

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

No. 16-11673
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 21, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARCEL ALEJANDRO RIVERA,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CR-160-1

Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Marcel Alejandro Rivera pleaded guilty to one count of possession of a controlled substance with the intent to distribute in violation of 21 U.S.C. § 841. The district court sentenced Rivera to 240 months of imprisonment to be followed by 3 years of supervised release. The Government moves for summary affirmance or, alternatively, for an extension of time to file a brief on the merits. Rivera does not oppose summary affirmance. Summary affirmance

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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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.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

In his brief, Rivera argues that the district court plainly erred under the Fifth and Sixth Amendments by imposing a sentence based on an amount of methamphetamine that was not supported by proof beyond a reasonable doubt. This argument is foreclosed by *United States v. Tuma*, 738 F.3d 681 (5th Cir. 2013), and *United States v. Bazemore*, 839 F.3d 379, 392-93 (5th Cir. 2016). He also argues that the sentence was substantively unreasonable because the applicable advisory guideline was not formulated using empirical evidence. This issue is foreclosed by *United States v. Duarte*, 569 F.3d 528, 530-31 (5th Cir. 2009), and *United States v. Mondragon-Santiago*, 564 F.3d 357, 366-67 (5th Cir. 2009).

The Government’s motion for summary affirmance is GRANTED, and the judgment is AFFIRMED. The alternative motion for an extension of time to file a brief on the merits is DENIED as unnecessary.