

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GUADALUPE ONATE-HERRERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

/s/ Adam Nicholson

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Appendix A Opinion of Fifth Circuit, *United States v. Guadalupe Onate-Herrera*, No. 22-10559, 2022 WL 17614860 (5th Cir. Dec. 13, 2022)(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered May 31, 2022.
United States v. Onate-Herrera, Dist. Court 4:21-CR-338-Y-1.

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 22-10559
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
December 13, 2022

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

GUADALUPE ONATE-HERRERA,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CR-338-1

Before HIGGINBOTHAM, GRAVES, and Ho, *Circuit Judges*.

PER CURIAM:*

Guadalupe Onate-Herrera appeals his conviction and sentence for illegal reentry after deportation under 8 U.S.C. § 1326(a) and (b)(1). He argues that treating a prior felony conviction that increases the statutory maximum under § 1326(b) as a sentencing factor, rather than a separate element of the offense, violates the Constitution. He also contends that he

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

No. 22-10559

was not informed that the statutory enhancement provision in § 1326(b)(1) was an essential element of the offense to which he was pleading guilty and, therefore, his guilty plea was made involuntarily. Onate-Herrera concedes that his arguments are foreclosed and indicates that he wishes to preserve them for further review. The Government has moved, unopposed, for summary affirmance or, alternatively, for an extension of time to file a brief.

The parties are correct that the issues raised on appeal are foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). See *United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019); *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014). Summary affirmance thus is appropriate. See *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

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, and the district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

GUADALUPE ONATE-HERRERA

Case Number: 4:21-CR-338-Y(1)

M. Levi Thomas, assistant U.S. attorney

Andrea G. Aldana, attorney for the defendant

On January 19, 2022, the defendant, Guadalupe Onate-Herrera, entered a plea of guilty to count one of the one-count indictment. Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE CONCLUDED</u>	<u>COUNT</u>
8 U.S.C. § 1326(a) and (b)(1)	Illegal Reentry After Deportation	October 2, 2019	1

The defendant is sentenced as provided in pages two through three of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 for count one of the one-count indictment.

The defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed May 24, 2022.



TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed May 31, 2022.

IMPRISONMENT

The defendant, Guadalupe Onate-Herrera, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of 37 months on count one of the one-count indictment. This sentence shall run consecutively to the undischarged term of imprisonment imposed by the 415th Judicial District Court, Parker County, Texas, in Case No. CR20-0308.

The Court makes a non-binding recommendation to the BOP that Defendant, if appropriately classified, be allowed to serve his term of imprisonment in an FCI as near geographically as possible to Fort Worth, Texas.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years on count one of the one-count indictment.

Under 18 U.S.C. § 3583(d), as a condition of supervised release upon the completion of the sentence of imprisonment, the defendant shall be surrendered by the Federal Bureau of Prisons to a duly authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. As a condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of the term of supervised release, the defendant shall also comply with the standard conditions recommended by the U.S. Sentencing Commission at §5D1.3(c) of the United States Sentencing Commission Guidelines Manual, and shall:

- not commit another federal, state, or local crime;
- not possess illegal controlled substances;
- not possess a firearm, destructive device, or other dangerous weapons;
- cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004;
- report in person to the probation office in the district to which the defendant is released from the custody of the Federal Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or entry;
- not illegally reenter the United States, if deported, removed, or allowed voluntary departure; and
- refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States marshal

BY _____
deputy marshal