

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

No. 16-51310
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 1, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RAUL RODRIGUEZ-CERVANTES,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:15-CR-1295-1

Before JOLLY, SMITH, and GRAVES, Circuit Judges.

PER CURIAM:*

Raul Rodriguez-Cervantes pleaded guilty to being found in the United States after having been removed and was sentenced to 41 months in prison, to be followed by a three-year term of supervised release. Rodriguez-Cervantes argues on appeal that his indictment charged a violation of only 8 U.S.C. § 1326(a) and failed to invoke the sentencing enhancement in § 1326(b)(2). 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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contends that his sentence exceeds the statutory maximum penalty for a conviction under § 1326(a) and violates his due process rights.

The Government has filed an unopposed motion for summary affirmance, because Rodriguez-Cervantes's argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). As Rodriguez-Cervantes concedes that his argument is foreclosed and is raised only to preserve it for further review, summary judgment is appropriate. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Accordingly, the Government's motion for summary affirmance is GRANTED. The judgment is AFFIRMED. The Government's alternative motion for an extension of time to file a brief is DENIED.