

FILED

February 23, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40292
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AMADOR ZAMBRANO-DUENEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-1503-ALL

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Amador Zambrano-Duenez (Zambrano) appeals his sentence under 8 U.S.C. § 1326 for illegal reentry into the United States after having been deported. Zambrano asserts that the district court erred in ordering him to cooperate in the collection of a DNA sample as a condition of supervised release and that this condition should therefore be vacated. He contends that the collection of his DNA violates the Ex Post Facto Clause.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

In United States v. Riascos-Cuenu, 428 F.3d 1100, 1102 (5th Cir. 2005) petition for cert. filed (Jan. 9, 2006) (No. 05-8662), which was decided after Zambrano filed his brief, this court declined to address such an argument on the ground that the claim was not ripe for review. In accordance with Riascos-Cuenu, this court lacks jurisdiction over this argument.

Zambrano also argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b) are unconstitutional. This challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Zambrano 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). Zambrano 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.

JUDGMENT AFFIRMED; APPEAL DISMISSED IN PART.