

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

United States Court of Appeals
Fifth Circuit

FILED

April 26, 2012

Lyle W. Cayce
Clerk

No. 11-10771
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

DAVID CHRISTIAN VIADO

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:10-CR-145-1

Before GARZA, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:*

Appealing the judgment in a criminal case, David Christian Viado raises arguments that he concedes are foreclosed by *United States v. Brown*, 920 F.2d 1212, 1216-17 (5th Cir. 1991), *abrogated on other grounds by United States v. Candia*, 454 F.3d 468, 472-73 (5th Cir. 2006), which held that 18 U.S.C. § 3584(a) authorizes a district court to order a federal sentence to run consecutively to a yet-to-be-imposed state sentence. He asks that his appeal be held in abeyance pending a possible resolution of the issue by the Supreme

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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Court; however, that Court recently affirmed our ruling in a case raising the identical issue. *United States v. Setser*, 607 F.3d 128, 131-32 & n.2 (5th Cir. 2010), *aff'd*, 132 S. Ct. 1463 (2012).

The Government moves to dismiss the appeal as moot and, in the alternative, moves for summary affirmance or for an extension of time to file a merits brief. The Government is correct that the appeal is moot as record evidence shows that Viado is not subject to a potential state sentence and his federal sentence cannot be consecutive to a nonexistent sentence. *See Rocky v. King*, 900 F.2d 864, 867 (5th Cir. 1990). Accordingly, the appeal is DISMISSED AS MOOT. All other pending motions are DENIED.

APPEAL DISMISSED; MOTIONS FOR SUMMARY AFFIRMANCE, EXTENSION OF TIME, AND TO HOLD APPEAL IN ABEYANCE DENIED.