

# United States Court of Appeals for the Fifth Circuit

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No. 23-10257  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

September 12, 2023

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

UBALDO DE LA CRUZ LEYVA,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:20-CR-405-1

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Before JOLLY, HIGGINSON, and DUNCAN, *Circuit Judges.*

PER CURIAM:\*

Ubaldo De La Cruz Leyva appeals his conviction and 50-month sentence for reentry after deportation under 8 U.S.C. § 1326(a) and (b)(1). De La Cruz Leyva argues that using a prior felony conviction never alleged in the indictment to impose a statutorily enhanced sentence violates the Sixth Amendment. De La Cruz Leyva correctly concedes that his argument is

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\* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

No. 23-10257

foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he wishes to preserve it for further review. See *United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019). The Government has moved without opposition for summary affirmance or, alternatively, for an extension of time to file its brief.

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