

United States Court of Appeals
for the Fifth Circuit

No. 22-50169
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

November 1, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

NORMANDO ELIGIO ESQUIVEL-ONTIVEROS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:21-CR-898-1

Before DAVIS, DUNCAN, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Normando Eligio Esquivel-Ontiveros appeals his guilty plea conviction and sentence for illegal reentry after deportation under 8 U.S.C. § 1326(a) and (b)(2). On appeal, he argues that the recidivism enhancement in § 1326(b) is unconstitutional because it permits a sentence above the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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otherwise-applicable statutory maximum established by § 1326(a), based on facts that are neither alleged in the indictment nor found by a jury beyond a reasonable doubt. Esquivel-Ontiveros acknowledges that this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he seeks to preserve it for possible Supreme Court review. Accordingly, he has filed an unopposed motion for summary disposition.

We have held that subsequent Supreme Court decisions such as *Alleyne v. United States*, 570 U.S. 99 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not overrule *Almendarez-Torres*. See *United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019). Esquivel-Ontiveros is correct that his argument is foreclosed. Because his position “is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case,” summary affirmance is proper. *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Accordingly, Esquivel-Ontiveros’s motion for summary disposition is GRANTED, and the judgment of the district court is AFFIRMED.