

October 22, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41521
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDRES REYES-JAIMEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. M-02-CR-278-1

Before KING, Chief Judge, and JOLLY and STEWART, Circuit Judges.

PER CURIAM:*

Andres Reyes-Jaimez (Reyes) appeals the 70-month sentence imposed following his guilty plea to illegal reentry following deportation, in violation of 8 U.S.C. § 1326(a) and (b).

Reyes argues that the sentence-enhancing provisions contained in 8 U.S.C. § 1326(b) are unconstitutional on their face and as applied in light of the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Alternatively, Reyes argues that because his indictment did not specifically

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

allege that he had a prior aggravated felony conviction, he was only convicted of illegal reentry, in violation of 8 U.S.C. § 1326(a). He contends that his sentence, which exceeds that authorized by 8 U.S.C. § 1326(a), is therefore illegal. Reyes' arguments are raised for the first time on appeal.

Reyes concedes that his arguments are foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but seeks to preserve the arguments for Supreme Court review. 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). This court must 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 marks and citation omitted).

Accordingly, the district court's judgment is AFFIRMED.