

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 23, 2021

Lyle W. Cayce
Clerk

No. 21-50551
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

INOCENCIO GAMBOA-RIVERA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:20-CR-589-1

Before SMITH, STEWART, and GRAVES, *Circuit Judges.*

PER CURIAM:*

Inocencio Gamboa-Rivera appeals his sentence of 27 months of imprisonment and three years of supervised release, which the district court imposed following his guilty plea conviction for entry after deportation in violation of 8 U.S.C. § 1326. He contends that the enhancement of his

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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sentence under § 1326(b)(2) based on his prior conviction for an aggravated felony increased the statutory maximum terms of imprisonment and supervised release. He maintains that the enhancement is unconstitutional because his prior conviction is treated as a sentencing factor rather than an element of the offense that must be alleged in the indictment and found by a jury beyond a reasonable doubt. Gamboa-Rivera concedes that the issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he seeks to preserve the issue for further review. The Government moves for summary affirmance, asserting that this issue is foreclosed.

The parties are correct that Gamboa-Rivera's assertion is foreclosed by *Almendarez-Torres*. 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). Accordingly, the Government's motion for summary affirmance is GRANTED, see *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969); its alternative motion for an extension of time to file an appellate brief is DENIED; and the judgment of the district court is AFFIRMED.