

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**August 22, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FILIBERTO PEREZ-REYES,

Defendant - Appellant.

No. 22-2145  
(D.C. No. 2:22-CR-00259-KG-1)  
(D. N.M.)

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**ORDER AND JUDGMENT\***

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Before **HARTZ, BALDOCK, and ROSSMAN**, Circuit Judges.\*\*

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Subsection (a) of 8 U.S.C. § 1326 forbids a previously deported “alien” from returning to the United States without special permission. Subsection (a) authorizes a prison term of “not more than 2 years.” Subsection (b)(2) of the same section authorizes a prison term of “not more than 20 years” if the prior deportation “was subsequent to a conviction for commission of an aggravated felony.” In this case, Defendant Filiberto Perez-Reyes pleaded guilty to violating §1326(a). Finding by a preponderance of the

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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

\*\* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties’ request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

evidence that Defendant had a prior aggravated felony conviction, the district court sentenced Defendant to 37 months imprisonment pursuant to subsection (b). Defendant appeals. Our jurisdiction arises under 18 U.S.C. §3742. On appeal, Plaintiff poses the following question in challenge to his sentence: “Where the [D]efendant pleaded guilty to one count in an information of illegal reentry *without any allegation that the reentry occurred after a felony conviction*, did the district court err in sentencing the [D]efendant to more than the statutory maximum of 2 years’ imprisonment?” (emphasis added). The straight answer to Defendant’s question is “no” the district court did not err. In *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998), the Supreme Court concluded that subsection (b) of § 1326 “is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government to charge the factor that [subsection (b)] mentions, an earlier conviction, in the indictment.” *See also United States v. Moore*, 401 F.3d 1220, 1224 (10th Cir. 2005) (holding that *Almendarez-Torres*’ prior-conviction exception to the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) “remains good law”). Accordingly, the judgment and sentence of the district court are

AFFIRMED.

Entered for the Court

Bobby R. Baldock  
United States Circuit Judge