

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

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No. 19-10994  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

April 29, 2020

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

OMERO NINO-GUERRERO,

Defendant-Appellant

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 5:19-CR-41-1

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Before CLEMENT, ELROD, and OLDHAM, Circuit Judges.

PER CURIAM:\*

Omero Nino-Guerrero appeals the 21-month term of imprisonment and three-year term of supervised release imposed following his guilty plea conviction for illegal reentry after deportation. *See* 8 U.S.C. § 1326(a), (b)(1). According to Nino-Guerrero, § 1326(b)'s enhanced penalty provisions for prior convictions are unconstitutional to the extent prior convictions are treated as sentencing factors rather than as elements of the offense that must be alleged

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

No. 19-10994

in the indictment and proved to a jury beyond a reasonable doubt. Nino-Guerrero correctly concedes that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he raises the issue to preserve it for further possible 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).

The Government has filed an unopposed motion for summary affirmance and, alternatively, seeks an extension of time to file its brief. Because the issue is foreclosed, 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 Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.