

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

September 30, 2020

Lyle W. Cayce  
Clerk

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No. 20-50005  
Summary Calendar

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UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

GABRIEL PONCE-RUIZ,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 3:19-CR-2450-1

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Before HIGGINBOTHAM, JONES, and COSTA, *Circuit Judges.*

PER CURIAM:\*

Gabriel Ponce-Ruiz appeals his conviction for illegal reentry into the United States. He argues that the enhanced sentencing range in § 1326(b) is unconstitutional because a prior conviction is an element of the offense that must be alleged in the indictment or found by a jury beyond a reasonable

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\* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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. 20-50005

doubt. He concedes that the issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he wishes to preserve it for further review. The Government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed by *Almendarez-Torres*. Alternately, the Government requests an extension of time to file its brief.

In *Almendarez-Torres*, 523 U.S. at 226-27, the Supreme Court held that a prior conviction used to enhance a sentence under § 1326(b) is a sentencing factor, not an element of the offense. Neither *Apprendi v. New Jersey*, 530 U.S. 466, 476, 490 (2000), nor subsequent Supreme Court cases overruled *Almendarez-Torres*, which remains binding precedent. See *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Garza-Lopez*, 410 F.3d 268, 276 (5th Cir. 2005). Accordingly, Ponce-Ruiz's sole appellate argument is foreclosed by *Almendarez-Torres*.

Because the Government's position "is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," *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 judgment of the district court is AFFIRMED.