

United States Court of Appeals for the Fifth Circuit

No. 24-50169
CONSOLIDATED WITH
No. 24-50179

United States Court of Appeals
Fifth Circuit

FILED

November 26, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GILBERTO AGUILAR-GUTIERREZ,

Defendant—Appellant.

Appeals from the United States District Court
for the Western District of Texas
USDC Nos. 4:22-CR-270-1,
4:23-CR-468-1

Before GRAVES, WILLETT, and WILSON, *Circuit Judges*.

PER CURIAM:*

Gilberto Aguilar-Gutierrez appeals his conviction and sentence under 8 U.S.C. § 1326(a) and (b)(2). For the first time on appeal, he contends that § 1326(b)(2) violates the Constitution by treating a prior conviction that increases the statutory maximum under the statute as a sentencing factor,

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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rather than as an element of the offense. He correctly concedes that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he wishes to preserve it for further review, *see United States v. Pervis*, 937 F.3d 546, 553–54 (5th Cir. 2019).

Because the only issue is foreclosed and “there can be no substantial question as to the outcome of the case,” the unopposed motion for summary disposition is GRANTED. *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). The judgment of the district court is AFFIRMED.