

October 12, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 05-40153  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NOE SIFUENTES-FLORES,  
also known as Carlos Solares-Hernandez,

Defendant-Appellant.

-----  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 7:04-CR-102-ALL  
-----

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:\*

Noe Sifuentes-Flores ("Sifuentes") appeals from his conviction of being found in the United States after a previous deportation, in violation of 8 U.S.C. § 1326. Sifuentes contends for the first time on appeal that the district court erred by characterizing his state conviction for possession of a controlled substance as an aggravated felony because a prior conviction must qualify as a felony under federal law in order to be an aggravated felony under the guidelines. He further

---

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

contends that the "felony" and "aggravated felony" sentencing-enhancement provisions of 8 U.S.C. § 1326(b) are facially unconstitutional because Almendarez-Torres v. United States, 523 U.S. 224 (1998), has been undercut by later Supreme Court opinions. Sifuentes concedes that his contentions are foreclosed by this court's caselaw.

Sifuentes's contentions are foreclosed. First, Sifuentes's prior state felony conviction for possession of a controlled substance qualifies as an aggravated felony under U.S.S.G. § 2L1.2(b) despite the fact that the same offense is punishable only as a misdemeanor under federal law. See United States v. Caicedo-Cuero, 312 F.3d 697, 705-11 (5th Cir. 2002); United States v. Hinojosa-Lopez, 130 F.3d 691, 693-94 (5th Cir. 1997). Second, this court must follow Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000) (internal quotation marks and citation omitted).

AFFIRMED.