

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 02-40428  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MOACIR ALVES DE LIMA,  
also known as Joao Dacunha,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. B-01-CR-519-ALL  
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December 12, 2002

Before JOLLY, JONES, and CLEMENT, Circuit Judges.

PER CURIAM:\*

Moacir Alves De Lima appeals his sentence imposed following his guilty plea conviction for illegal reentry into the United States following his deportation. Alves argues that 8 U.S.C. § 1326(b) is unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000) because the enhancement provision is not treated as an element of the offense to be alleged and proved to

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

a jury beyond a reasonable doubt. He acknowledges that his argument is foreclosed by Supreme Court and circuit precedent, but he wishes to preserve the issue for further review.

Alves' argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235-47 (1998), which held that the fact of a prior conviction is a sentencing factor. Apprendi did not overrule Almendarez-Torres, but instead carved out an exception which preserved the holding in that case. 530 U.S. at 489-90. This court must follow Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000) (internal quotation and citation omitted), cert. denied, 531 U.S. 1202 (2001).

AFFIRMED.