

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

No. 17-10336
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

February 1, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JUNIOR JOSE HERRERA,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CR-233-1

Before KING, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Junior Jose Herrera pleaded guilty to possession with intent to distribute marijuana, and the district court sentenced him to 60 months of imprisonment and three years of supervised release. Herrera now argues that the district court plainly erred under the Fifth and Sixth Amendments by imposing a sentence based on factual findings that were not supported by proof beyond a reasonable doubt. He concedes that his argument is foreclosed under

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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current circuit law, but he raises the claim solely to preserve it for further review.

The Government has filed an unopposed motion for summary affirmance or, alternatively, for an extension of time to file a brief on the merits. Summary affirmance 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). Because Herrera’s arguments are foreclosed by *United States v. Tuma*, 738 F.3d 681 (5th Cir. 2013), 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.