

APPENDIX A

*United States v. Enriguez-Hernandez,*

No. 18-50921

(5th Cir. June 3, 2019)

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 18-50921  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**  
June 3, 2019

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAIME ENRIGUEZ-HERNANDEZ, also known as Jaime Enriques-Hernandez,

Defendant-Appellant

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 2:17-CR-1391-1

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Before DAVIS, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:\*

Jaime Enriques-Hernandez appeals the 60-month, within-guidelines sentence imposed following his guilty plea conviction for illegal reentry in violation of 8 U.S.C. § 1326. He argues that his sentence is unconstitutional because it exceeds the two-year statutory maximum sentence of § 1326(a). He concedes that the issue is foreclosed by *Almendarez-Torres v. United States*,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

No. 18-50921

523 U.S. 224 (1998), and that this court remains bound by *Almendarez-Torres*, but wishes to preserve the issue for further review due to what he perceives as indications by the Supreme Court that it may reconsider that decision. The Government has filed an unopposed motion for summary affirmance, arguing that the issue is foreclosed under *Almendarez-Torres*. Alternatively, the Government requests an extension of time to file its brief.

Summary affirmance is appropriate if “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). In *Almendarez-Torres*, 523 U.S. at 226-28, 235, the Supreme Court held that for purposes of a statutory sentencing enhancement, a prior conviction is not a fact that must be alleged in an indictment or found by a jury beyond a reasonable doubt. We have held that subsequent Supreme Court decisions did not overrule *Almendarez-Torres*. See *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014) (considering the effect of *Alleyne v. United States*, 570 U.S. 99 (2013)); *United States v. Pineda-Arellano*, 492 F.3d 624, 625-26 (5th Cir. 2007) (considering the effect of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). Thus, Enriguez-Hernandez’s argument is foreclosed.

Accordingly, the Government’s motion for summary affirmance is GRANTED, the Government’s alternative motion for an extension of time to file a brief is DENIED as moot, and the judgment of the district court is AFFIRMED.

APPENDIX B

Indictment,

*United States v. Enriquez-Hernandez,*

DR-17-CR-1391, November 29, 2017

**REDACTED COPY**

**FILED**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
DEL RIO DIVISION

2017 NOV 29 AM 11:44  
CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY BAJ  
REPUTY CLERK

UNITED STATES OF AMERICA

§ Cause No.:

v.

§ **INDICTMENT**

JAIME ENRIQUEZ-HERNANDEZ

§ [Vio: 8 U.S.C. § 1326(a) & (b)(1)/(2):  
Illegal Re-entry into the United States.]

**DR 17 CR 1391**

THE GRAND JURY CHARGES:

COUNT ONE  
[8 U.S.C. § 1326(a) & (b)(1)/(2)]

That on or about November 5, 2017, in the Western District of Texas, Defendant,

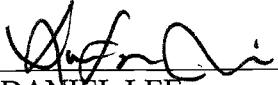
JAIME ENRIQUEZ-HERNANDEZ,

an alien, attempted to enter, entered, and was found in the United States having previously been denied admission, excluded, deported and removed from the United States on or about June 14, 2017, and that the Defendant had not received the consent of the Attorney General of the United States and the Secretary of the Department of Homeland Security, to reapply for admission to the United States, in violation of Title 8, United States Code, Section 1326(a) and (b)(1)/(2).

A TRUE BILL

~~FOREPERSON~~

RICHARD L. DURBIN, JR.  
United States Attorney

By:   
DANIEL LEE  
Assistant United States Attorney

APPENDIX C

8 U.S.C. § 1326

 KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

**United States Code Annotated**

**Title 8. Aliens and Nationality (Refs & Annos)**

**Chapter 12. Immigration and Nationality (Refs & Annos)**

**Subchapter II. Immigration**

**Part VIII. General Penalty Provisions**

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996

**Currentness**

**(a) In general**

Subject to subsection (b), any alien who--

**(1)** has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

**(2)** enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

**(b) Criminal penalties for reentry of certain removed aliens**

Notwithstanding subsection (a), in the case of any alien described in such subsection--

**(1)** whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

**(2)** whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

**(3)** who has been excluded from the United States pursuant to [section 1225\(c\)](#) of this title because the alien was excludable under [section 1182\(a\)\(3\)\(B\)](#) of this title or who has been removed from the United States pursuant to the

provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.<sup>1</sup> or

**(4)** who was removed from the United States pursuant to [section 1231\(a\)\(4\)\(B\)](#) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

**(c) Reentry of alien deported prior to completion of term of imprisonment**

Any alien deported pursuant to [section 1252\(h\)\(2\)](#)<sup>2</sup> of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

**(d) Limitation on collateral attack on underlying deportation order**

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

**(1)** the alien exhausted any administrative remedies that may have been available to seek relief against the order;

**(2)** the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

**(3)** the entry of the order was fundamentally unfair.

**CREDIT(S)**

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; [Pub.L. 100-690, Title VII, § 7345\(a\)](#), Nov. 18, 1988, 102 Stat. 4471; [Pub.L. 101-649, Title V, § 543\(b\)\(3\)](#), Nov. 29, 1990, 104 Stat. 5059; [Pub.L. 103-322, Title XIII, § 130001\(b\)](#), Sept. 13, 1994, 108 Stat. 2023; [Pub.L. 104-132, Title IV, §§ 401\(c\), 438\(b\), 441\(a\)](#), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; [Pub.L. 104-208](#), Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

[Notes of Decisions \(1300\)](#)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. [Section 1252](#) of this title, was amended by [Pub.L. 104-208](#), Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in [section 1252\(h\)\(2\)](#) of this title, see [8 U.S.C.A. § 1231\(a\)\(4\)](#).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 115-173. Also includes P.L. 115-176 to 115-178. Title 26 current through 115-182.

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