

April 20, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10880
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDRES GONZALEZ-CLEMENTE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:03-CR-28-P-ALL

Before JOLLY, JONES, and SMITH, Circuit Judges.

PER CURIAM:*

Andres Gonzalez-Clemente appeals his conviction and sentence for illegal reentry of an aggravated felon after deportation, in violation of 8 U.S.C. § 1326. His argument that the district court erred in determining his criminal history category is without merit. The court's finding that Gonzalez had been convicted of the assault charge in ¶ 40 of the presentence report is supported by the record and is not clearly erroneous. 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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. Cabrera, 288 F.3d 163, 168 (5th Cir. 2002);

United States v. Fitzgerald, 89 F.3d 218, 223 (5th Cir. 1996).

Equally unavailing is Gonzalez's argument that Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998) has been overruled or cast into doubt by Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), an argument he admits is foreclosed. 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).

AFFIRMED.