

December 10, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-40808
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS DONALDO ESPINOSA-HERNANDEZ, also known as Ronnie
Espinosa,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. M-03-CR-147-1

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

PER CURIAM:*

Jesus Donald Espinosa-Hernandez appeals his guilty plea conviction of being found in the United States without permission after having been removed. He argues for the first time on appeal that the felony conviction that resulted in his increased sentence under 8 U.S.C. § 1326(b)(2) was an element of the offense that should have been charged in the indictment and that 8 U.S.C. § 1326(b)'s felony and aggravated felony provisions are

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). As he acknowledges, his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). See United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000).

AFFIRMED.