

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

United States Court of Appeals  
Fifth Circuit

**FILED**

July 27, 2020

Lyle W. Cayce  
Clerk

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No. 20-50176  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GERARDO FLORES-RIOJAS,

Defendant-Appellant

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 5:19-CR-454-1

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Before CLEMENT, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:\*

Gerardo Flores-Riojas appeals the 46-month sentence imposed following his guilty plea conviction for being found unlawfully in the United States following a previous removal. He argues that the recidivism enhancement under 8 U.S.C. § 1326(b) is unconstitutional because it allows a sentence above the otherwise applicable statutory maximum based on facts that are neither alleged in the indictment nor found by a jury beyond a reasonable doubt.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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.