

**FILED**

August 18, 2004

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III  
Clerk

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No. 04-40163  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERARDO OLVERA-VITELA, also known as Natalio  
Avalos-Rodriguez, also known as Martin Guzman-Garcia, also  
known as Pedro Morales-Dominguez,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. L-03-CR-1371-1  
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Before HIGGINBOTHAM, DAVIS, and PICKERING, Circuit Judges.

PER CURIAM:\*

Gerardo Olvera-Vitela (Olvera) appeals his guilty-plea conviction and sentence for being found present in the United States following deportation and removal, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. He argues for the first time on appeal that 8 U.S.C. § 1326(b) is unconstitutional because it does not require the prior aggravated felony conviction used to

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

increase his sentence to be proven as an element of the offense. He contends that his conviction should be reformed to the lesser included offense in 8 U.S.C. § 1326(a) and that he should be resentenced to no more than two years of imprisonment.

Olvera acknowledges that his argument is foreclosed by the Supreme Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), but he seeks to preserve the issue for Supreme Court review in light of the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

Apprendi did not overrule Almendarez-Torres. Apprendi, 530 U.S. at 489-90; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). Olvera's argument is foreclosed. The judgment of the district court is AFFIRMED.