

FILED

June 23, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 03-41501
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE LUIS RODRIGUEZ-FLORES,
also known as Simon Millan-Flores,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. M-02-CR-563-ALL

Before BARKSDALE, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Jose Luis Rodriguez-Flores appeals the revocation of his supervised release based on his being found illegally in the United States after deportation in violation of the conditions of his supervised release. He argues that his underlying conviction under 8 U.S.C. § 1326 is unconstitutional in view of Apprendi v. New Jersey, 530 U.S. 466 (2000). A defendant may not use the revocation of supervised release to challenge his sentence for the underlying offense based on Apprendi for the first time.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

United States v. Moody, 277 F.3d 719, 720-21 (5th Cir. 2001).

Therefore, Rodriguez-Flores may not challenge his underlying conviction in this appeal of the revocation of his supervised release. See id.

Nonetheless, Rodriguez-Flores acknowledges that his attack on his conviction is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 226-27 (1998), but seeks to preserve it for Supreme Court review. Apprendi did not overrule Almendarez-Torres. Apprendi, 530 U.S. at 489-90, 496. This court must follow Almendarez-Torres until the Supreme Court overrules it. United States v. Hernandez-Avalos, 251 F.3d 505, 507 & n.1 (5th Cir. 2001).

AFFIRMED.