

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERTO ALANIZ-PIMENTEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 22-10980
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 14, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROBERTO ALANIZ-PIMENTEL,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:22-CR-22-1

Before WILLETT, DUNCAN, and DOUGLAS, *Circuit Judges.*

PER CURIAM:*

Roberto Alaniz-Pimentel appeals his sentence for illegal reentry into the United States after having been removed, in violation of 8 U.S.C. § 1326(a) and (b)(2). He argues that his sentence exceeds the statutory maximum and is therefore unconstitutional because the district court enhanced his sentence under § 1326(b) based on the fact of a prior conviction

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

No. 22-10980

that was not alleged in the indictment. However, he correctly concedes that this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and explains that he raises this issue to preserve it for further review. *See United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019). The Government has moved without opposition for summary affirmance, or, alternatively, for an extension of time to file a brief.

Because summary affirmance is appropriate, *see Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), 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

Wichita Falls Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

ROBERTO ALANIZ-PIMENTEL

Case Number: 7:22-CR-00022-O(01)

U.S. Marshal's No.: 12261-077

Levi Thomas, Assistant U.S. Attorney

John Stickney, Attorney for the Defendant

On June 22, 2022 the defendant, ROBERTO ALANIZ-PIMENTEL, entered a plea of guilty as to Count One of the Information filed on June 7, 2022. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

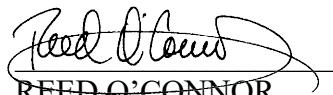
| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|-------------------------------|-----------------------------------|----------------------|--------------|
| 8 U.S.C. § 1326(a) and (b)(2) | Illegal Reentry After Deportation | 04/01/2021 | One |

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 Information filed on June 7, 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 September 30, 2022.


REED O'CONNOR
U.S. DISTRICT JUDGE

Signed September 30, 2022.

IMPRISONMENT

The defendant, ROBERTO ALANIZ-PIMENTEL, 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 Information filed on June 7, 2022.

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 Information filed on June 7, 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;

take notice that as a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered 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 further 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, he shall also comply with the standard conditions recommended by the U.S. Sentencing Commission; 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.

No. 7:22-CR-00022-O-1

ROBERTO ALANIZ-PIMENTEL,

§

AMENDED OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

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

COMES NOW, Roberto Alaniz-Pimentel, defendant, by and through his counsel, John J. Stickney, hereby submits these written objections to the presentence investigation report ("PSR") dated August 11, 2022, as prepared by U.S. Probation Officer, Javier Lujan.

OBJECTION NO. 1:

Mr. Alaniz-Pimentel 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. Alaniz-Pimentel's indictment did not allege that he had such a prior conviction. Mr. Alaniz-Pimentel contends that, because the indictment did not allege a prior conviction, it charged only an offense under § 1326(a).

Mr. Alaniz-Pimentel 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 the 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. Alaniz-Pimentel 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. Alaniz-Pimentel admit to any prior conviction in his Factual Resume. Because Mr. Alaniz-

Pimentel 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.¹

CLARIFICATION NO. 1 (regarding page 2 and paragraph 51):

Mr. Alaniz-Pimentel clarifies that his date of birth is November 11, 1974.

Additionally, Mr. Alaniz-Pimentel clarifies that the Texas syndicate tattoo listed from immigration records has been covered up by a large cross tattoo. So he no longer has a visible Texas syndicate tattoo.

CLARIFICATION NO. 2 (regarding paragraph 54):

His prior relationship was with “Mary Jane Tha.” This is simply a spelling clarification. Also, in this same paragraph, Mr. Alaniz-Pimentel clarifies that his son Roberto Jr. lives in Wichita Falls, but he believes his three daughters live in Arlington.

¹ Mr. Alaniz-Pimentel 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.

CONCLUSION

WHEREFORE, counsel for Mr. Alaniz-Pimentel respectfully submits this written objection to the PSR.

Respectfully submitted,

JASON HAWKINS
Federal Public Defender
Northern District of Texas

/s/ John J. Stickney
JOHN J. STICKNEY
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MA Bar No. 687134
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817.978.2753
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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 25th day of August, 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
WICHITA FALLS DIVISION

UNITED STATES OF AMERICA

v.

ROBERTO ALANIZ-PIMENTEL (01)

|
No. 7:22-CR-022-O

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

The United States Attorney for the Northern District of Texas, in response to defendant Roberto Alaniz-Pimentel's Amended 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.

Response to Clarifications 1-2

The defendant also submits various clarifications to the PSR that do not affect the guideline calculations. The Government is not opposed to these clarifications.

Respectfully submitted,

CHAD E. MEACHAM
UNITED STATES ATTORNEY

s/ Levi Thomas _____
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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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 Stickney and the U.S. Probation Officer.

s/ Levi Thomas _____
LEVI THOMAS
Assistant United States Attorney