

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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CARLOS DELGADO-ADAME,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent

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PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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## APPENDIX A

# United States Court of Appeals for the Fifth Circuit

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No. 22-10586  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

March 21, 2023

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

CARLOS DELGADO-ADAME,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:22-CR-18-1

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Before KING, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:\*

Carlos Delgado-Adame appeals his conviction and 60-month sentence for illegal reentry after having been previously removed, in violation of 8 U.S.C. § 1326(a) and (b)(1). He argues that it is a violation of the Sixth Amendment's Notice Clause to treat a prior conviction that increases the statutory maximum under § 1326(b) as a sentencing factor, rather than as an

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

element of the offense. Delgado-Adame concedes that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), forecloses this argument, but he wishes to preserve it for further review. The Government has moved for summary affirmance or, alternatively, for an extension of time to file its brief.

As the Government asserts and as Delgado-Adame concedes, the sole issue raised on appeal is foreclosed by *Almendarez-Torres*. 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). Because the Government’s position “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), summary affirmance is proper.

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

## APPENDIX B

**UNITED STATES DISTRICT COURT**

NORTHERN DISTRICT OF TEXAS

Fort Worth Division

UNITED STATES OF AMERICA

**JUDGMENT IN A CRIMINAL CASE**

v. Case Number: 4:22-CR-00018-O(01)  
U.S. Marshal's No.: 84381-509  
CARLOS DELGADO-ADAME Levi Thomas, Assistant U.S. Attorney  
John Stickney, Attorney for the Defendant

On February 16, 2022 the defendant, CARLOS DELGADO-ADAME, entered a plea of guilty as to Count One of the Indictment filed on January 12, 2022. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:


<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. § 1326(a) and (b)(1)	Illegal Reentry After Deportation	11/11/2021	One

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on January 12, 2022.

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 June 10, 2022.

  
REED O'CONNOR  
U.S. DISTRICT JUDGE

Signed June 10, 2022.

Judgment in a Criminal Case  
Defendant: CARLOS DELGADO-ADAME  
Case Number: 4:22-CR-00018-O(1)

### IMPRISONMENT

The defendant, CARLOS DELGADO-ADAME, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **SIXTY (60) MONTHS** as to Count One of the Indictment filed on January 12, 2022. This sentence shall run consecutively to any future sentence which may be imposed in Case No. 1708646, which is pending in the 432<sup>nd</sup> Judicial District Court of Tarrant County, as it is not related to the instant offense.

The Court makes a non-binding recommendation to the BOP that Defendant, if appropriately classified, be allowed to serve his term of imprisonment as near as geographically possible to an FCI facility in 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 **THREE (3) YEARS** as to Count One of the Indictment filed on January 12, 2022.

As a condition of supervised release, upon the completion of the sentence of imprisonment, the defendant shall be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 USC § 1101 et seq. As a further condition of supervised release, if ordered deported or removed, 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 contained in the Judgment and shall comply with the mandatory and special conditions stated herein.

- ( 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- ( 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- ( 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- ( 4) You must answer truthfully the questions asked by your probation officer.
- ( 5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.



- ( 6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- ( 7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- ( 8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- ( 9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- (10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- (11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- (12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- (13) You must follow the instructions of the probation officer related to the conditions of supervision.

In addition the defendant shall:

not commit another federal, state, or local crime;

not illegally possess controlled substances;

cooperate in the collection of DNA as directed by the probation officer;

not possess a firearm, ammunition, destructive device, or any dangerous weapon;

refrain from any unlawful use of a controlled substance. You 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;

pay the assessment imposed in accordance with 18 U.S.C. § 3013;

take notice that if this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment;

Judgment in a Criminal Case  
Defendant: CARLOS DELGADO-ADAME  
Case Number: 4:22-CR-00018-O(1)

not illegally re-enter the United States, if deported, removed, or allowed voluntary departure; and,  
  
participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

**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

## APPENDIX C

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

UNITED STATES OF AMERICA,

V.

CARLOS DELGADO-ADAME,

§  
§  
§  
§  
§  
§

No. 4:21-CR-00018-O-1

**OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT**

TO THE HONORABLE REED O'CONNOR UNITED STATES DISTRICT JUDGE:

COMES NOW, Carlos Delgado-Adame, defendant, by and through his counsel, John J. Stickney, hereby submits this written objection to the presentence investigation report ("PSR") dated April 14, 2022, as prepared by U.S. Probation Officer, April Bolden.

**OBJECTION NO. 1:**

Mr. Delgado-Adame was indicted for illegal reentry into the United States, an offense punishable by a maximum of two years of imprisonment and one year's supervised release under 8 U.S.C. § 1326(a). Section 1326(b) increases the maximum punishment if the alien was removed after having been convicted of certain categories of offenses. Mr. Delgado-Adame's indictment did not allege that he had such a prior conviction. Mr. Delgado-Adame contends that, because the indictment did not allege a prior conviction, it charged only an offense under § 1326(a).

