

February 23, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41006
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOMAS BETANCOURT-OCHOA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:05-CR-180-ALL

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Tomas Betancourt-Ochoa (Betancourt) pleaded guilty to unlawful presence in the United States following deportation after having been convicted of an aggravated felony, in violation of 8 U.S.C. § 1326(a) and (b). The district court sentenced him to 37 months of imprisonment, to be followed by three years of supervised release.

Betancourt challenges the constitutionality of § 1326(b)'s treatment of prior felony and aggravated felony convictions as sentencing factors rather than elements of the offense that must

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

be found by a jury. We decline ruling on the applicability of the waiver provisions in Betancourt's plea agreement because his constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Betancourt contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), we 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). Betancourt properly concedes that his argument is foreclosed in light of Almendarez-Torres and circuit precedent, but he raises it here to preserve it for further review.

AFFIRMED.