

October 22, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-40414
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN MARTINEZ-ARRATIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-02-CR-660-1

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

PER CURIAM:*

Martin Martinez-Arratia (Martinez) appeals his guilty-plea conviction and sentence for being an alien unlawfully found in the United States after deportation. He argues for the first time on appeal that 8 U.S.C. § 1326(b) 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 contends that his conviction should be reformed to the lesser included offense in 8 U.S.C. § 1326(a)

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

and that he should be resentenced to no more than two years of imprisonment.

Martinez 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). Martinez's argument is foreclosed. The judgment of the district court is AFFIRMED.