

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40975
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS ZARATE-HERNANDEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. M-00-101-1

April 12, 2001

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:*

Jesus Zarate-Hernandez appeals his conviction and 70-month sentence for being found in the United States after deportation in violation of 8 U.S.C. § 1326.

Zarate-Hernandez contends that the felony conviction that resulted in his increased sentence under 8 U.S.C. § 1326(b)(2) is an element of the offense that must have been charged in the indictment. Zarate-Hernandez acknowledges that this argument is foreclosed by the Supreme Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), but he seeks to preserve

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

the issue for Supreme Court review in light of the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi did not overrule Almendarez-Torres. See Apprendi, 120 S. Ct. at 2362; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000), cert. denied, ___ U.S. ___, No. 00-8299, 2001 WL 77067 (Feb. 26, 2001), .

As Zarate-Hernandez concedes, his argument is foreclosed. His conviction and sentence are AFFIRMED.