

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 02-40050  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARIO ALBERTO BARRERA-MORALES,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. M-01-CR-339-1  
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October 30, 2002

Before DeMOSS, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:\*

Mario Alberto Barrera-Morales appeals the 77-month sentence imposed following his plea of guilty to a charge of being found in the United States after having been deported in violation of 8 U.S.C. § 1326. He contends for the first time on appeal that 8 U.S.C. § 1326(b)(2) is unconstitutional because it does not require the prior aggravated felony conviction used to increase his sentence to be proven as an element of the offense. He argues that his conviction should be reformed to the lesser

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

included offense in 8 U.S.C. § 1326(a) and that he should be resentenced to no more than 2 years of imprisonment.

Barrera-Morales acknowledges that his argument is foreclosed by the Supreme Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), but he seeks to preserve the issue for Supreme Court review in light of the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000), cert. denied, 531 U.S. 1202 (2001). Barrera-Morales' argument is foreclosed. The judgment of the district court is AFFIRMED.