

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

March 24, 2022

Lyle W. Cayce  
Clerk

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No. 21-10778  
Summary Calendar

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UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

FIDEL TORRES-VILLANUEVA,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 5:21-CR-6-1

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Before KING, COSTA, and HO, *Circuit Judges.*

PER CURIAM:\*

Fidel Torres-Villanueva appeals his conviction and sentence for illegal reentry after having been previously removed, pursuant to 8 U.S.C. § 1326(a) and (b)(1). For the first time on appeal, he argues that it is violative of the Constitution to treat a prior conviction that increases the statutory maximum

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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under § 1326(b) as a sentencing factor, rather than as an element of the offense. He correctly concedes that the argument 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 moved without opposition for summary affirmance or, alternatively, for an extension of time to file its brief.

As the Government asserts and as *Torres-Villanueva* concedes, the sole issue raised on appeal is foreclosed by *Almendarez-Torres*. See *United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019); *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014). 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), summary affirmance is proper.

Accordingly, the Government’s unopposed motion for summary affirmance is GRANTED. The Government’s alternative motion for an extension of time to file an appellate brief is DENIED. The district court’s judgment is AFFIRMED.