

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-11469
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
August 10, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FRANCISCO GUTIERREZ-LOPEZ, also known as Jesus Aguilar, also known as Jorge Alberto Gutierrez-Rodriguez, also known as Jesus Fuentes, also known as Jorge Lopez-Perez, also known as Juan Jose Espinoza, also known as Noel Torres,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-11-1

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Francisco Gutierrez-Lopez challenges the 35-month sentence he received following his guilty plea conviction for illegal reentry. The Government moves for summary affirmance or, alternatively, for an extension of time to file an appellate brief. Summary affirmance is proper where, among other instances,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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“the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case.” *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Gutierrez first raises an argument that is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 228, 235 (1998), which held that convictions used to enhance a sentence under 8 U.S.C. § 1326(b)(2) need not be set forth in the indictment. He also raises an argument that is foreclosed by *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). In *Gonzalez-Longoria*, we held that 18 U.S.C. § 16(b), which defines a crime of violence when incorporated by reference into U.S.S.G. § 2L1.2(b)(1)(C) (2014), is not unconstitutionally vague on its face in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Gonzalez-Longoria*, 831 F.3d at 672.

Accordingly, the motion for summary affirmance is GRANTED, and the district court’s judgment is AFFIRMED. *Groendyke Transport, Inc.*, 406 F.2d at 1162. The Government’s alternative motion for an extension of time to file a brief is DENIED.