

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10262
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERIBERTO NICOLAS MARIN-CARDONA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:00-CR-48-1-C

August 23, 2001

Before KING, Chief Judge, and POLITZ and PARKER, Circuit Judges.

PER CURIAM:*

Heriberto Nicolas Marin-Cardona appeals the 71-month term of imprisonment imposed following his guilty plea conviction of being found in the United States after removal in violation of 8 U.S.C. § 1326. Marin-Cardona argues that his sentence should not have exceeded the two-year maximum term of imprisonment prescribed in 8 U.S.C. § 1326(a). Marin-Cardona acknowledges that his argument is foreclosed by the Supreme Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), but

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000), cert. denied, 121 S. Ct. 1214 (2001). Marin-Cardona's argument is foreclosed. The judgment of the district court is AFFIRMED.

In lieu of filing an appellee's brief, the Government has filed a motion asking this court to dismiss this appeal. The Government's motion to dismiss is DENIED. However, in light of our decision to affirm the district court's judgment, the Government need not file an appellee's brief.

AFFIRMED; MOTION TO DISMISS DENIED.