

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10887
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CRISTOBAL MARTINEZ-HERNANDEZ,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:00-CR-29-1
- - - - -
February 15, 2001

Before SMITH, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Cristobal Martinez-Hernandez appeals his sentence following his guilty plea conviction for illegal reentry following deportation in violation of 8 U.S.C. § 1326(a) and (b). Martinez-Hernandez argues that a prior felony conviction is an element of the offense that must be alleged in the indictment rather than a sentencing factor. Martinez-Hernandez acknowledges that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but he seeks to preserve the issue for possible Supreme Court review in the light of Apprendi v. New

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Jersey, 120 S.Ct. 2348 (2000). Apprendi did not overrule Almendarez-Torres. See Apprendi, 120 S.Ct. at 2361-62 & n.15; see also United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000), petition for cert. filed, (U.S. Jan. 26, 2001)(No. 00-8299).

As Martinez-Hernandez's sole argument for appeal is foreclosed, the district court's judgment of conviction is AFFIRMED.