

March 6, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-41607  
Summary Calendar

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UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

JOEL ESTUARDO ALVARADO-PALMA

Defendant-Appellant.

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Appeal from the United States District Court  
For the Southern District of Texas

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(USDC No. 5:04-CR-1005-1)

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Joel Estuardo Alvarado-Palma appeals his sentence following his guilty-plea conviction for illegal reentry. Alvarado argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (b)(2) are unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Alvarado's constitutional challenge is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). Although Alvarado contends that *Almendarez-Torres* was incorrectly decided and that a majority of the Supreme Court would overrule *Almendarez-Torres* in light of *Apprendi*, we

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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). Alvarado properly concedes that his argument is foreclosed, but he raises it here to preserve it for further review.

Alvarado also argues that the district court reversibly erred under *United States v. Booker*, 125 S. Ct. 738 (2005), by sentencing him pursuant to a mandatory application of the federal sentencing guidelines. The government concedes that Alvarado has preserved this issue for appeal. The government cannot show beyond a reasonable doubt that the error was harmless. See *United States v. Walters*, 418 F.3d 461, 463-64.

Accordingly, we REMAND to the district court to allow the district court to resentence Alvarado if, in its discretion under the now-advisory Guidelines, it chooses to do so.

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING.