

April 21, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-41188
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS VILLALOBOS-CARDENAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-03-CR-408-1

Before JOLLY, JONES, and SMITH, Circuit Judges.

PER CURIAM:*

Jesus Villalobos-Cardenas ("Villalobos") appeals the sentence imposed following his guilty-plea conviction for illegal re-entry after deportation in violation of 8 U.S.C. § 1326. Villalobos contends that 8 U.S.C. §§ 1326(b)(1) and (b)(2) are unconstitutional because they are treated as sentencing provisions rather than as elements of the offense. He argues that his sentence exceeds the two-year maximum term of imprisonment which may be imposed under 8 U.S.C. § 1326(a).

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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 Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998), the Supreme Court held that the enhanced penalties in 8 U.S.C. § 1326(b) are sentencing provisions, not elements of separate offenses. Villalobos acknowledges that his argument is foreclosed by Almendarez-Torres but asserts that the decision has been cast into doubt by Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). He seeks to preserve his argument for further review.

Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). This court must follow Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 231 F.3d at 984 (internal quotation marks and citation omitted). Accordingly, the judgment of the district court is AFFIRMED.