

December 17, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-40649  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR CANTU-RIOS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 7:03-CR-1073  
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Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges.

PER CURIAM:\*

Oscar Cantu-Rios pleaded guilty to violating 8 U.S.C. § 1326(a) and (b) by being found in the United States, without permission, following his conviction of an aggravated felony and subsequent deportation. The district court sentenced him to serve 46 months of imprisonment and two years of supervised release.

For the first time on appeal, Cantu-Rios argues that the "felony" and "aggravated felony" provisions set forth in 8 U.S.C.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

§ 1326(b)(1) and (2) are unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), because they do not require the fact of a prior felony or aggravated felony conviction to be charged in the indictment and proved beyond a reasonable doubt. As Cantu-Rios concedes, his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). See United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000).

Cantu-Rios also argues for the first time on appeal that if Almendarez-Torres is overruled, the Supreme Court's holding in Blakely v. Washington, 124 S. Ct. 2531 (2004), renders unconstitutional the district court's calculation of his sentence under the United States Sentencing Guidelines based on facts relating to his prior convictions that were neither found by a jury beyond a reasonable doubt nor admitted by him. Cantu-Rios concedes that in addition to the obstacle posed by Almendarez-Torres, his argument regarding the effect of Blakely is foreclosed by United States v. Pineiro, 377 F.3d 464, 465-66 (5th Cir. 2004), petition for cert. filed (U.S. July 14, 2004) (No. 04-5263), in which this court held that Blakely does not extend to the United States Sentencing Guidelines.

The judgment of the district court is AFFIRMED.