

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10158
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PEDRO JIMENEZ-VILLAREAL, also known as Martin
Jimenez-Hernandez,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:00-CR-265-ALL-L
- - - - -

October 29, 2001

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Pedro Jimenez-Villareal, also known as Martin Jimenez-Hernandez, appeals the 41-month sentence imposed following his plea of guilty to a charge of being found in the United States after deportation, a violation of 8 U.S.C. § 1326. He contends 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 the indictment.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Jimenez-Villareal acknowledges that his argument is foreclosed by the Supreme Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), but he seeks to preserve the issue for Supreme Court review in light of the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; see also United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000), cert. denied, 121 S. Ct. 1214 (2001). Jimenez-Villareal's argument is foreclosed.

The Government has filed a motion seeking dismissal of this appeal as frivolous, or a summary affirmance of the district court's judgment without further briefing. Alternatively, the Government seeks an extension of time in which to file an appeal brief. This appeal is not frivolous. However, because the sole issue raised on appeal is foreclosed by precedent, the Government's motion for summary affirmance of the district court's judgment is GRANTED and the district court's judgment is AFFIRMED. All other relief sought in the Government's motion is DENIED.

GOVERNMENT'S MOTION GRANTED IN PART, DENIED IN PART; AFFIRMED.