

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-21144

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GIOVANNI RODRIGUEZ-MARTINEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(H-00-CR-474-1)

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July 19, 2001

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Giovanni Rodriguez-Martinez appeals the 46-month sentence imposed following his guilty plea to a charge of being found in the United States after deportation in violation of 8 U.S.C. § 1326. He contends that the prior 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.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Rodriguez-Martinez acknowledges that his argument is foreclosed by the Supreme Court's decision in *Almendarez-Torres v. United States*,<sup>1</sup> but he seeks to preserve the issue for Supreme Court review in light of *Apprendi v. New Jersey*.<sup>2</sup> Since *Apprendi* did not overrule *Almendarez-Torres*,<sup>3</sup> Rodriguez-Martinez's argument is foreclosed in this court.<sup>4</sup> Therefore, the judgment of the district court is AFFIRMED.

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<sup>1</sup> 523 U.S. 224 (1998).

<sup>2</sup> 530 U.S. 466 (2000).

<sup>3</sup> See *Apprendi*, 530 U.S. at 489-90.

<sup>4</sup> See *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000), cert. denied, 121 S. Ct. 1214 (2001).