

FILED

February 23, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 05-40791
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE LUIS GONZALEZ-ROJAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:05-CR-27-1

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Jose Luis Gonzalez-Rojas (Gonzalez) appeals following his conviction and sentence under 8 U.S.C. § 1326(a) and (b) for being illegally present in the United States after having been deported following conviction for an aggravated felony. Gonzalez asserts that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b) are unconstitutional. The Government seeks to enforce a waiver-of-appeal provision contained in Gonzalez's plea agreement.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Gonzalez's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Gonzalez 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, 530 U.S. 466 (2000), 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). Gonzalez 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.

Given the above disposition, we do not decide whether Gonzalez's appeal is barred by the waiver provision of his plea agreement.

The judgment of the district court is AFFIRMED.