

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-41009

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS CALDERON-MESA,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas, Laredo
L-00-CR-232-1
- - - - -

May 14, 2001

Before JONES, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Jesus Calderon-Mesa appeals from the sentence imposed upon him following his guilty plea and conviction for the offense of illegal re-entry into the United States following deportation; 8 U.S.C. § 1326(b). Specifically, he contends that a prior offense upon which his sentence was enhanced constitutes an element of the offense and thus the failure of the superseding indictment to allege the prior offense resulted in an illegal sentence.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Calderon-Mesa's argument relies on *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-63 (2000), for support. He acknowledges that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998), but seeks to preserve the issue for further review suggesting that *Apprendi* places the authority of *Almendarez-Torres* in question.¹ The Supreme Court expressly declined to overrule *Almendarez-Torres* in *Apprendi*. Accordingly, we are required to follow the precedent set in *Almendarez-Torres* "unless and until the Supreme Court itself determines to overrule it." *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1214 (2001).²

The judgment of the district court is AFFIRMED.

¹ We find no merit in the government's argument that Calderon-Mesa failed to raise the issue in the district court.

² In his original brief, Calderon-Mesa had raised in his first issue attacks based on the purported failure of the district court to follow Rule 11 of the Federal Rules of Criminal Procedure. Prior to submission to the panel, Calderon-Mesa withdrew his first issue complaints and accordingly they are not before us and not considered on appeal.