

February 23, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41587
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HECTOR CRUZ-ALVARADO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:04-CR-583-ALL

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Hector Cruz-Alvarado pleaded guilty to being found in the United States after deportation and was sentenced to 46 months of imprisonment and two years of supervised release. Cruz-Alvarado argues that the felony and aggravated felony provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional. Specifically, he argues that the viability of Almendarez-Torres v. United States, 523 U.S. 224 (1998), is in doubt in light of later Supreme Court cases such as Apprendi v. New Jersey, 530 U.S. 466 (2000), and Shepard v. United States, 125 S. Ct. 1254

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

(2005). We need not decide the applicability of the waiver provision in this case because the issue that Cruz-Alvarado raises is foreclosed.

Cruz-Alvarado's constitutional challenge is foreclosed by Almendarez-Torres v. United States. Although Cruz-Alvarado contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi v. New Jersey, we have repeatedly rejected such arguments on the basis that Almendarez-Torres remains binding. See United States v. Garza-Lopez, 410 F.3d 268, 276 (5th Cir.), cert. denied, 126 S. Ct. 298 (2005). Cruz-Alvarado properly concedes that his argument is foreclosed in light of Almendarez-Torres and circuit precedent, but he raises it here to preserve it for further review.

AFFIRMED.