

United States Court of Appeals
for the Fifth Circuit

No. 20-50489
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

October 23, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANICETO DE LA CRUZ-TIBURCIO,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:19-CR-3091-1

Before JOLLY, ELROD, AND GRAVES, CIRCUIT JUDGES.

PER CURIAM:*

Aniceto De La Cruz-Tiburcio appeals his sentence of 33 months of imprisonment and three years of supervised release, which the district court imposed following his guilty plea conviction for illegal reentry. He asserts that the enhancement of his sentence based on his prior conviction pursuant

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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to 8 U.S.C. § 1326(b)(1), which increased the statutory maximum term of imprisonment, is unconstitutional because his prior conviction is treated as a sentencing factor rather than an element of the offense that must be alleged in the indictment and found by a jury beyond a reasonable doubt. He concedes that the issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he seeks to preserve the issue for further review. The Government moves for summary affirmance, asserting that De La Cruz-Tiburcio's argument is foreclosed.

The parties are correct that De La Cruz-Tiburcio's assertion is foreclosed by *Almendarez-Torres*. See *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Rojas-Luna*, 522 F.3d 502, 505-06 (5th Cir. 2008). Accordingly, the Government's motion for summary affirmance is GRANTED, see *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the Government's alternative motion for an extension of time to file a brief is DENIED as unnecessary, and the judgment of the district court is AFFIRMED.