

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

IN THE SUPREME COURT OF THE UNITED STATES

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ANTONIO OCHOA-LEYVA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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- Appendix A Opinion of Fifth Circuit, CA No. 23-10763,  
*United States v. Antonio Ochoa-Leyva*, No. 23-10763,  
2024 WL 244940 (5th Cir. Jan. 23, 2024) (unpublished).
- Appendix B Judgment and Sentence of the United States District Court  
for the Northern District of Texas, entered July 14, 2023.  
*United States v. Antonio Ochoa-Leyva*, Dist. Court No. 4:23-cr-0039-O.

## APPENDIX A

# United States Court of Appeals for the Fifth Circuit

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No. 23-10763  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

January 23, 2024

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

ANTONIO OCHOA-LEYVA,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:23-CR-39-1

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Before JONES, SOUTHWICK, and HO, *Circuit Judges*.

PER CURIAM:\*

Antonio Ochoa-Leyva appeals the sentence imposed following his guilty plea conviction for illegal reentry after deportation in violation of 8 U.S.C. § 1326. Renewing an argument made before the district court, Ochoa-Leyva challenges the application of the enhanced penalty range in

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\* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

No. 23-10763

§ 1326(b) as 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. As he correctly concedes, this 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). He raises the issue to preserve it for Supreme Court review. The Government has filed an unopposed motion for summary affirmance agreeing that the issue is foreclosed and, in the alternative, requesting an extension of time to file a brief.

Because summary affirmance is appropriate, see *Groendyke Trans., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the Government's motion is GRANTED, and the district court's judgment 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  
Fort Worth Division

UNITED STATES OF AMERICA

**JUDGMENT IN A CRIMINAL CASE**

v. Case Number: 4:23-CR-00039-O(01)  
U.S. Marshal's No.: 44708-510  
ANTONIO OCHOA-LEYVA Levi Thomas, Assistant U.S. Attorney  
Andrea Aldana, Attorney for the Defendant

On March 22, 2023 the defendant, ANTONIO OCHOA-LEYVA, entered a plea of guilty as to Count One of the Indictment filed on February 15, 2023. 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	07/24/2022	One

The defendant is sentenced as provided in pages 2 through 4 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 February 15, 2023.

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 July 14, 2023.

  
\_\_\_\_\_  
REED O'CONNOR  
U.S. DISTRICT JUDGE

Signed July 14, 2023.

Judgment in a Criminal Case  
Defendant: ANTONIO OCHOA-LEYVA  
Case Number: 4:23-CR-00039-O(1)

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### IMPRISONMENT

The defendant, ANTONIO OCHOA-LEYVA, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **SIXTEEN (16) MONTHS** as to Count One of the Indictment filed on February 15, 2023.

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 February 15, 2023.

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.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

- ( 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



Judgment in a Criminal Case  
Defendant: ANTONIO OCHOA-LEYVA  
Case Number: 4:23-CR-00039-O(1)

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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;

Judgment in a Criminal Case  
Defendant: ANTONIO OCHOA-LEYVA  
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take notice that if this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment;

not illegally reenter the United States if deported 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:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

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United States Marshal

BY

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Deputy Marshal