

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50249
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSÉ ALEJANDRO HERRERA-PENA, also known as Alejandro José
Herrera-Pena, also known as Alejandro Herrera,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-99-CR-434-ALL-OG
- - - - -

December 14, 2000

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:*

José Alejandro Herrera-Pena appeals his sentence following his guilty plea conviction for illegal reentry following deportation in violation of 8 U.S.C. § 1326(a) and (b). Herrera-Pena argues that a prior felony conviction is an element of the offense that must be alleged in the indictment rather than a sentencing factor. Herrera-Pena 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

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Court review in the light of Apprendi v. New 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, ___ F.3d ___, 2000 WL 1634264 at *4 (5th Cir. Oct. 30, 2000, No. 00-10065).

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