

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-20902  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PEDRO ANTONIO GUTIERREZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-00-CR-305-1  
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October 29, 2001

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Pedro Antonia Gutierrez ("Gutierrez") appeals his conviction and 57-month sentence following his plea of guilty to illegal reentry into the United States after deportation, a violation of 8 U.S.C. § 1326. Gutierrez argues that the felony conviction that resulted in his increased sentence under 8 U.S.C. § 1326(b)(2) was an element of the offense that should have been charged in his indictment.

Gutierrez acknowledges that his first argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

he seeks to preserve the issue for Supreme Court review in light of decision in Appendi because the Supreme Court indicated in Appendi that Almendarez- Torres may have been wrongly decided. Because the Supreme Court has not overruled Almendarez-Torres, this court is compelled to follow it. See United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000), cert. denied, 121 S. Ct. 1214 (2001). Gutierrez's argument is foreclosed. See Almendarez-Torres, 523 U.S. at 235.

Gutierrez also argues that his indictment was defective under the Fifth and Sixth Amendments because it did not allege general intent. Because Gutierrez withdrew this argument in the district court, review is foreclosed. See United States v. Reveles, 190 F.3d 678 (5th Cir. 1999); United States v. Olano, 507 U.S. 725 (1993).

Gutierrez's conviction and sentence are AFFIRMED.