

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

UBALDO DE LA CRUZ LEYVA,
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. 23-10257
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
September 12, 2023

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

UBALDO DE LA CRUZ LEYVA,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CR-405-1

Before JOLLY, HIGGINSON, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

Ubaldo De La Cruz Leyva appeals his conviction and 50-month sentence for reentry after deportation under 8 U.S.C. § 1326(a) and (b)(1). De La Cruz Leyva argues that using a prior felony conviction never alleged in the indictment to impose a statutorily enhanced sentence violates the Sixth Amendment. De La Cruz Leyva correctly concedes that his argument is

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

No. 23-10257

foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he wishes 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 its brief.

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 Government’s 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 to file a brief is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

UBALDO DE LA CRUZ LEYVACase Number: **3:20-CR-00405-B(1)**USM Number: **47616-177****Maria Esther Torres Chin**

Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	Count 1 of the one-count Indictment filed September 2, 2020
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
8 U.S.C. § 1326(a) & (b)(1) Illegal Reentry After from the United States	11/18/2018	1

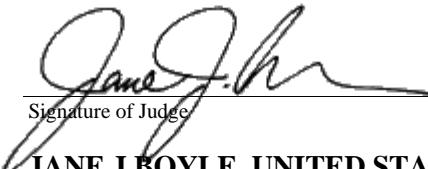
The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s)
- Count(s) is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 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. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 2, 2023

Date of Imposition of Judgment



Signature of Judge

JANE J BOYLE, UNITED STATES DISTRICT JUDGE

Name and Title of Judge

March 3, 2023

Date

DEFENDANT: UBALDO DE LA CRUZ LEYVA
CASE NUMBER: 3:20-CR-00405-B(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
50 months. No term of supervised release imposed.

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 U.S.C. § 1101 et seq. If ordered deported or removed, the defendant shall remain outside the United States.

The court makes the following recommendations to the Bureau of Prisons:
that the defendant be allowed to serve his sentence at a BOP facility in the North Texas area, if eligible.

The defendant is remanded to the custody of the United States Marshal.
 The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

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 UNITED STATES MARSHAL

DEFENDANT: UBALDO DE LA CRUZ LEYVA
 CASE NUMBER: 3:20-CR-00405-B(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00	\$0.00

The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

<input type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: UBALDO DE LA CRUZ LEYVA
CASE NUMBER: 3:20-CR-00405-B(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payments of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

§

v.

§

CASE NO. 3:20-CR-405-B

UBALDO DE LA CRUZ LEYVA

§

DEFENDANT'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

Ubaldo De La Cruz Leyva, (Mr. Leyva), defendant, by and through his counsel of record, Maria Torres Chin, Assistant Federal Public Defender, hereby submits the following objections to the presentence investigation report (PSR) dated September 22, 2022. Dkt. No. 22-1.

OBJECTION NO. 1: Mr. Leyva objects to paragraph 61 of the PSR.

Mr. Leyva respectfully objects to the Presentence Report's conclusion that the defendant's statutory maximum exceeds two years imprisonment under 8 U.S.C. §1326(b). Of course, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), holds that Congress intended Subsection (b) to act as a sentence enhancement, and not as a distinct and aggravated offense that must be alleged in the indictment and proven to a jury beyond a reasonable doubt. *See Almendarez-Torres*, 523 U.S. at 235. It rejected the suggestion that such construction of the statute would deprive the defendant of the right to have all elements of the offense pleaded in the indictment. *See id.* at 239. It also rejected the defendant's argument that the statute should be construed to treat Subsection (b) as an element to avoid substantial doubt about the statute's constitutionality. *See id.* at 239.

After *Almendarez-Torres*, the Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S.

466, 490 (2000). It then held that “[i]n federal prosecutions, such facts must also be charged in the indictment.” *United States v. Cotton*, 535 U.S. 625, 627 (2002).

Since *Almendarez-Torres*, a series of Supreme Court decisions have held that any “prior conviction” exception to the constitutional rules set forth above must be narrowly construed, extending only to the bare fact of a prior conviction, and not to facts about a prior conviction. *See* *Shepard v. United States*, 544 U.S. 13, 25 (2005)(Souter, J., controlling plurality op.) (“While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.”)(emphasis added); *Apprendi*, 530 U.S. at 490 (referring to the prior conviction exception as a “narrow exception.”); *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009)(accepting government’s concession that a defendant subjected to a twenty year re-entry sentence on the basis of a prior fraud offense would be entitled to a jury trial on the amount of loss in that case); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004)(applying the doctrine of constitutional avoidance to the scope of the prior conviction exception in a case where the sequence of a defendant’s prior convictions raised his statutory maximum). Indeed, the Fifth Circuit held in *United States v. Rojas-Luna*, 522 F.3d 502, 506 (5th Cir. 2008), that it is plain error to treat the sequence of the defendant’s prior conviction and removal date as a sentencing factor rather than an element of the offense.

In light of this new authority, it is now clear that 8 U.S.C. §1326(b) presents at least one serious constitutional question not considered in *Almendarez-Torres*: whether it violates the Fifth and Sixth Amendments to increase the defendant’s statutory maximum on the basis of a judge’s finding, made by a preponderance of the evidence, and without notice in the indictment, that the

defendant's prior removal *followed* his prior conviction for a felony or aggravated felony. That is, even accepting that the fact of a prior conviction may be treated as a sentencing factor, can the Court treat the timing of the defendant's prior conviction – its occurrence before the removal rather than after – as a sentencing factor rather than the element of the offense? Because *Apprendi*, *Shepard*, *Nijhawan*, and *Haley* all show this to be a question of substantial constitutional doubt, this Court should construe the timing of the prior conviction relative to the removal as an element of the offense. See *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, (1909) (“where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”). The sentence should be capped at two years.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ MARIA TORRES CHIN
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Attorney for Mr. Leyva

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2023, I electronically filed the foregoing document using the Court's CM/ECF system, thereby providing service on attorneys of record.

