

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50314
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MANUEL GUERRERO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-99-CR-1582-1-DB

October 19, 2000

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Manuel Guerrero appeals his guilty-plea conviction for illegal reentry into the United States, in violation of 8 U.S.C. § 1326. Guerrero challenges the district court's refusal to grant his motion for a downward departure under U.S.S.G. § 2L1.2, comment. (n.5). He contends "that the text, history, and policies of the Sentencing Guidelines indicate that note 5 authorizes departures for aggravated felons who received suspended sentences, without actual incarceration, exceeding one year." Guerrero concedes that the issue raised in this appeal is

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

foreclosed by our decision in United States v. Yanez-Huerta, 207 F.3d 746 (5th Cir. 2000), petition for cert. filed, (U.S. Sept. 5, 2000)(No. 00-6044), but raises his contention solely to preserve it for review by the Supreme Court.

Both Guerrero and the government have filed motions for leave to file supplemental briefs. The motions are granted. Appellant in his supplemental brief argues that the Supreme Court in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) effectively overruled Almendarez-Torres v. United States, 523 U.S. 224 (1998). He argues that if Apprendi undermines Almendarez-Torres, his sentence, which was enhanced pursuant to 8 U.S.C. § 1326(b)(2), is invalid, and he should be resentenced under 8 U.S.C. § 1326(a). Guerrero acknowledges that this court does not have the authority to overrule Almendarez-Torres and states that he is raising the issue solely to preserve it for possible Supreme Court review. Almendarez-Torres forecloses this argument.

AFFIRMED; BOTH PARTIES' MOTIONS FOR LEAVE TO FILE SUPPLEMENTAL BRIEFS GRANTED.