

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ENRIQUE MARTINEZ-FLORES,

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

JASON HAWKINS
Federal Public Defender
Northern District of Texas
TX State Bar No. 00759763
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886 Fax

KEVIN J. PAGE **
Assistant Federal Public Defender
Northern District of Texas
TX State Bar No. 24042691
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886

INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, CA No. 23-10991, *United States v. Martinez-Flores*, 2024 WL 1216557 5th Cir. Mar. 21, 2024)(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered September 22, 2023. *United States v. Martinez-Flores*, Dist. Court 4:23-CR-083-P.

Appendix C Indictment

Appendix D Petitioner's Objections to the Presentence Report

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10991
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
March 21, 2024

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

ENRIQUE MARTINEZ-FLORES,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CR-83-1

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

PER CURIAM:*

Enrique Martinez-Flores appeals his sentence of 36 months of imprisonment and three years of supervised release following his guilty-plea conviction of illegal reentry after deportation in violation of 8 U.S.C. § 1326. He contends that the district court erred in imposing more than two years in prison and more than one year of supervised release without an indictment

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

No. 23-10991

alleging, or any jury finding beyond a reasonable doubt, that he had been convicted of a felony before the removal specified in the indictment.

As Martinez-Flores correctly concedes, this issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See United States v. Garza-De La Cruz*, 16 F.4th 1213, 1213–14 (5th Cir. 2021). He raises the issue to preserve it for Supreme Court review.

The government has moved, without opposition, for summary affirmance, or in the alternative, for an extension of time to file a brief on the merits. Because the issue is foreclosed, summary affirmance is appropriate. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

The government's unopposed motion for summary affirmance is GRANTED, and the judgment of conviction and sentence is AFFIRMED. The government's alternative motion for an extension of time to file a brief is DENIED as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

ENRIQUE MARTINEZ-FLORES

Case Number: 4:23-CR-00083-P(01)

U.S. Marshal's No.: 68975-180

Michael Levi Thomas, Assistant U.S. Attorney

John Stickney, Attorney for the Defendant

On May 24, 2023 the defendant, ENRIQUE MARTINEZ-FLORES, entered a plea of guilty as to Count One of the Indictment filed on March 29, 2023. 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	12/12/2022	One

The defendant is sentenced as provided in pages 2 through 5 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 March 29, 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 September 21, 2023.



MARK T. PITTMAN
U.S. DISTRICT JUDGE

Signed September 22, 2023.

Judgment in a Criminal Case

Page 2 of 3

Defendant: ENRIQUE MARTINEZ-FLORES

Case Number: 4:23-CR-00083-P(1)

IMPRISONMENT

The defendant, ENRIQUE MARTINEZ-FLORES, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Thirty-Six (36) months** as to Count One of the Indictment filed on March 29, 2023. This sentence shall run consecutively to any future sentences which may be imposed in Case Nos: 1759734D and 1759733D filed in 372nd Judicial District Court, Tarrant County; and Case No. 1759731 filed in Tarrant County Criminal Court No. 8, which are not related to the instant offense.

The Court recommends to the Bureau of Prisons that the defendant be incarcerated at a facility where he may receive Vocational Training, specifically in welding.

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 March 29, 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:

- 1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame;
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed;
- 3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer;
- 4) The defendant shall answer truthfully the questions asked by the probation officer;
- 5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of

Judgment in a Criminal Case

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Defendant: ENRIQUE MARTINEZ-FLORES

Case Number: 4:23-CR-00083-P(1)

becoming aware of a change or expected change;

- 6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observed in plain view;
- 7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her employment (such as the position or the job responsibilities), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;
- 8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer;
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours;
- 10) The defendant shall 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) The defendant shall not act or make an 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 the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk; and,
- 13) The defendant shall 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 possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

Judgment in a Criminal Case
Defendant: ENRIQUE MARTINEZ-FLORES
Case Number: 4:23-CR-00083-P(1)

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cooperate in the collection of DNA as directed by the U.S. probation officer;

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;

participate in an approved program for domestic violence;

pay the assessment imposed in accordance with 18 U.S.C. § 3013;

take notice that as a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duty 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;

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.

