguilera 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 response, the Government has filed an unopposed motion for reformation of the judgment and for summary affirmance or, alternatively, for an extension of time in which to file a brief.

An appellate court has discretion to “affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106. The record supports the parties’ agreement that the judgment should be reformed to reflect a conviction under § 1326(a) and (b)(1).

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. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Rojas-Luna*, 522 F.3d 502, 505-06 (5th Cir. 2008). Thus, the parties are correct that Rodriguez-Aguilera’s challenge to the constitutionality of the recidivism enhancement is foreclosed, and summary affirmance is appropriate. See *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Accordingly, the Government’s motion for reformation of the judgment and for summary affirmance is GRANTED, and its alternative motion for an extension of time to file a brief is DENIED. We REFORM

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the district court's judgment to reflect conviction and sentencing under 8 U.S.C. § 1326(a) and (b)(1). The judgment is **AFFIRMED** as modified.