

August 28, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 05-41731  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN RICARDO GUTIERREZ-GARCIA,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:05-CR-586-ALL  
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Before DAVIS, SMITH, and WIENER, Circuit Judges.

PER CURIAM:\*

Juan Ricardo Gutierrez-Garcia (Gutierrez) appeals his guilty-plea conviction for unlawful reentry in violation of 8 U.S.C. § 1326(b). In his sole issue on appeal, Gutierrez argues that § 1326(b)'s treatment of prior felony and aggravated felony convictions as sentencing factors rather than elements of the offense that must be found by a jury is unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Gutierrez's appeal waiver is not binding because the Government does not seek to enforce the waiver and has therefore waived the issue. See United States v. Story, 439 F.3d 226, 230-31 & n.5 (5th Cir. 2006). Gutierrez's constitutional argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Gutierrez contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi, 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). Gutierrez 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.