

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10895
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NICOLAS ZAPATA-DIAZ,
also known as Mario Rendon-Leobos,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:01-CR-49-ALL-X

February 21, 2002

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Nicolas Zapata-Diaz appeals his guilty plea conviction of being found in the United States after deportation in violation of 8 U.S.C. § 1326. He argues that his guilty plea was rendered involuntary by the district court's failure to advise him during the plea colloquy that a prior aggravated felony conviction is an element of the offense under 8 U.S.C. § 1326(b)(2) which the Government would have to prove to a jury beyond a reasonable doubt. Zapata-Diaz acknowledges that his argument is foreclosed

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

by the Supreme Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), but seeks to preserve the issue for Supreme Court review in light of the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

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), cert. denied, 531 U.S. 1202 (2001). Zapata-Diaz's argument is foreclosed. The judgment of the district court is AFFIRMED.

In lieu of filing an appellee's brief, the Government has filed a motion asking this court to dismiss this appeal or, in the alternative, to summarily affirm the district court's judgment. The Government's motion to dismiss is DENIED. The motion for a summary affirmance is GRANTED. The Government need not file an appellee's brief.

Zapata-Diaz has filed a motion for leave to file an amended initial brief. The motion is GRANTED.

AFFIRMED; MOTION TO DISMISS DENIED; MOTION FOR SUMMARY AFFIRMANCE GRANTED; MOTION TO FILE AN AMENDED BRIEF GRANTED.