

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40424
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO MANUEL MARTINEZ-HERNANDEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. L-00-CR-39-1

December 14, 2000

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:*

Francisco Manuel Martinez-Hernandez ("Martinez") appeals the sentence imposed following his guilty-plea conviction for illegal reentry into the United States in violation of 8 U.S.C. § 1326. Martinez's plea agreement provided that he waived his right to appeal his sentence. The district court did not make a specific inquiry into whether Martinez understood that he was relinquishing his right to appeal, and thus the record is not adequate to demonstrate that Martinez knowingly and voluntarily waived his right to appeal. See FED. R. CRIM. P. 11(c). Under

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

these circumstances, the waiver cannot be enforced against Martinez.

Martinez argues that his prior felony conviction was an element of the offense of conviction. Martinez acknowledges that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but he seeks to preserve the issue for Supreme Court review in light of Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). This argument is foreclosed by Almendarez-Torres, 523 U.S. at 235.

The judgment of the district court is AFFIRMED.