

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-11169

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN CRUZ CERVANTES-GARCIA,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas, Fort Worth
(4:00-CR-109-1-Y)
- - - - -

May 22, 2001

OPINION ON GOVERNMENT'S MOTION

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

The government has moved for dismissal inasmuch as the Appellant has raised in his sole issue an argument controlled by *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998). Indeed, Appellant does not claim otherwise; he concedes that *Almendarez-Torres* is the controlling authority and stands in contravention of his argument. Nonetheless, he raises the argument to protect his

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

right to further review. We do not agree with the government that the claim is frivolous because a member of the Supreme Court that decided *Almendarez-Torres* has indicated in a related case that the decision in *Almendarez-Torres* was mistaken. See *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2367-80 (2000) (Thomas, J., concurring). *Almendarez-Torres* was decided by a 5-4 vote with Justice Thomas a part of the majority. Under such circumstances, we reject the contention that Appellant's appeal is frivolous. Nonetheless, because it is unmistakably clear that *Almendarez-Torres* controls the disposition of the case and we are bound thereby, we summarily affirm the judgment of the district court in lieu of dismissal of Appellant's appeal.

Motion Denied, Judgment AFFIRMED.