

April 21, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-41301
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FLORENCIO LAZO-RAYA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. M-03-CR-548-1

Before JOLLY, JONES, and SMITH, Circuit Judges.

PER CURIAM:*

Florencio Lazo-Raya appeals his conviction of being present in the United States following deportation. He argues, for the first time on appeal, that 8 U.S.C. § 1326(b) is unconstitutional because it treats a prior conviction for a felony or aggravated felony as a sentencing factor and not as an element of the offense. He also contends that his sentence is illegal because his indictment did not allege that he committed an aggravated felony before he was deported. Lazo-Raya's arguments 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 239-47 (1998). *Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000), did not overrule that decision. See *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000). Thus, the district court did not err in sentencing Lazo-Raya under 8 U.S.C. § 1326(b).

AFFIRMED.