

April 13, 2007

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-41186
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO GARCIA-GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:06-CR-221-ALL

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Fernando Garcia-Garcia (Garcia) appeals the 36-month sentence he received following his guilty-plea conviction for illegal reentry after deportation following a conviction for an aggravated felony, in violation of 8 U.S.C. § 1326. Garcia argues that the provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional, but this argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Garcia contends that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi v. New Jersey,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

530 U.S. 466 (2000), we have repeatedly rejected such arguments on the basis that Almendarez-Torres remains binding. See United States v. Garza-Lopez, 410 F.3d 268, 276 (5th Cir.), cert. denied, 126 S. Ct. 298 (2005). Garcia properly concedes that his argument is foreclosed in light of Almendarez-Torres and circuit precedent, but raises it to preserve it for further review.

Garcia argues that the district court erred by characterizing his prior state felony convictions for possession of a controlled substance as "aggravated felonies" for purposes of U.S.S.G. § 2L1.2(b)(1)(C), thereby enhancing his sentence by eight-levels. Garcia has filed an unopposed motion to remand his case for resentencing in light of the Supreme Court's opinion in Lopez v. Gonzales, 127 S. Ct. 625, 633 (2006). The motion is GRANTED. See United States v. Estrada-Mendoza, [475 F.3d 258, 261](#) (5th Cir. 2007). Garcia's conviction is AFFIRMED, the sentence is VACATED and the case is REMANDED for resentencing.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.