

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-51198
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALFREDO BASTIDAS-NUNEZ,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-99-CR-432-ALL
- - - - -

October 19, 2000

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Alfredo Bastidas-Nunez ("Bastidas") appeals his conviction and sentence for illegal reentry into the United states after deportation, in violation of 8 U.S.C. § 1326. He argues that the district court erred in denying his motion to dismiss the indictment and in increasing his base offense level by 16 points pursuant to U.S.S.G. § 2L1.2(b)(1)(A), on the basis that his prior convictions for transporting and concealing aliens constituted aggravated felonies. He argues that transporting and

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

concealing aliens within the United States does not constitute an aggravated felony under 8 U.S.C. § 1101(a)(43)(N).

As Bastidas acknowledges, his position is foreclosed by our opinions in United States v. Monjaras-Castaneda, 190 F.3d 326, 331 (5th Cir. 1999), cert. denied, 120 S. Ct. 1254 (2000), and Ruiz-Romero v. Reno, 205 F.3d 837, 839-40 (5th Cir. 2000).

Both Bastidas and the government have filed motions for leave to file supplemental briefs. The motions are granted. Appellant in his supplemental brief argues that the Supreme Court in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) effectively overruled Almendarez-Torres v. United States, 523 U.S. 224 (1998). He argues that if Apprendi undermines Almendarez-Torres, his sentence, which was enhanced pursuant to 8 U.S.C. § 1326(b)(2), is invalid, and he should be resentenced under 8 U.S.C. § 1326(a). Bastidas acknowledges that this court does not have the authority to overrule Almendarez-Torres and states that he is raising the issue solely to preserve it for possible Supreme Court review. Almendarez-Torres forecloses this argument.

AFFIRMED; BOTH PARTIES' MOTIONS FOR LEAVE TO FILE
SUPPLEMENTAL BRIEFS GRANTED.