

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

May 18, 2020

Lyle W. Cayce
Clerk

No. 19-50675
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARTIN DE VICENTE-OLVERA, also known as Martin Devicente-Olvera,
also known as Martin De Vicente, also known as Martin Olvera,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:19-CR-677-1

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Martin De Vicente-Olvera appeals the 33-month sentence imposed following his guilty plea conviction for being found unlawfully present in the United States after previous deportation. He argues that his sentence was imposed under an unconstitutional statute, 8 U.S.C. § 1326(b). Specifically, he contends that in order to trigger a sentencing enhancement under § 1326(b),

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

No. 19-50675

the fact of a prior conviction must be alleged in the indictment and proven to a jury; therefore, he asserts that § 1326(b) is unconstitutional. He correctly concedes that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but raises the issue to preserve for further possible review. See *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Pineda-Arrellano*, 492 F.3d 624, 625-26 (5th Cir. 2007).

The Government has filed an unopposed motion for summary affirmance and, alternatively, seeks an extension of time to file its brief. Because the issue is foreclosed, summary affirmance is appropriate. See *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Accordingly, 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 judgment of the district court is AFFIRMED.