

**SEP 29 2004**

**NOT FOR PUBLICATION**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,	)	No. 03-10660
	)	
Plaintiff-Appellee,	)	D.C. No. CR-03-00095-HDM/RAM
	)	
v.	)	<b>MEMORANDUM*</b>
	)	
RAMON NUNEZ-RODELO,	)	
	)	
Defendant-Appellant.	)	
_____	)	

Appeal from the United States District Court  
for the District of Nevada  
Howard D. McKibben, District Judge, Presiding

Argued and Submitted July 15, 2004  
Partially Withdrawn from Submission July 22, 2004  
Resubmitted September 29, 2004  
San Francisco, California

Before: FERNANDEZ, PAEZ, and CLIFTON, Circuit Judges.

Ramon Nunez-Rodelo appeals his sentence, imposed after a guilty plea for unlawful reentry by a deported, removed, or excluded alien, in violation of 8 U.S.C. § 1326(a). He asserts that the elements of 8 U.S.C. § 1326(b)(2) must be

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

pled in the indictment and proved to a jury beyond a reasonable doubt.<sup>1</sup> We disagree and affirm.

The indictment here did not specifically charge that Nunez committed an offense under § 1326(b)(2); it charged him under § 1326(a). As the Supreme Court has clearly held, that was proper because § 1326(b)(2) “is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government to charge the factor that it mentions, an earlier conviction, in the indictment.” Almendarez-Torres v. United States, 523 U.S. 224, 226-27, 118 S. Ct. 1219, 1222, 140 L. Ed. 2d 350 (1998).

Nunez argues that Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) changes that. It does not. See United States v. Arellano-Rivera, 244 F.3d 1119, 1127 (9th Cir. 2001); United States v. Pacheco-Zepeda, 234 F.3d 411, 414 (9th Cir. 2000). Nor does Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 2443, 153 L. Ed. 2d 556 (2002), for it, too, excepts prior convictions from its strictures. Id. at 597 n.4, 122 S. Ct. at 2437 n.4. Nor does Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531, \_\_\_ L. Ed. 2d \_\_\_ (2004).

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<sup>1</sup> He also made another claim, which we have previously disposed of in an opinion. See United States v. Nunez-Rodelo, 378 F.3d 877 (9th Cir. July 29, 2004).

See United States v. Quintana-Quintana, No. 03-50254, slip op. 13291, 13292 (9th Cir. Sept. 13, 2004). Finally, as we said in Pacheco-Zepeda, 234 F.3d at 414, we cannot “ignore controlling Supreme Court authority. Unless and until Almendarez-Torres is overruled by the Supreme Court, we must follow it.”

AFFIRMED.