

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40787
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTURO RIOS-PEÑA,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-00-CR-133-1

- - - - -
February 15, 2001

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

PER CURIAM:*

Arturo Rios-Peña (Rios) appeals his conviction and 46-month prison sentence following a plea of guilty to illegal re-entry into the United States after deportation. See 8 U.S.C. § 1326. Rios argues 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 charged in the indictment. He acknowledges that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he seeks to preserve the issue for Supreme Court review in light of *Apprendi v. New*

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Jersey, 120 S. Ct. 2348 (2000). *Apprendi* did not overrule *Almendarez-Torres*. See *Apprendi*, 120 S. Ct. at 2361-62 & n.15. Rios' argument is foreclosed. See *Almendarez-Torres*, 523 U.S. at 235. Accordingly, Rios' conviction and sentence are AFFIRMED.