

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 17, 2021

Lyle W. Cayce
Clerk

No. 21-50353

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GERARDO HERNANDEZ-GUZMAN,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:20-CR-186-1

Before JOLLY, WILLET, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Gerardo Hernandez-Guzman pleaded guilty to illegal reentry into the United States. He appeals his sentence, arguing that the enhanced sentencing range in 8 U.S.C. § 1326(b) is unconstitutional because a prior conviction is an element of the offense that must be alleged in the indictment and found by a jury beyond a reasonable doubt. He concedes, though, that

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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this issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Still, he wishes to preserve it for further review. The Government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed by *Almendarez-Torres*. Alternately, the Government requests an extension of time to file its brief.

We agree that *Almendarez-Torres* forecloses Hernandez-Guzman's sole appellate argument. See 523 U.S. at 226–27; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 489–90 (2000); *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Garza-Lopez*, 410 F.3d 268, 275–76 (5th Cir. 2005). Because the Government's position "is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), 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.