

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50547
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

J. CARMEN ROJAS-ROJAS, also known as Carmelo Rojas-Rojas,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-01-CR-111-ALL

January 14, 2003

Before KING, Chief Judge, and BARKSDALE and STEWART, Circuit
Judges.

PER CURIAM:*

J. Carmen Rojas-Rojas appeals from his guilty-plea conviction for illegal reentry into the United States after having been previously deported following an aggravated felony. He first argues that the district court erred by departing upwardly from the Sentencing Guidelines when determining his sentence. Rojas-Rojas fails to show that the district court abused its discretion by granting the upward departure. See

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

United States v. Ashburn, 38 F.3d 803, 807 (5th Cir. 1994)(en banc).

Rojas-Rojas also contends that 8 U.S.C. § 1326(b) is unconstitutional. He acknowledges that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but asserts that Almendarez-Torres has been called into doubt by Apprendi v. New Jersey, 530 U.S. 466 (2000). He seeks to preserve his argument for further review.

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). This court must follow Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 231 F.3d at 984 (internal quotation marks and citation omitted).

The judgment of the district court is AFFIRMED.