

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PEDRO PENA-TALAMANTES,

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/ Kevin Joel Page

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Appendix A Opinion of Fifth Circuit, CA No. 23-10325,
United States v. Pena-Talamantes, 2023 WL 6444768
(5th Cir. Oct. 3, 2023)(unpublished).

Appendix B Judgment and Sentence of the United States District Court
for the Northern District of Texas, entered March 24, 2023.
United States v. Pena-Talamantes, No. 4:22-cr-00326-O.

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10325
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
October 3, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PEDRO PENA-TALAMANTES,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CR-326-1

Before DENNIS, ENGELHARDT, and WILSON, *Circuit Judges.*

PER CURIAM:*

Pedro Pena-Talamantes appeals his within-guidelines range sentence for illegal entry following deportation. *See* 8 U.S.C. § 1326(a) & (b)(1). The district court sentenced Pena-Talamantes to 18 months of imprisonment followed by three years of supervised release. Pena-Talamantes contends that his supervised release term violates *Apprendi v. New Jersey*, 530 U.S. 466

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

No. 23-10325

(2000), because it is greater than the one-year term permitted under § 1326(a) and is based on a fact—his prior conviction for a felony—that was neither pleaded in the indictment nor found by a jury beyond a reasonable doubt or admitted by him in pleading guilty. Pena-Talamantes concedes that this issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and that he seeks to preserve it for possible Supreme Court review. The Government moves for summary affirmance, urging that Pena-Talamantes’s argument is foreclosed, or, alternatively, for an extension of time in which to file a merits brief.

The parties are correct that Pena-Talamantes’s argument 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 Government’s motion for summary affirmance is GRANTED. The Government’s alternative motion for an extension of time is DENIED. The judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

v.

PEDRO PENA-TALAMANTES

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:22-CR-00326-O(01)
U.S. Marshal's No.: 41458-280
Levi Thomas, Assistant U.S. Attorney
Michael Lehmann, Attorney for the Defendant

On November 30, 2022 the defendant, PEDRO PENA-TALAMANTES, entered a plea of guilty as to Count One of the Indictment filed on November 1, 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)(1)	Illegal Reentry After Deportation	07/19/2022	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 November 1, 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 March 24, 2023.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed March 24, 2023.

Judgment in a Criminal Case

Defendant: PEDRO PENA-TALAMANTES

Case Number: 4:22-CR-00326-O(1)

IMPRISONMENT

The defendant, PEDRO PENA-TALAMANTES, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **EIGHTEEN (18) MONTHS** as to Count One of the Indictment filed on November 1, 2022. This sentence shall run consecutively to any future sentence which may be imposed in Case Nos. 1729162D, 1739927D, 1739928D, in the 371st Judicial District Court, Tarrant County; and Case No. 1729163, in Tarrant County Criminal Court No. 7, which are not related to the instant offense.

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 **TWO (2) YEARS** as to Count One of the Indictment filed on November 1, 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

Judgment in a Criminal Case

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Defendant: PEDRO PENA-TALAMANTES
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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;

surrender to U.S. Immigration and Customs Enforcement and follow all their instructions and reporting requirements until any deportation proceedings are completed;

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Defendant: PEDRO PENA-TALAMANTES

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take notice that if you are ordered deported from the United States, you must remain outside the United States, unless legally authorized to re-enter. If you re-enter the United States, you must report to the nearest probation office within 72 hours after you return; 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