

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL SALGADO,

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. 23-10937,
United States v. Salgado, 2024 WL 1429412 (5th Cir. April 3,
2024)(unpublished).

Appendix B Judgment and Sentence of the United States District Court
for the Northern District of Texas, entered August 31, 2023.
United States v. Salgado, Dist. Court 4:23-CR-082-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. 23-10937
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

April 3, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DANIEL SALGADO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CR-82-1

Before KING, HAYNES, and GRAVES, *Circuit Judges*.

PER CURIAM:*

Daniel Salgado appeals his conviction and sentence for illegal reentry after deportation in violation of 8 U.S.C. § 1326(a) and (b)(1). Salgado argues that treating a prior felony conviction that increases the statutory maximum under § 1326(b) as a sentencing factor, rather than a separate element of the offense, violates the Constitution. While Salgado's 12-month term of

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

No. 23-10937

imprisonment is within the otherwise applicable statutory maximum in § 1326(a), he complains that his three-year term of supervised release exceeds the one-year statutory maximum that applies without a § 1326(b) enhancement. *See* 18 U.S.C. §§ 3559(a), 3583(b). However, Salgado concedes that this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and merely raises this issue to preserve it for further review. The Government therefore has filed an unopposed motion for summary affirmance, or, alternatively, for an extension of time to file a brief.

Because Salgado is correct that his argument is foreclosed, *see United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019), 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
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

DANIEL SALGADO

Case Number: 4:23-CR-00082-P(01)
U.S. Marshal's No.: 02333-379
Michael Levi Thomas, Assistant U.S. Attorney
Michael A. Lehmann, Attorney for the Defendant

On May 10, 2023 the defendant, DANIEL SALGADO, 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 | 11/24/2022 | 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 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 August 31, 2023.



MARK T. PITTMAN
U.S. DISTRICT JUDGE

Signed August 31, 2023.

Judgment in a Criminal Case
Defendant: DANIEL SALGADO
Case Number: 4:23-CR-00082-P(1)

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IMPRISONMENT

The defendant, DANIEL SALGADO, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **TWELVE (12) months** as to Count One of the Indictment filed on March 29, 2023. This sentence shall run consecutively to any future sentence which may be imposed in Case No. 1757433D, before the Criminal District Court No. 2, Tarrant County, Texas, as it is unrelated to the instant offense.

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 Dallas/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 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 becoming aware of a change or expected change;

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23-10937.45

Judgment in a Criminal Case

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Defendant: DANIEL SALGADO

Case Number: 4:23-CR-00082-P(1)

- 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;

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Judgment in a Criminal Case
Defendant: DANIEL SALGADO
Case Number: 4:23-CR-00082-P(1)

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cooperate in the collection of DNA as directed by the U.S. probation officer; and,
not illegally reenter the United States if deported or allowed voluntary departure.

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.

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Judgment in a Criminal Case
Defendant: DANIEL SALGADO
Case Number: 4:23-CR-00082-P(1)

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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

Pet. a-7

23-10937.48

APPENDIX C

ORIGINAL

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

CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
FILED

2023 MAR 29 PM 1:07

UNITED STATES OF AMERICA

DEPUTY CLERK

mb

v.

No.

DANIEL SALGADO (01)

4:23-cr-82-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 November 24, 2022, in the Fort Worth Division of the Northern District of Texas, defendant **Daniel Salgado**, an alien, was found in the United States having previously been deported and removed from the United States on or about October 27, 2017, 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



LEVI THOMAS

Assistant United States Attorney
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

THE UNITED STATES OF AMERICA

v.

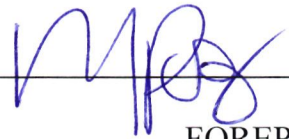
DANIEL SALGADO (01)

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

Pet. a-10

23-10937.9

APPENDIX D

**United States District Court
Northern District of Texas
Fort Worth Division**

United States of America,
Plaintiff,

v.

Daniel Salgado,
Defendant

No. 4:23-CR-082-P

Defendant's Objections to the Presentence Investigation Report

Comes now before the Court the Defendant, Daniel Salgado, with his objections to the presentence report ("PSR").

Objection 1

The Defendant 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. The Defendant's indictment did not allege that he had such a prior conviction. The Defendant contends that, because the indictment did not allege a prior conviction, it charged only an offense under § 1326(a). He further contends that his sentence exceeds the statutory maximum punishment for the § 1326(a) offense.

The Defendant 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 the Defendant 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 the Defendant admit to any prior conviction in his Factual Resume. Because the Defendant 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

¹ The Defendant 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

Objection 2 (¶¶ 81, 82)

The PSR suggests there are grounds that warrant an upward departure or variance. Citing U.S.S.G. § 4A1.3(a)—that Defendant’s criminal history category substantially underrepresents the likelihood that he will commit other crimes—the PSR references prior unscored convictions and administrative immigration history as reasons for an above-Guideline sentence. Under the Guideline provisions, certain conduct has been properly scored and certain conduct has appropriately received no criminal history points. Here, an upward departure or variance is not warranted when the Guidelines have been properly applied. Balanced against the many compelling 18 U.S.C. § 3553(a) mitigating factors in Mr. Salgado’s life, again, an upward departure or variance is not warranted.

Respectfully submitted this the 18th day of July, 2023.

/s/ Michael A. Lehmann
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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.

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Defendant’s Objections to the Presentence Report

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23-10937.207

Certificate of Service

I, Michael A. Lehmann, hereby certify that on the 18th day of July, 2023 a copy of the foregoing motion was delivered via ECF to the United States Attorney's Office, attention Levi Thomas.

/s/ Michael A. Lehmann

MICHAEL A. LEHMANN

Assistant Federal Public Defender

Pet. a-15

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