

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

No. 15-41209
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
October 28, 2016

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FIDEL FLORES,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:15-CR-439-1

Before KING, DENNIS, and COSTA, Circuit Judges.

PER CURIAM:*

Fidel Flores was convicted of illegal reentry after deportation. On appeal, Flores contends that the district court erred by entering a judgment reflecting that he was convicted under 8 U.S.C. § 1326(b)(2) and by applying an eight-level enhancement under U.S.S.G. § 2L1.2(b)(1)(C). He argues that his prior Texas conviction for the offense of evading arrest with a motor vehicle is not a crime of violence because the definition of crime of violence in 18 U.S.C.

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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§ 16(b), as incorporated by reference into the definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)(F), is unconstitutionally vague on its face in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). He further contends that we cannot apply § 16(b) in this case without violating due process.

The Government has moved unopposed for summary affirmance in lieu of filing a brief. Summary affirmance is proper where, among other instances, “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.” *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 781 (5th Cir. 2006) (internal quotation marks and citation omitted). The summary procedure is generally reserved for cases in which the parties concede that the issues are foreclosed by circuit precedent. *United States v. Lopez*, 461 F. App’x 372, 374 n.6 (5th Cir. 2012); *see also United States v. Houston*, 625 F.3d 871, 873 n.2 (5th Cir. 2010) (noting the denial of summary affirmance where an issue was not foreclosed).¹

Our recent decision in *United States v. Gonzalez-Longoria*, __ F.3d __, No. 15-40041, 2016 WL 4169127, at *2-*6 (5th Cir. Aug. 5, 2016) (en banc), forecloses relief on Flores’s argument that in light of *Johnson*, § 16(b) is unconstitutionally vague on its face.² However, Flores also raises an as-applied challenge. In *Gonzalez-Longoria*, we addressed an as-applied challenge to the appellant’s prior conviction of the Texas offense of Assault

¹ See *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006) (unpublished opinions issued after January 1, 1996 are not controlling precedent but may be considered persuasive authority); 5th Cir. R. 47.5.

² The recent grant of certiorari by the United States Supreme Court on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, __ S. Ct. __, No. 15-1498, 2016 WL 3232911 (Sept. 29, 2016), does not alter the analysis. This court is bound by its own precedent unless and until that precedent is altered by a decision of the Supreme Court. See *Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

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Causing Bodily Injury with a Prior Conviction of Family Violence and concluded that the standard provided by § 16(b) could be “straightforwardly applied” to the offense. 2016 WL 4169127, at *5. Our opinion in *Gonzalez-Longoria* does not foreclose relief on Flores’s as-applied challenge regarding his offense of evading arrest with a motor vehicle. Accordingly, summary affirmance is not appropriate in this case. *See United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d at 781.

Nevertheless, the standard of § 16(b) can be straightforwardly applied to Flores’s prior conviction, and § 16(b) is not unconstitutionally vague as applied to him. *See* 2016 WL 4169127, at *5; *see also United States v. Sanchez-Ledezma*, 630 F.3d 447, 450-51 (5th Cir. 2011). Thus, there was no error in the district court’s determination that Flores’s prior conviction for evading arrest with a motor vehicle is an aggravated felony for purposes of § 2L1.2(b)(1)(C) and § 1326(b)(2). In light of our conclusion, further briefing is not necessary.

The motions for summary affirmance and for an extension of time to file a brief are DENIED. The judgment of the district court is AFFIRMED.