/s/ Maria Torres Chin
MARIA TORRES CHIN

a10

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

UBALDO DE LA CRUZ LEYVA

NO. 3:20-CR-00405-B

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

The United States of America (“the government”) hereby responds to the Defendant Ubaldo De La Cruz Leyva’s objection (Dkt. 26 and 31) to the Presentence Investigation Report (PSR). Through his objection, the defendant challenges the PSR’s finding that he is subject to a statutory maximum of 10 years’ imprisonment under 8 U.S.C. § 1326(b)(1), rather than a statutory maximum of two years’ imprisonment under 8 U.S.C. § 1326(a). (*See* Dkt. 26 at 1-3.) The defendant contends that the timing of the prior conviction qualifying him for the penalty in Section 1326(b)(1) is an element of his offense that was not alleged by the government, and, therefore, that he is not exposed to the penalties in Section 1326(b). (*Id.*) Fifth Circuit precedent forecloses his argument that the timing of prior convictions is an element of his offense. For this reason, the Court should overrule his objection.

The Fifth Circuit has rejected his argument numerous times due to the Supreme Court’s holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In *Almendarez-Torres*, the Supreme Court held that Section 1326(b)(2) is a penalty provision, so the government need not “charge the factor that it mentions, an earlier

conviction, in the indictment.” 523 U.S. at 226-27. Given this holding, the Fifth Circuit has repeatedly held that the government need not allege a defendant’s prior convictions for purposes of applying Section 1326(b) or the timing of these convictions in relation to the defendant’s removal. *See, e.g., United States v. Alanis-Perales*, 263 F.3d 165, 2001 WL 803914, at *1 (5th Cir. 2001) (“In *Almendarez-Torres*, the Supreme Court held that § 1326(b)(2), which includes the timing requirement, is a sentencing factor and not a separate criminal offense.”)¹ As the Fifth Circuit has pointed out, why would “an indictment that, under *Almendarez-Torres*, need not allege the defendant’s prior conviction at all [be] deficient for omitting the details of that prior conviction[?]” *Trivedi*, 2001 WL 360656, at *1. Accordingly, the Fifth Circuit has squarely rejected the defendant’s argument based on *Almendarez-Torres*, which remains good law today.²

And insofar as the defendant suggests that *United States v. Rojas-Luna*, 522 F.3d 502, 506 (5th Cir. 2008), holds otherwise, this suggestion mischaracterizes *Rojas-Luna*’s holding. The defendant appears to suggest that in *Rojas-Luna*, the Fifth Circuit held that “the sequence of the defendant’s prior conviction and removal date” is an element of the offense. (*See* Dkt. 29 at 3.) In *Rojas-Luna*, the factual basis for the defendant’s plea included that he had been deported in 1988 and re-entered the United States in 2006. 522 F.3d at 503. Yet at sentencing, the district court relied upon a 2006 removal to find that

¹ *See also, e.g., United States v. Duron*, 273 F.3d 1100, 2001 WL 1075855, at *1 (5th Cir. 2001); *United States v. Trivedi*, 252 F.3d 434, 2001 WL 360656, at *1 (5th Cir. 2001).

² *See, e.g., United States v. Flores-Gamino*, 2021 WL 5458122, at *1 (5th Cir. Nov. 22, 2021) (“Our court has likewise recognized that *Almendarez-Torres* remains good law.”); *United States v. Moncada-Aguirre*, 2022 WL 4546925, at *1 (5th Cir. Sept. 29, 2022) (granting summary disposition because the defendant’s argument was foreclosed by *Almendarez-Torres*).

the defendant had been removed subsequent to an aggravated felony conviction and thus subject to the penalties of Section 1326(b)(2). *Id.* On appeal, the Fifth Circuit held that the district court erred in relying upon the 2006 removal. *Id.* at 506. In so holding, the court made clear that its “ruling only applies when the Government seeks to use a removal under § 1326(b)(2) that is different than the removal used to obtain the conviction under § 1326(a).” *Id.* at 506 n.2. Indeed, the court expressly clarified that had the defendant “admitted to his 2006 removal,” the district court could have relied on it to enhance the defendant’s sentence under Section 1326(b)(2). *Id.*

Here, application of Section 1326(b)(1) comports with *Rojas-Luna*, because it is premised upon the same removal alleged in the indictment —the removal occurring on or about October 13, 2015. (See Dkt. 1 (alleging removal).) And the PSR sets forth uncontested facts establishing that the defendant’s October 13, 2015, removal was subsequent to a felony conviction for illegal reentry after removal from the United States, a felony for purposes of Section 1326(b)(1). (See PSR ¶¶ 14, 15, 25.) The penalties of Section 1326(b)(1) thus apply to the defendant.

In sum, the Fifth Circuit has repeatedly rejected the defendant’s attempted end-run around the holding of *Almendarez-Torres* to preclude application of Section 1326(b). Accordingly, the basis for the defendant’s objection is foreclosed, and the Court should overrule the objection.

Respectfully submitted,

LEIGHA SIMONTON

UNITED STATES ATTORNEY

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