

FILED

February 15, 2006

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 05-50538

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALVARO NORIEGA-PUENTE, also known as Avaro Noriega, also known as
Chito Salas, also known as Jose Noriega, also known as Mario
Arriaga, also known as Arturo Sanchez-Garcia,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(1:04-CR-269-1)

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:*

IT IS **ORDERED** that Appellee's unopposed motion to vacate the sentence is **GRANTED**.

IT IS FURTHER ORDERED that Appellee's unopposed motion to remand this case to District Court for re-sentencing consistent with our decision in *United States v. Bonilla-Mungia*, 422 F.3d 316, 320 (5th Cir.), *cert. denied*, 126 S. Ct. 819 (2005), is **GRANTED**.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

For purposes of that re-sentencing, Noriega's constitutional challenge to the sentencing provisions of 8 U.S.C. § 1326(b) is foreclosed by ***Almendarez-Torres v. United States***, 523 U.S. 224, 235 (1998). Although Noriega contends ***Almendarez-Torres*** was incorrectly decided and that a majority of the Supreme Court would overrule it in the light of ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), ***Almendarez-Torres*** remains binding precedent. See ***United States v. Garza-Lopez***, 410 F.3d 268, 276 (5th Cir.), cert. denied, 126 S. Ct. 298 (2005). Noriega concedes ***Almendarez-Torres*** and circuit precedent foreclose this challenge; he raises it to preserve it for possible further review.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RE-SENTENCING