

United States Court of Appeals
for the Fifth Circuit

No. 22-50716
CONSOLIDATED WITH
No. 22-50719
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

February 27, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JUAN OSWALDO RUBALCABA-CAPUCHINO,

Defendant—Appellant.

Appeals from the United States District Court
for the Western District of Texas
USDC Nos. 4:22-CR-145-1, 4:19-CR-198-1

Before JONES, HAYNES and OLDHAM, *Circuit Judges.*

PER CURIAM:*

Juan Oswaldo Rubalcaba-Capuchino appeals his conviction and sentence for illegal reentry after removal from the United States, in violation

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

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of 8 U.S.C. § 1326(a) & (b). He also appeals the revocation of his supervised release and the sentence imposed upon revocation.

Appellant does not address either the validity of the revocation or the revocation sentence. He has therefore abandoned any challenge to those issues on appeal. *See Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993).

With respect to his illegal reentry conviction and sentence, he argues that the application of Section 1326(b)'s enhanced penalty provision is unconstitutional because it permits a defendant to be sentenced above the statutory maximum of Section 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. He has filed an unopposed motion for summary disposition and a letter brief conceding that the 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), and explaining that he raises the issue to preserve it for Supreme Court review.

Because summary disposition is appropriate, *see Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the motion is GRANTED, and the district court's judgments are AFFIRMED.