

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-41251
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEONEL BALDERAS-ALVARADO,
also known as Ricardo Silva,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:00-CR-45-ALL

June 15, 2001

Before WIENER, DeMOSS, and DENNIS, Circuit Judges.

PER CURIAM:*

The Federal Public Defender appointed to represent Leonel Balderas-Alvarado has moved for leave to withdraw and has filed a brief as required by Anders v. California, 386 U.S. 738 (1967). Balderas-Alvarado has filed a response to counsel's motion.

Our independent review of the brief, the record, and the response of Balderas-Alvarado discloses one possible nonfrivolous issue for appeal. His offense level and sentence were increased for his having been deported after a prior aggravated-felony conviction that was not alleged in his indictment. An argument

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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, 489 (2000)(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.

In light of this possible nonfrivolous issue for appeal, we deny counsel's motion to withdraw. By our denying the motion to withdraw, Balderas-Alvarado 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 Apprendi, 530 U.S. at 490; 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).

Finally, the record has not been adequately developed for us to consider Balderas-Alvarado's ineffective-assistance-of-counsel arguments on direct appeal. See United States v. Haese, 162 F.3d 359, 363 (5th Cir. 1998).

Accordingly, counsel's motion for leave to withdraw is DENIED, and the decision of the district court is AFFIRMED.