

June 25, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41266
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO MENJIVAR-HERRERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. L-02-CR-466-ALL

Before DeMOSS, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Francisco Menjivar-Herrera appeals from a guilty-plea conviction for re-entry of a deported alien in violation of 8 U.S.C. § 1326. Menjivar-Herrera argues that the written judgment fails to reflect the court's oral pronouncement at sentencing that he be placed in a prison medical facility. As Menjivar-Herrera concedes, this issue is now moot because the court has amended the judgment under FED. R. CRIM. P. 36 to reflect the special condition for incarceration.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Menjivar-Herrera also argues for the first time on appeal that 8 U.S.C. § 1326(b)(1)&(2) are unconstitutional because they treat a prior conviction for an aggravated felony as a mere sentencing factor and not as an element of the offense. Menjivar-Herrera concedes 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 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; see also United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000).

AFFIRMED.