

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-40614  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE JAIME RODRIGUEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 6:99-CR-81-1  
- - - - -

April 12, 2001

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:\*

The Federal Public Defender appointed to represent Jose Jaime Rodriguez has moved for leave to withdraw and has filed a brief as required by Anders v. California, 386 U.S. 738 (1967). Rodriguez received a copy of counsel's motion and brief, but did not file a response.

Our independent review of the brief and the record discloses one possible nonfrivolous issue for appeal. Rodriguez's offense level and sentence were increased for his having been deported after a prior aggravated-felony conviction which was not alleged

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

in his indictment. An argument that the prior conviction should have been alleged in the indictment is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998). However, the continuing validity of Almendarez-Torres has been cast into doubt by Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). See id. at 2362 (finding it "arguable that Almendarez-Torres was incorrectly decided"). Counsel could have raised the issue on appeal in order to preserve it for Supreme Court review in light of Apprendi.

Because our independent review of the record has revealed this possible nonfrivolous issue for appeal, we deny counsel's motion to withdraw. By our denying the motion to withdraw, Rodriguez preserves the Almendarez-Torres issue for further review. We pretermitt further briefing, however, and AFFIRM the judgment of the district court because Apprendi did not overrule Almendarez-Torres. See id., 120 S. Ct. at 2362; 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 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, counsel's motion for leave to withdraw is DENIED, and the decision of the district court is AFFIRMED.