

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41470
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENITO RAMIREZ-YBARRA, also known as Benito Ramirez,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-01-CR-396-1

July 17, 2002

Before JOLLY, BENAVIDES, and CLEMENT, Circuit Judges.

PER CURIAM:*

Benito Ramirez-Ybarra pleaded guilty to being found in the United States without permission after having been previously deported. He was sentenced on December 3, 2001, and the 2001 Sentencing Guidelines, which became effective November 1, 2001, apply to his case.

Ramirez appeals the district court's increase of his offense level by 16 under U.S.S.G. § 2L1.2(b)(1)(A). The district court

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

determined that Ramirez' prior conviction for being a felon in possession of a firearm was a firearms offense under U.S.S.G. § 2L1.2(b)(1)(A)(iii). However, the district court did not determine whether the gun involved in Ramirez' prior offense fell within the definition of firearm under 26 U.S.C. § 5845(a), as referenced in Application Note 1(B)(v)(II) of U.S.S.G. § 2L1.2. The Government concedes that the record is devoid of evidence to allow for such a determination. The district court's sentence is VACATED and this case is REMANDED so that the district court can make such a determination.