

August 28, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41732
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GRACIELA BARBOSA-CANTU,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:05-CR-594

Before DAVIS, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

Graciela Barbosa-Cantu (Barbosa) appeals her conviction and 68-month sentence for illegal reentry following deportation. She argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Barbosa contends that her plea agreement, which contained a waiver-of-appeal provision, does not bar this appeal because she is challenging the constitutionality of the statute of conviction and her sentence is in excess of the statutory maximum. The Government

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

seeks to enforce the appeal waiver. We assume, arguendo only, that the waiver does not bar the instant appeal.

Barbosa's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Barbosa contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi, 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). Barbosa properly concedes that her argument is foreclosed in light of Almendarez-Torres and circuit precedent, but she raises it here to preserve it for further review. Because Barbosa has shown no error in the judgment of the district court, that judgment is AFFIRMED.