

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

June 11, 2008

No. 06-50856
Summary Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JUAN ANTONIO PINA-MARTINEZ, also known as Juan Jose Duarte-Nino

Defendant-Appellant

consolidated with:

No. 06-50862
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JUAN JOSE MARTINEZ-ZAVALA

Defendant-Appellant

Appeals from the United States District Court
for the Western District of Texas
USDC No. 2:05-CR-970-ALL
USDC No. 2:05-CR-187-ALL

Before JONES, Chief Judge, and REAVLEY and PRADO, Circuit Judges.

PER CURIAM:*

In two consolidated appeals, Juan Antonio Pina-Martinez (Pina) challenges his conviction and sentence for illegal reentry after deportation and the revocation of a previously imposed term of supervised release. The Federal Public Defender appointed to represent Pina on appeal previously moved for leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion was denied and the parties were ordered to brief the issues of whether this court could consider Pina's appeals despite his apparently untimely notices of appeal and whether this court should require withdrawing counsel to certify that the Government would assert the untimeliness of a notice of appeal.

We pretermite the issue of the timeliness of Pina's notices of appeal because there is no jurisdictional impediment to reaching the merits of the case and his appeal fails on the merits. See *United States v. Martinez*, 496 F.3d 387, 389 (5th Cir. 2007) cert. denied, 2007 WL 3265472 (Dec. 3, 2007) (No. 07-7436). In light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Pina challenges the constitutionality of 8 U.S.C. § 1326(b)'s treatment of prior felony and aggravated felony convictions as sentencing factors rather than elements of the offense that must be found by a jury. This issue is foreclosed. *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007), petition for cert. filed (Aug. 28, 2007) (No. 07-6202).

AFFIRMED.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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