FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOSE ANTONIO LEYVA-MARTINEZ, a.k.a. Jose Antonio Levya-Hernandez, *Defendant-Appellant.*	No. 10-50269 D.C. No. 3:09-cr-04334-L Southern District of California, San Diego ORDER

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Submitted to a Motions Panel December 6, 2010

Filed January 27, 2011

Before: Alfred T. Goodwin, Pamela Ann Rymer, and Susan P. Graber, Circuit Judges.

COUNSEL

Daniel E. Butcher, Esquire, Assistant U.S. Attorney, Office of The U.S. Attorney, San Diego, California, for the plaintiff-appellee.

Gary Paul Burcham, Esquire, San Diego, California, for the defendant-appellant.

ORDER

PER CURIAM:

Jose Antonio Leyva-Martinez appeals from the 70-month sentence imposed following his conviction for attempted reentry after deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Leyva-Martinez contends that the district court erred when it applied a 16-level enhancement, pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii), because his prior conviction for inflicting corporal injury on a spouse or co-habitant, in violation of California Penal Code § 273.5, does not qualify as a crime of violence. As Leyva-Martinez concedes however, this contention is foreclosed. *See United States v. Laurico-Yeno*, 590 F.3d 818, 823 (9th Cir.) (holding that a conviction under California Penal Code § 273.5 is categorically a "crime of violence" under the Sentencing Guidelines because the offense requires the intentional use of physical force against the person of another), *cert. denied*, 131 S. Ct. 216 (2010).

Leyva-Martinez also contends the district court erred by applying 8 U.S.C. § 1326(b) to enhance his sentence. Specifically, he argues that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which permits enhancement based on the existence of a prior felony, has been overruled by *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), so that his prior felony conviction must be either admitted or proved to a jury beyond a reasonable doubt. We have repeatedly held, however, that *Almendarez-Torres* is binding unless it is expressly overruled by the Supreme Court. *See, e.g.*, *United States v. Grajeda*, 581 F.3d 1186, 1197 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 583 (2010); *Butler v. Curry*, 528 F.3d 624, 643-44 (9th Cir.) (citing cases), *cert. denied* 129 S. Ct. 767 (2009). Because *Nijhawan* does not even mention *Almendarez-Torres*, we cannot conclude that *Almendarez-Torres* has been expressly overruled and, accordingly, we reject Leyva-Martinez's con-

tention to the contrary and grant appellee's motion for summary affirmance.

AFFIRMED.