

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10987
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAFAEL GARCIA-CRUZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:00-CR-42-1-C

February 15, 2001

Before SMITH, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Rafael Garcia-Cruz appeals his conviction and 57-month sentence following his plea of guilty to a charge of illegal re-entry to the United States after deportation, a violation of 8 U.S.C. § 1326. Garcia-Cruz asserts that the felony conviction that resulted in his increased sentence under 8 U.S.C. § 1326(b)(2) was an element of the offense that should have been alleged in the indictment. He acknowledges that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998), but he seeks to preserve the issue for 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

Court review in light of *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2362-63 (2000). *Apprendi* did not overrule *Almendarez-Torres*. See *Apprendi*, 120 S. Ct. at 2361-62 & n.15; *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000) (explaining that the Supreme Court in *Apprendi* did not overrule *Almendarez-Torres*), *petition for cert. filed*, (U.S. Jan. 26, 2001) (No. 00-8299). Garcia-Cruz's argument is foreclosed. See *Almendarez-Torres*, 523 U.S. at 235. Accordingly, Garcia-Cruz's conviction and sentence are AFFIRMED.