

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40739
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE VILLAFRANCA-CABRERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-00-CR-78-1

April 12, 2001

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:*

Jose Villafranca-Cabrera appeals his 41-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. Villafranca-Cabrera 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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). Villafranca-Cabrera's argument is foreclosed. See *Almendarez-Torres*, 523 U.S. at 235.

AFFIRMED.