

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50577
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAXIMINO FLORES-GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. DR-00-CR-23-1

December 14, 2000

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:*

Maximino Flores-Garcia (Flores) appeals his conviction and sentence following his guilty plea to illegally reentering the United States after having been deported in violation of 8 U.S.C. § 1326(a)(1) and (b)(2). Flores argues for the first time on appeal that a prior felony conviction is an element of the offense of reentry following deportation after a felony conviction in violation of § 1326(b) and that his indictment was defective because it did not allege a prior felony conviction. Flores concedes that his argument is foreclosed by United States

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

v. Almendarez-Torres, 523 U.S. 224 (1998). Flores contends, however, that Apprendi v. New Jersey, 120 S. Ct. 2348, 2362 (2000), casts doubt on Almendarez-Torres and that he is raising the argument to preserve it for Supreme Court review.

Although the Supreme Court noted in Apprendi that, arguably, Almendarez-Torres was incorrectly decided, the Court expressly declined to overrule Almendarez-Torres. Apprendi, 120 S. Ct. at 2362-63 & n.15; United States v. Dabeit, ___ F.3d ___ (5th Cir., Oct. 30, 2000, No. 00-10065) 2000 WL 1634264 at *4. This court is compelled to follow the precedent set in Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 2000 WL at *4.

The judgment of the district court is AFFIRMED.