

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 16-11795  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

October 31, 2017

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MIGUEL ANGEL GUTIERREZ,

Defendant-Appellant

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:16-CR-212-1

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Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:\*

Miguel Angel Gutierrez pleaded guilty to illegally reentering the United States after he had been removed and received a 46-month prison sentence to be followed by three years of supervised release. On appeal, Gutierrez argues that the district court violated his right to due process by imposing a prison term greater than the two-year maximum sentence authorized under 8 U.S.C.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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§ 1326(a) because his indictment did not allege that he had a prior conviction permitting a higher sentence under § 1326(b).

The Government has filed an unopposed motion for summary affirmance, asserting that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), forecloses Gutierrez's argument. Gutierrez concedes that his argument is foreclosed and explains that he raises it only to preserve it for further review; thus, summary affirmance is appropriate. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Accordingly, the Government's motion for summary affirmance is GRANTED. The judgment is AFFIRMED. The Government's alternative motion for an extension of time to file a brief is DENIED.