

December 10, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-40791
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARMANDO LOZANO-SALAZAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-03-CR-144-1

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

Armando Lozano-Salazar appeals his conviction of being found in the United States following deportation after conviction of an aggravated felony. He argues, for the first time on appeal, that 8 U.S.C. § 1326(b) is unconstitutional because it treats a prior conviction for a felony or aggravated felony as a sentencing factor and not as an element of the offense. Lozano-Salazar's argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 239-47 (1998). *Apprendi v. New Jersey*, 530 U.S.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

466, 489-90 (2000), did not overrule that decision. See *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000). Thus, the district court did not err in sentencing Lozano-Salazar under 8 U.S.C. § 1326(b).

AFFIRMED.