

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41410
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SAUL VELASQUEZ-LARIOS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-01-CR-348-1

December 12, 2002

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

Saul Velasquez-Larios (Velasquez) appeals his guilty-plea conviction and sentence for illegal reentry following deportation in violation of 8 U.S.C. § 1326(a) and (b)(2). Velasquez argues that the district court plainly erred in imposing a 16-level sentence enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(i) because the "sentence imposed" for his prior drug-trafficking conviction did not exceed 13 months. He also argues that the

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

sentencing-enhancing provisions of 8 U.S.C. § 1326(b) are unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000).

As Velasquez states, whether "sentence imposed" under U.S.S.G. § 2L1.2(b)(1)(A)(i) means the sentence originally imposed or the sentence imposed upon revocation of probation is an issue of first impression in this circuit. Given the lack of controlling authority, any error by the district court in applying the enhancement was not clear or obvious and, therefore, does not meet the plain-error standard. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994)(en banc), abrogated in part, Johnson v. United States, 520 U.S. 461 (1997).

Velasquez's constitutional challenge to 8 U.S.C. § 1326(b) is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), which this court must follow "unless and until the Supreme Court itself determines to overrule it." United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000), cert. denied, 531 U.S. 1202 (2001).

Based on the foregoing, the district court's judgment is
AFFIRMED.