

September 10, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10279
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

HUMBERTO GONZALES-GONZALES,
also known as Roberto Soto Flores,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:03-CR-194-ALL-P

Before JOLLY, HIGGINBOTHAM, and PICKERING, Circuit Judges.

PER CURIAM:*

Huberto Gonzales-Gonzales ("Gonzales") entered a guilty plea to a violation of 8 U.S.C. § 1326 for being found in the United States subsequent to deportation and without having obtained permission to re-enter. The district court sentenced Gonzales to sixty-four months of imprisonment and three years of supervised release.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

The sole issue raised in adversarial fashion is whether Gonzales's prior conviction that resulted in his increased sentence under 8 U.S.C. § 1326(b) was an element of the offense that had to be alleged in the indictment. Gonzales acknowledges that his argument is foreclosed by *Almendarez-Torres*,¹ but he seeks to preserve the issue for Supreme Court review in light of the Court's more recent *Apprendi* decision.² *Apprendi* did not overrule *Almendarez-Torres*.³ Accordingly, the judgment of the district court is AFFIRMED. The Government's motion for summary affirmance is GRANTED. The Government's motion to dismiss the appeal and motion for an extension of time to file a brief are DENIED as moot.

¹*Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

²*Apprendi v. New Jersey*, 530 U.S. 466 (2000).

³See *id.* at 489-90; *United States v. Mancía-Perez*, 331 F.3d 464, 470 (5th Cir.), *cert. denied*, 124 S. Ct. 358 (2003).