

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

March 17, 2022

Lyle W. Cayce
Clerk

No. 21-50969
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LARRY JOSE TORREZ-GUTIERREZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:21-CR-407-1

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

PER CURIAM:*

Larry Jose Torrez-Gutierrez appeals his conviction and sentence for reentry after deportation under 8 U.S.C. § 1326(a) and (b)(1). For the first time on appeal, he contends that § 1326(b) is unconstitutional because it permits a defendant to be sentenced above the statutory maximum of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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§ 1326(a) based on the fact of a prior conviction that was not alleged in the indictment or found by a jury beyond a reasonable doubt. Torrez-Gutierrez correctly concedes that the argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). See *United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019); *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014). However, he wishes to preserve the issue for further review and has filed an unopposed motion for summary disposition. Because summary disposition is appropriate, see *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), Torrez-Gutierrez's motion is GRANTED, and the district court's judgment is AFFIRMED.