

October 24, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41828
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROSENDO TORRES-LUNA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:05-CR-606

Before JOLLY, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Rosendo Torres-Luna (Torres) appeals his guilty-plea conviction and sentence for being an alien found unlawfully in the United States after deportation and following an aggravated felony conviction. Torres argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional. Torres also asserts that his appeal is not barred by the waiver-of-appeal provision in his plea agreement. The Government argues that the waiver bars the appeal.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

We assume, arguendo only, that the waiver does not bar the instant appeal. Torres's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Torres 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). Torres 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.