

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50417
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ENRIQUE GUTIERREZ-MARTINEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. DR-99-CR-680-01

December 14, 2000

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:*

Enrique Gutierrez-Martinez appeals his sentence following his guilty plea conviction for illegal reentry following deportation in violation of 8 U.S.C. § 1326(a) and (b). Gutierrez argues that a prior felony conviction is an element of the offense that must be alleged in the indictment rather than a sentencing factor. Gutierrez 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 Court review in the light of Apprendi v. New Jersey, 120 S. Ct.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

2348 (2000). Gutierrez's argument is foreclosed by Almendarez-Torres, 523 U.S. at 235. See United States v. Dabeit, ___ F.3d ___ (5th Cir. Oct. 30, 2000, No. 00-10065), 2000 WL 1634264, at *4.

AFFIRMED.