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*United States v. Diaz-Diaz*,  
No. 23-50179 cons. w/ No. 23-50186  
(5th Cir. Aug. 1, 2023) (per curiam)

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*United States v. Diaz-Diaz*,  
Indictment,  
No. 4:22-cr-713-DC  
(W.D. Tex. Oct. 13, 2022)

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8 U.S.C. § 1326

## APPENDIX A

# United States Court of Appeals for the Fifth Circuit

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No. 23-50179  
CONSOLIDATED WITH  
No. 23-50186

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United States Court of Appeals  
Fifth Circuit

**FILED**

August 1, 2023

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

SALVADOR DIAZ-DIAZ,

*Defendant—Appellant.*

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Appeals from the United States District Court  
for the Western District of Texas  
USDC Nos. 4:22-CR-697-1, 4:22-CR-713-1

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Before SMITH, HIGGINSON, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:\*

Salvador Diaz-Diaz appeals his conviction and sentence for illegal reentry after removal in violation of 8 U.S.C. § 1326(a) and (b). He also appeals the revocation of his supervised release and the sentence imposed upon revocation.

With respect to his illegal reentry conviction and sentence, Diaz-Diaz

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

No. 23-50179  
c/w No. 23-50186

contends that the application of § 1326(b)'s enhanced penalty provision is unconstitutional because it permits a defendant to be sentenced above the statutory maximum of § 1326(a) based on the fact of a prior conviction that was not alleged in the indictment or found by a jury beyond a reasonable doubt. Diaz-Diaz has filed an unopposed motion for summary disposition and a letter brief conceding that the issue is 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), and explaining that he raises the issue to preserve it for Supreme Court review.

Because summary disposition is appropriate, see *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the motion is GRANTED, and the judgments are AFFIRMED.

## APPENDIX B

**FILED**

10/13/22

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
PECOS DIVISION**

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
By: TA  
Deputy

**UNITED STATES OF AMERICA**

**Plaintiff**

**v**

**SALVADOR DIAZ-DIAZ**

**Defendant**

**Case No: 4:22-CR-00713**

**INDICTMENT**

**8 U.S.C. § 1326(a) & (b)(1) Illegal Re-  
entry into the United States**

**THE GRAND JURY CHARGES:**

**COUNT ONE**

**[8 U.S.C. § 1326(a) & (b)(1)]**

That on or about September 14, 2022, in the Western District of Texas, Defendant,

**SALVADOR DIAZ-DIAZ**

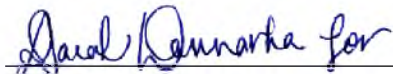
an alien, attempted to enter, entered, and was found in the United States having previously been denied admission, excluded, deported, and removed from the United States on or about August 3, 2022, and that the Defendant had not received consent of the Attorney General of the United States or the Secretary of Homeland Security, to reapply for admission to the United States, in violation of Title 8, United States Code, Section 1326(a) & (b)(1).

**A TRUE BILL**

**FOREPERSON OF THE GRAND JURY**

**ASHLEY C. HOFF  
UNITED STATES ATTORNEY**

BY:



**KEVIN CAYTON  
ASSISTANT UNITED STATES ATTORNEY**

## APPENDIX C

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 \(1512\)](#)