

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50269
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON ALBERTO PADILLA-GALLARDO,
a.k.a. Danny Sabalas

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. A-95-CR-190
- - - - -

October 24, 1996

Before POLITZ, Chief Judge, and JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

Ramon Alberto Padilla-Gallardo appeals the sentence imposed subsequent to his plea of guilty to reentry into the United States after deportation. Padilla-Gallardo first argues that the district court erred in using the statutory maximum of 18 U.S.C. § 1326(b)(2) because the indictment did not allege that his deportation had been subsequent to the commission of an

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

aggravated felony. Title 18 U.S.C. § 1326(b) is a sentence enhancement provision rather than an independent criminal offense; thus, it need not be alleged in the indictment. United States v. Vasquez-Olvera, 999 F.2d 943, 945 (5th Cir. 1993), cert denied, 510 U.S. 1076 (1994). In his reply brief, Padilla-Gallardo invites the court to reconsider its decision in Vasquez-Olvera en banc. We decline to consider the request as it is untimely under Rule 35 of the Federal Rules of Civil Procedure and does not comply with this court's local rules. See 5th Cir. R. 35.2.

Padilla-Gallardo next argues that the court erred in denying him a two-level reduction for acceptance of responsibility. It was not clear error for the district court to determine that Padilla-Gallardo's statements to an INS agent and other behavior were inconsistent with his acceptance of responsibility. U.S.S.G. § 3E1.1, comment. (n.3).

AFFIRMED.