

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-20804  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VICTOR MANUEL MONTES-MANZANO,  
also known as Victor Manuel Montes Manzano,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-00-CR-172-1  
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April 11, 2001

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:\*

Victor Manuel Montes-Manzano (Montes) appeals the 41-month sentence imposed following his guilty plea to a charge of being found present in the United States after deportation, a violation of 8 U.S.C. § 1326. Relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), Montes argues that the aggravated-felony conviction that resulted in his enhanced sentence under 8 U.S.C. § 1326(b)(2) was an element of the offense that should have been alleged in the indictment. As Montes acknowledges, however, his

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

argument remains foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998). See United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000)(stating that Apprendi did not overrule Almendarez-Torres), cert. denied, 121 S. Ct. 1214 (2001).

Montes also challenges a sixteen-level increase to his base offense level pursuant to U.S.S.G. § 2L1.2(b)(1)(A). Specifically, Montes argues that his prior Texas conviction for possession of less than one gram of cocaine does not qualify as an "aggravated felony" for purposes of § 2L1.2. Montes' argument, however, is foreclosed by our decision in United States v. Hinojosa-Lopez, 130 F.3d 691, 693-94 (5th Cir. 1997). Montes maintains that this issue is not foreclosed by Hinojosa-Lopez because he raises it as a rule-of-lenity argument. "The rule of lenity . . . applies only when, **after** consulting traditional canons of statutory construction, [a court is] left with an ambiguous statute." United States v. Shabani, 513 U.S. 10, 17 (1994)(emphasis added). It follows from the interpretation reached by this court in Hinojosa-Lopez that the term "aggravated felony" is not so ambiguous as to require an application of the rule of lenity. See Hinojosa-Lopez, 130 F.3d at 693-94.

AFFIRMED.