United States Court of Appeals
Fifth Circuit

F I L E D

December 12, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40585
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERASMO ESPINOZA-GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-1774-ALL

Before KING, WIENER, and OWEN, Circuit Judges.

PER CURIAM:[*]

Erasmo Espinoza-Garcia (Espinoza) appeals his guilty-plea
conviction of, and sentence for, violating 8 U.S.C. § 1326 by
being found in the United States without permission after
deportation. He argues, in light of Apprendi v. New Jersey, 530
U.S. 466 (2000), that the 48-month term of imprisonment imposed
in his case exceeds the statutory maximum sentence allowed for
the § 1326(a) offense charged in his indictment. He challenges

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[*] 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this opinion should not be published and is not precedent except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.

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 be found by a jury.

Espinoza's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although he 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). Espinoza 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.

The judgment of the district court is AFFIRMED.