

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

No. 16-51436
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
September 6, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JUAN LUIS RECENDIS-HERRERA,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:16-CR-118-1

Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Juan Luis Recendis-Herrera pled guilty to illegal reentry into the United States and was sentenced within the advisory guidelines range to 60 months of imprisonment and three years of supervised release. In his only argument on appeal, he asserts that because the indictment did not allege that he had a prior felony conviction, his sentence exceeded the two-year statutory maximum sentence set forth in 8 U.S.C. § 1326(a) and violated his due process rights. He

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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concedes that his argument is foreclosed by Supreme Court precedent but states that he seeks to preserve it for possible future review. *See Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998). Recent decisions indicate that the Supreme Court may reconsider the issue. *See Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013).

The Government has filed a motion for summary affirmance, or alternatively, for an extension of time to file a brief. Summary affirmance is proper when, 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, 1162-63 (5th Cir. 1969).

As Recendis-Herrera concedes, his due process argument is foreclosed by *Almendarez-Torres*. The Supreme Court’s subsequent decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne* did not overrule *Almendarez-Torres*. *See United States v. Juarez-Duarte*, 513 F.3d 204, 211 (5th Cir. 2008); *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014). Accordingly, the Government’s motion for summary affirmance is GRANTED, and the judgment is AFFIRMED. The Government’s alternative motion for an extension of time to file a brief is DENIED.