

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-50798  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MONTGOMERY ALLEN WILLIAMSON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. EP-00-CR-492-1-DB  
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March 12, 2001

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Appellant Williamson plead guilty to possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and importation of marijuana, in violation of 21 U.S.C. § 952(a). Because Williamson had a prior felony drug conviction the statutory maximum sentences for the possession and importation offenses was 10 years' imprisonment. See 21 U.S.C. §§ 841(b)(1)(D), 960(b)(4) and 962. Absent the felony drug conviction, offenses involving less than 50 kilograms of

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

marijuana carry a statutory maximum sentence of 5 years' imprisonment. See 21 U.S.C. §§ 841(b)(1)(D), 960(b)(4). The prescribed range under the Federal Sentencing Guidelines was 77-96 months' imprisonment. The district court sentenced Williamson to two concurrent terms of 87 months' imprisonment.

Williamson's indictment did not allege that he had a prior felony drug conviction. Williamson contends that a prior felony drug conviction, because it raises the statutory maximum sentence, is an element of the enhanced drug offenses. See *Apprendi v. United States*, 120 S.Ct. 2348, 2359 n.10 (2000) ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense."). Therefore, his 87-month sentences, which exceed the five-year maximum for the offenses alleged in the indictment, violate due process. Williamson acknowledges that his argument is foreclosed by the Supreme Court's ruling in *Almendarez-Torres v. United States* that the fact of a prior conviction is not an element of the offense, even if it increases the statutory maximum. 523 U.S. 224 (1998). Williamson brings this claim because of the doubt cast on *Almendarez-Torres'* holding in *Apprendi*. See *Apprendi*, 120 S.Ct. at 2362 (finding it "arguable that *Almendarez-Torres* was incorrectly decided").

Despite this uncertainty, Williamson also concedes that our controlling caselaw dictates an affirmance of his sentence. See

*United States v. Doggett*, 230 F.3d 160, 166 (5<sup>th</sup> Cir. 2000) (*Almendarez-Torres* stills controls prior conviction enhancements under 21 U.S.C. § 841); *United States v. Dabeit*, 231 F.2d 979, 984 (5<sup>th</sup> Cir. 2000)(affirming that *Almendarez-Torres* is still controlling law), *cert. denied*, 2001 U.S. Lexis 1889 (U.S. Feb. 26, 2001) (No. 00-8299). Williamson brings this appeal merely to preserve the issue for possible Supreme Court review. Accordingly, the Government's motion for summary affirmance is granted and the judgment of the district court is AFFIRMED.<sup>1</sup>

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<sup>1</sup> Even if *Almendarez-Torres* is overturned, it is questionable whether Williamson would receive any practical relief. His applicable sentencing guideline range will remain 77-96 months' imprisonment. See *Doggett*, 230 F.3d at 166 n.3 ("*Apprendi* does not affect [judicial determinations] in formulating the appropriate sentencing range under the Guidelines"). Within that prescribed range, the district court determined the appropriate punishment to be 87 months' imprisonment. While the statutory maximum on each count will be lowered from 10 years' to 5 years' imprisonment, §5G1.2 of the Guidelines, governing sentencing on multiple counts of conviction, would require the sentences to be run consecutively to the extent necessary to achieve the "total punishment" of 87 months' imprisonment.