

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 4, 2022

Lyle W. Cayce
Clerk

No. 22-10037
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

NOHE DOMINGUEZ-MORALES,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CR-220-1

Before WIENER, ELROD, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Nohe Dominguez-Morales appeals his conviction and sentence for illegal reentry after deportation under 8 U.S.C. § 1326(a) and (b)(1). He argues that treating a prior felony conviction that increases the statutory

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 22-10037

maximum under § 1326(b) as a sentencing factor, rather than a separate element of the offense, violates the Constitution.

Dominguez-Morales 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. 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 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.