

November 9, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40308
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALFONSO ZAMORA-ANAYA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:03-CR-920-ALL

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:*

Alfonso Zamora-Anaya appeals the sentence imposed following his guilty plea to illegal reentry into the United States following deportation. Zamora was sentenced to a term of imprisonment of 46 months to be followed by a three-year term of supervised release.

Zamora argues that in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), it appears that Almendarez-Torres v. United States, 523 U.S. 224 (1998), was incorrectly decided and that, therefore, the sentencing provisions of 8 U.S.C. § 1326(b) are

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

unconstitutional. He contends that the unconstitutional portions of the statute should be severed and that he should be resentenced to no more than two years of imprisonment for the lesser included offense provided under 8 U.S.C. § 1326(a). Zamora recognizes that his argument is foreclosed by the existing precedent of the Supreme Court and this court; however, he wishes to preserve the issue for possible Supreme Court review.

Almendarez-Torres held that the enhanced penalties contained in 8 U.S.C. § 1326(b) were sentencing factors and not elements of the offense. 523 U.S. at 235. Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). This court must follow the precedent set in Almendarez-Torres unless the Supreme Court overrules it. Dabeit, 231 F.3d at 984. Zamora's challenge to the constitutionality of 8 U.S.C. § 1326(b) is without merit.

AFFIRMED.