

FILED

June 23, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 03-41395
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE LUIS HERNANDEZ-ESTALA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. L-03-CR-820-ALL

Before BARKSDALE, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Jose Luis Hernandez-Estala pleaded guilty and was convicted of illegal re-entry in violation of 8 U.S.C. § 1326(b)(2) and 6 U.S.C. §§ 202, 557. On appeal, Hernandez-Estala asserts that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000).

Hernandez-Estala concedes that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but he

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

nevertheless seeks to preserve the issue for Supreme Court review in light of the decision in Apprendi. Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; see also United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). We must follow Almendarez-Torres unless and until the Supreme Court overrules it. See Dabeit, 231 F.3d at 984.

Accordingly, the judgment of the district court is AFFIRMED.