

October 21, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 04-40204  
Conference Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARIO GARCIA-LOPEZ,

Defendant-Appellant.

-----  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. B-03-CR-856-ALL  
-----

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:\*

Mario Garcia-Lopez appeals his guilty-plea conviction and sentence for violating 8 U.S.C. § 1326(a) and (b) by being found in the United States, without permission, following both his conviction for an aggravated felony and subsequent deportation. Garcia-Lopez contends that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional. He asks us to vacate his conviction and sentence, reform the

---

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

judgment to reflect a conviction only under 8 U.S.C. § 1326(a), and remand his case for resentencing under that provision.

In Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998), the Supreme Court held that the enhanced penalties in 8 U.S.C. § 1326(b) are sentencing provisions, not elements of separate offenses. The Court further held that the sentencing provisions do not violate the Due Process Clause. Id. at 239-47. Garcia-Lopez acknowledges that his argument is foreclosed by Almendarez-Torres, but asserts that the decision has been cast into doubt by Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). He seeks to preserve his argument for further review.

Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). This court must follow Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 231 F.3d at 984 (internal quotation marks and citation omitted). The judgment of the district court is AFFIRMED.