

October 22, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-20200
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HENRY JIMENEZ-VARGAS,
also known as Nelson Hernandez,
also known as Anthony Delgado,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-02-CR-538-ALL

Before KING, Chief Judge, and JOLLY and STEWART, Circuit Judges.

PER CURIAM:*

Henry Jimenez-Vargas appeals his guilty-plea conviction of and sentence for illegal reentry following deportation. Jimenez-Vargas argues pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are elements of the offense, not sentence enhancements, making those provisions unconstitutional. Jimenez-Vargas concedes that this argument is foreclosed by

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Almendarez-Torres v. United States, 523 U.S. 224 (1998), and he raises it "for possible direct review by the Supreme Court and to avoid later accusations of procedural default should the law change on this question."

Jimenez-Vargas's Apprendi argument is foreclosed by Almendarez-Torres, 523 U.S. at 235. We must follow the precedent set in Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000) (internal quotation and citation omitted).

AFFIRMED.