

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

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No. 17-50284  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

March 9, 2018

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE LUIS MEDINA-AVALOS,

Defendant-Appellant

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 2:16-CR-1108-1

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Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:\*

Jose Luis Medina-Avalos appeals the 77-month sentence imposed after his guilty plea conviction for illegal reentry after deportation. Medina-Avalos argues that 8 U.S.C. § 1326(b)(2) is unconstitutional because he was sentenced based on a prior conviction that was not charged in his indictment. He reasons that his sentence should have been no greater than the two-year statutory maximum provided under Section 1326(a).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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Acknowledging that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), Medina-Avalos contends that the Supreme Court has questioned that ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013). He therefore wishes 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 (5th Cir. 1969).

As Medina-Avalos concedes, his sole claim is foreclosed by *Almendarez-Torres*. *Apprendi* and *Alleyne* did not overrule *Almendarez-Torres*. *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Juarez-Duarte*, 513 F.3d 204, 211 (5th Cir. 2008).

In light of the foregoing, 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.