

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

October 25, 2007

No. 06-51405
c/w No. 06-51407
Conference Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JESUS NIAVE-DELGADO

Defendant-Appellant

Appeals from the United States District Court
for the Western District of Texas
USDC No. 2:06-CR-394-ALL
USDC No. 2:06-CR-692-ALL

Before JOLLY, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:*

In this consolidated appeal, Jesus Niave-Delgado (Niave) has appealed the sentence imposed following his conviction of illegal reentry into the United States after deportation and the district court's order revoking his supervised release related to a prior conviction of illegal reentry following deportation. Citing *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000), Niave contends that the

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

three-year supervised release term imposed by the district court for the instant conviction of illegal reentry violated due process because the indictment, which did not allege a prior felony conviction, charged an offense punishable by a maximum supervised release term of one year. Niave concedes that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 239–47 (1998). He contends that the holding of *Almendarez-Torres* has been cast into doubt by the decision in *Apprendi*. Niave seeks to preserve the issue for possible Supreme Court review. Niave raises no issue with respect to the revocation of his supervised release.

“This court has repeatedly rejected arguments like the one made by [Niave] and has held that *Almendarez-Torres* remains binding despite *Apprendi*.” *United States v. Garza-Lopez*, 410 F.3d 268, 276 (5th Cir. 2005). The Government’s motion for summary affirmance is GRANTED and the district court’s judgment of conviction and order revoking supervised release are AFFIRMED. The Government’s motion for an extension of time within which to file a brief is DENIED as moot.