

United States Court of Appeals for the Fifth Circuit

No. 21-50286
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

November 19, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE IVAN LICONA-RODRIGUEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:20-CR-417-1

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

PER CURIAM:*

Jose Ivan Licona-Rodriguez appeals the 24-month within-guidelines sentence imposed following his conviction for illegal reentry into the United States after deportation, in violation of 8 U.S.C. § 1326(a), (b)(2). As his sole appellate issue, Licona-Rodriguez argues that the sentencing enhancement

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.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) is unconstitutional because the statute provides for a sentence above the otherwise applicable statutory maximum based on facts that are not alleged in the indictment and not admitted or found beyond a reasonable doubt. Although Licona-Rodriguez concedes that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), 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 Licona-Rodriguez concedes, the sole issue raised on appeal is foreclosed by *Almendarez-Torres*. See *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 appropriate.

Accordingly, the 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 its brief is DENIED as unnecessary.