

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50276
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO MENDOZA-MEDINA,
also known as Antonio Mendoza,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-00-CR-1689-ALL-H
- - - - -

October 29, 2001

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Antonio Mendoza-Medina ("Mendoza") appeals the 77-month sentence imposed following his plea of guilty to a charge of illegally reentering the United States after a deportation that occurred subsequent to a conviction for the aggravated-felony offense of forgery, a violation of 8 U.S.C. § 1326(b)(2). Mendoza argues that a prior aggravated-felony conviction is an element of 8 U.S.C. § 1326(b)(2) under Apprendi v. New Jersey, 530 U.S. 466 (2000), and thus that the district court

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

constructively amended the indictment by finding the required prior aggravated-felony conviction to be a conviction other than that alleged in the indictment.

Mendoza concedes that this argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998). Mendoza nevertheless seeks to preserve the issue for Supreme Court review in light of the decision in Apprendi. 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)(noting that the Supreme Court in Apprendi expressly declined to overrule Almendarez-Torres), cert. denied, 121 S. Ct. 1214 (2001). This court must therefore follow the precedent set in Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 231 F.3d at 984 (internal quotation and citation omitted). Accordingly, the judgment of the district court is AFFIRMED.