

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

June 17, 2022

Lyle W. Cayce
Clerk

No. 21-50850
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RAMIRO MONTOYA-DE LA CRUZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:21-CR-336-1

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

PER CURIAM:*

Ramiro Montoya-De La Cruz appeals his conviction and sentence under 8 U.S.C. § 1326(a) and (b)(1). For the first time on appeal, he contends that it violates the Constitution to treat a prior conviction that increases the statutory maximum under § 1326(b) as a sentencing factor,

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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rather than as an element of the offense. He correctly concedes that his argument is 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. 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 only issue is foreclosed and “there can be no substantial question as to the outcome of the case,” the unopposed motion for summary disposition filed by Montoya-De La Cruz is GRANTED. *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). The judgment of the district court is AFFIRMED.