

April 20, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-41384
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OCTAVIO WITHRON-ALVAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:03-CR-682-1

Before SMITH, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

Octavio Withron-Alvarez appeals his sentence imposed following his guilty plea conviction for illegal reentry into the United States following deportation. Withron-Alvarez contends that the sentencing enhancements in 8 U.S.C. § 1326(b) are unconstitutional and that he should be resentenced for the lesser included offense contained in 8 U.S.C. § 1326(a). Withron-Alvarez acknowledges that his arguments are foreclosed under Almendarez-Torres v. United States, 523 U.S. 224 (1998).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

However, he contends that if Almendarez-Torres is overruled, his sentence should be reconsidered in light of Blakely v. Washington, 124 S. Ct. 2531 (2004).

Apprendi v. New Jersey, 530 U.S. 466 (2000) did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; see also United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). Withron-Alvarez has not demonstrated that Blakely v. Washington, 124 S. Ct. 2531 (2004) is applicable to cases arising under Almendarez-Torres. The sentence imposed is AFFIRMED.