

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 3, 2021

Lyle W. Cayce
Clerk

No. 21-50488
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BONIFACIO EDUARDO TRUJILLO-GUTIERREZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
No. 4:20-CR-587-1

Before SMITH, STEWART, and GRAVES, *Circuit Judges.*

PER CURIAM:*

Bonifacio Trujillo-Gutierrez appeals his sentence for illegal reentry after removal in violation of 8 U.S.C. § 1326(a) and (b)(1). For the first time on appeal, Trujillo-Gutierrez contends that the sentence is unconstitutional because his indictment alleged only those facts sufficient for a conviction

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.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(a) and did not include any allegations of a prior conviction necessary for the § 1326(b)(1) enhancement.

Trujillo-Gutierrez concedes that this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998), but seeks to preserve the issue for further review. The government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed, and in the alternative, a motion for an extension of time to file a brief.

As the government says and Trujillo-Gutierrez 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); *United States v. Pineda-Arrellano*, 492 F.3d 624, 625–26 (5th Cir. 2007). 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 motion for summary affirmance is GRANTED, and the judgment is AFFIRMED. The government’s alternative motion for an extension of time to file a brief is DENIED.