Mr. Delgado-Adame concedes this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 239 (1998). But its narrow exception for previous convictions is severely undermined by the very opinions of Supreme Court justices who created it:

*Almendarez-Torres*, like *Taylor*, has been eroded by this Court's subsequent Sixth

Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. See 523 U.S., at 248-249, 118 S.Ct. 1219 \*28 SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); *Apprendi*, supra, at 520-521, 120 S.Ct. 2348 (THOMAS, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements." *Harris v. United States*, 536 U.S. 545, 581-582, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (THOMAS, J., dissenting).

*Shepard v. United States*, 544 U.S. 13, (2005) (Thomas, J., concurring). The shifting composition of the Supreme Court, and the justices' repeated expressions of doubt about the continuing vitality of that case provide reason to believe they may ultimately have a right indictment as to the fact of his prior conviction. The Court has thus far declined to revisit the issue by the narrowest of margins in recent opinions. See *Alleyne v. United States*, 133 S.Ct. 2151, 2160 n.1 (2013) ("In *Almendarez-Torres v. United States*...we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today."); *Descamps v. United States*, 133 S. Ct. 2276, 2294–2295 (2013) (Thomas, J., concurring) (reluctantly noting that the Supreme Court has not "yet" overruled *Almendarez-Torres*); *Jones v. United States*, 125 S. Ct. 8, at n.\* (2014) (Mem.) (Scalia, J., dissenting from denial of certiorari); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided . . .").

If *Apprendi*, its progeny, and, most recently, *Alleyne*, undermine *Almendarez-Torres*, as Mr. Delgado-Adame argues, his sentence exceeds the statutory maximum. The indictment alleged only the elements of the § 1326(a) offense; it did not allege a prior conviction. Nor did Mr. Delgado-Adame admit to any prior conviction in his Factual Resume. Because Mr. Delgado-

Adame was charged only with the § 1326(a) offense, he preserves for possible Supreme Court review the argument that his maximum punishment was limited to two years' imprisonment and one year of supervised release.<sup>1</sup>

### CONCLUSION

WHEREFORE, counsel for Mr. Delgado-Adame respectfully submits this written objection to the PSR.

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<sup>1</sup> Mr. Delgado-Adame recognizes that the Fifth Circuit has expressed the opinion, in dictum, that the issue he raises “no longer serves as a legitimate basis for appeal[,]” and that it would view appeals raising this issue “with skepticism.” *United States v. Pineda-Arrellano*, 492 F.3d 624, 625–26 (5th Cir. 2007); *see also id.* at 626–27 (Dennis, J., concurring) (characterizing majority’s statement on this issue as “dictum”). *Alleyne*’s broad reasoning and discussion of the precedential strength of *Apprendi* suggests that the Court may revisit *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 239 (1998). For this reason, counsel raises the issue to fulfill his obligation of zealous representation, and to preserve the issue for further review.

Respectfully submitted,

JASON HAWKINS  
Federal Public Defender  
Northern District of Texas

/s/ John J. Stickney  
JOHN J. STICKNEY  
Assistant Federal Public Defender  
MA Bar No. 687134  
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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Defendant's Written Objections to Presentence Investigation Report have been served upon the Assistant U.S. Attorney and U.S Probation Officer on this 28<sup>th</sup> day of April, 2022.

/s/ John J. Stickney  
John J. Stickney  
Assistant Federal Public Defender

## APPENDIX D



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

No. 4:22-CR-018-O

CARLOS DELGADO-ADAME (01)

**GOVERNMENT'S RESPONSE TO DEFENDANT'S  
OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT**

The United States Attorney for the Northern District of Texas, in response to defendant Carlos Delgado-Adame's Objections to the Presentence Investigation Report, would respectfully show the court as follows.

**Response to Objection No. 1 – Statutory Punishment**

The defendant argues that the Court should limit punishment to the two-year maximum provided by 8 U.S.C. § 1326(a), absent allegation in the Indictment of a prior conviction. The defendant raises this argument to preserve it for possible appellate review. The defendant recognizes this position is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) and *United States v. Pineda-Arrellano*, 492 F.3d 624, 625–26 (5th Cir. 2007). Further, the Supreme Court has held that its decisions remain binding precedent until it decides to reconsider them, “regardless of whether subsequent cases have raised doubts about their continuing vitality.” *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (quoting *Hohn v. United States*, 524 U. S. 236, 252–53 (1998)). Thus, this argument

remains foreclosed by binding Supreme Court precedent. The Court should overrule this objection.

Respectfully submitted,

CHAD E. MEACHAM  
UNITED STATES ATTORNEY

s/ Levi Thomas  
LEVI THOMAS  
Assistant United States Attorney  
Texas State Bar No. 24083963  
801 Cherry Street, Suite 1700  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 5, 2022, I electronically filed the foregoing document with the clerk for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means: Assistant Federal Public Defender John J. Stickney and the U.S. Probation Officer.

s/ Levi Thomas  
LEVI THOMAS  
Assistant United States Attorney