

June 22, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40972
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS LOZANO-HERRERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-216-ALL

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Carlos Lozano-Herrera ("Lozano") pleaded guilty to one count of being found in the United States without having obtained permission to re-enter after deportation and was sentenced to 46 months of imprisonment. Lozano argues, for the first time on appeal, that 8 U.S.C. § 1326(b) is unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Lozano's argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998). See United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Also for the first time on appeal, Lozano, relying on the possibility that Almendarez-Torres will be overruled, as well as on Blakely v. Washington, 124 S. Ct. 2531 (2004), argues that the federal sentencing guidelines are unconstitutional because they permit the enhancement of a sentence based on prior convictions. Lozano's argument fails because Almendarez-Torres has not been overruled and because the enhancement of a sentence based on prior convictions does not violate the Sixth Amendment. See United States v. Booker, 125 S. Ct. 738, 756 (2005).

The judgment of the district court is AFFIRMED.