

August 25, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-40126
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FILIBERTO OCHOA-PEREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:05-CR-543-ALL

Before DAVIS, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

Filiberto Ochoa-Perez appeals following his guilty-plea conviction for being found unlawfully in the United States after deportation, in violation of 8 U.S.C. § 1326. Ochoa-Perez argues that the district court misapplied the Sentencing Guidelines by characterizing his state felony conviction for possession of cocaine as an "aggravated felony" for purposes of U.S.S.G. § 2L1.2(b)(1)(C). Ochoa-Perez's argument is unavailing in light of circuit precedent. See United States v. Hinojosa-Lopez, 130 F.3d 691, 693-94 (5th Cir. 1997). Ochoa-Perez argues that this

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

circuit's precedent is inconsistent with Jerome v. United States, 318 U.S. 101 (1943). Having preceded Hinojosa-Lopez, Jerome is not "an intervening Supreme Court case explicitly or implicitly overruling that prior precedent." See United States v. Short, 181 F.3d 620, 624 (5th Cir. 1999).

Ochoa-Perez also challenges the constitutionality of § 1326(b) in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Ochoa-Perez's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Ochoa-Perez 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). Ochoa-Perez 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.