

**FILED**

June 22, 2004

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III  
Clerk

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No. 03-41457  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUILLERMO CUELLAR-TORRES,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. M-03-CR-549-1  
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Before BARKSDALE, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:\*

Guillermo Cuellar-Torres (Cuellar) pleaded guilty to being a previously-deported alien unlawfully present and found in the United States without permission, in violation of 8 U.S.C. § 1326(a). The district court sentenced Cuellar to 41 months' imprisonment, followed by two years' supervised release.

Cuellar argues that the district court's factual finding underlying his denial of a downward departure was clearly erroneous. This court has no jurisdiction to review the district

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\* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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's decision because "the court's refusal is based on its determination that the departure is not warranted on the facts of the case." United States v. Buck, 324 F.3d 786, 797 (5th Cir. 2003). This portion of Cuellar's appeal is DISMISSED.

Cuellar also argues that the offense for which he was indicted has a maximum sentence of two years' imprisonment because the indictment did not allege that he had a prior conviction for an aggravated felony. See 8 U.S.C. § 1326(a), (b). Cuellar acknowledges that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998), but he asserts that the decision has been cast into doubt by Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). He seeks to preserve his argument for further review.

Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). This court must follow Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 231 F.3d at 984 (internal quotation marks and citation omitted). This part of the district court's judgment is AFFIRMED.

APPEAL DISMISSED FOR LACK OF JURISDICTION IN PART; AFFIRMED  
IN PART.