

February 18, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 03-40917  
Conference Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ESTEBAN MARQUEZ-CONDE,

Defendant-Appellant.

-----  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. B-03-CR-225-1  
-----

Before HIGGINBOTHAM, EMILIO M. GARZA, and PRADO, Circuit Judges.

PER CURIAM:\*

Esteban Marquez-Conde appeals the sentence imposed following his guilty-plea conviction for being found in the United States after deportation in violation of 8 U.S.C. § 1326. Marquez-Conde argues pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are elements of the offense, not sentence enhancements, making those provisions unconstitutional. Marquez-Conde concedes that this argument is foreclosed by

---

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998), and he raises it for possible review by the Supreme Court.

Marquez-Conde's Apprendi argument is foreclosed by Almendarez-Torres, 523 U.S. at 235. We must follow the precedent set in Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000) (internal quotation and citation omitted).

AFFIRMED.