

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

No. 17-50711
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

February 15, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RAMIRO ORTIZ-MEMBRENO,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:16-CR-536-1

Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Ramiro Ortiz-Membreno appeals the 37-month sentence imposed after his conviction for illegal reentry after deportation. Ortiz-Membreno contends that his indictment did not allege that he had a prior conviction and, therefore, his sentence pursuant to 8 U.S.C. § 1326(b) violated due process by exceeding the two-year statutory maximum provided by Section 1326(a). He acknowledges that his argument is foreclosed by *Almendarez-Torres v. United*

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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States, 523 U.S. 224 (1998), but he seeks to preserve his claim for possible future review.

The Government has moved for summary affirmance or, alternatively, an extension of time to file a brief. Summary affirmance is appropriate 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 Ortiz-Membreno concedes, his sole claim is foreclosed by *Almendarez-Torres*. The Supreme Court’s subsequent decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), 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). Thus, 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.