

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 8, 2021

Lyle W. Cayce
Clerk

No. 21-50567
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GUSTAVO GUILLERMO GUTIERREZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:20-CR-440-1

Before KING, COSTA, and HO, *Circuit Judges.*

PER CURIAM:*

Appealing the judgment in a criminal case, Gustavo Guillermo Gutierrez challenges his sentence of 77 months of imprisonment and three years of supervised release for illegal reentry. As the sole issue on appeal, he argues that the enhancement of his sentence pursuant to 8 U.S.C.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 21-50567

§ 1326(b)(1) is unconstitutional because the enhancement is based on facts neither alleged in his indictment nor proved to a jury beyond a reasonable doubt. The Government has filed an unopposed motion for summary affirmance arguing that the issue is foreclosed and, in the alternative, a motion for an extension of time to file a brief.

As the Government argues, and Gutierrez concedes, this issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998). See *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Rojas-Luna*, 522 F.3d 502, 505-06 (5th Cir. 2008). Thus, 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 AS MOOT, and the judgment of the district court is AFFIRMED.