Judgment in a Criminal Case

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Defendant: ENRIQUE MARTINEZ-FLORES

Case Number: 4:23-CR-00083-P(1)

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

CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
FILED

2023 MAR 29 PM 1:08

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

ENRIQUE MARTINEZ-FLORES (01)

DEPUTY CLERK

mb

No.

4:23-cr-83-P

INDICTMENT

The Grand Jury Charges:

Count One

Illegal Reentry After Deportation
(Violation of 8 U.S.C. § 1326(a) and (b)(1))

On or about December 12, 2022, in the Fort Worth Division of the Northern District of Texas, defendant **Enrique Martinez-Flores**, an alien, was found in the United States having previously been deported and removed from the United States on or about May 3, 2019, and the defendant had not received the consent of the Attorney General of the United States or the Secretary of the Department of Homeland Security, to reapply for admission to the United States.

In violation of 8 U.S.C. § 1326(a) and (b)(1).

A TRUE BILL.

FOREPERSON

LEIGHA SIMONTON
UNITED STATES ATTORNEY

M. Z. Tamm
LEVI THOMAS
Assistant United States Attorney
Texas State Bar No. 24083963
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
Telephone: 817-252-5200
Facsimile: 817-252-5455
Email: Levi.Thomas@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

THE UNITED STATES OF AMERICA

v.

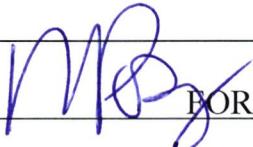
ENRIQUE MARTINEZ-FLORES (01)

INDICTMENT

8 U.S.C. § 1326(a) and (b)(1)
Illegal Reentry After Deportation
Count 1

A true bill rendered

DALLAS


FOREPERSON

Filed in open court this 29 day of March, 2023.

Warrant to be Issued - In State Custody


UNITED STATES MAGISTRATE JUDGE
No Criminal Matter Pending

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA,

§
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§
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§
§

V.

No. 4:23-CR-0083-P-1

ENRIQUE MARTINEZ-FLORES,

§
§

OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

TO THE HONORABLE MARK T. PITTMAN, UNITED STATES DISTRICT JUDGE:

COMES NOW, Enrique Martinez-Flores, defendant, by and through his counsel, John J. Stickney, hereby submits these written objections to the presentence investigation report (“PSR”) dated July 19, 2023, as prepared by U.S. Probation Officer, Kyro King.

CLARIFICATION NO. 1 (regarding paragraph 52):

Mr. Martinez-Flores clarifies that Xenia’s last name is Lares. This is not his biological daughter, but he raised her since she was very young.

CLARIFICATION NO. 2 (regarding paragraph 54):

There is a spelling error regarding Ms. Alvarez’s last name. It is “Bianca” not “Blanca.” And her full last name is “Alvarez-Ruiz.”

OBJECTION NO. 1:

Mr. Martinez-Flores 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. Martinez-Flores’s indictment did not allege that he had such a prior conviction. Mr. Martinez-Flores contends that,

because the indictment did not allege a prior conviction, it charged only an offense under § 1326(a).

Mr. Martinez-Flores 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 he 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. Martinez-Flores 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. Martinez-Flores admit to any prior conviction in his Factual Resume. Because Mr. Martinez-Flores 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

CONCLUSION

WHEREFORE, counsel for Mr. Martinez-Flores respectfully submits these clarifications and this written objection to the PSR.

¹ Mr. Martinez-Flores 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.

Respectfully submitted,

JASON HAWKINS
Federal Public Defender
Northern District of Texas

/s/ John J. Stickney
JOHN J. STICKNEY
Assistant Federal Public Defender
MA Bar No. 687134
819 Taylor Street, Room 9A10
Fort Worth, Texas 76102
817.978.2753
John_J_Stickney@fd.org

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 1st day of August, 2023.

/s/ John J. Stickney
John J. Stickney
Assistant Federal Public Defender