

FILED

June 23, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 03-41713
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SANTIAGO AGUILERA-GUERRERO,
also known as Ernesto Rangel,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. M-03-CR-789-1

Before BARKSDALE, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Santiago Aguilera-Guerrero appeals the sentence imposed following his guilty-plea conviction for being found in the United States following deportation subsequent to an aggravated felony conviction, a violation of 8 U.S.C. § 1326. Aguilera raises two issues that he concedes are foreclosed, but he seeks to preserve them for further review.

Aguilera argues for the first time on appeal that his prior conviction for possession of a controlled substance should not be

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

considered an "aggravated felony" under U.S.S.G. § 2L1.2(b)(1)(C). This argument is foreclosed by our decision in United States v. Caicedo-Cuero, 312 F.3d 697, 705-711 (5th Cir. 2002), cert. denied, 538 U.S. 1021 (2003).

Also for the first time on appeal, Aguilera argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional in view of Apprendi v. New Jersey, 530 U.S. 466 (2000). He concedes that this argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but states that he is raising it to preserve it for further review. Apprendi did not overrule Almendarez-Torres. United States v. Hernandez-Avalos, 251 F.3d 505, 507 & n.1 (5th Cir. 2001). We must follow Almendarez-Torres until the Supreme Court overrules it. Id.

AFFIRMED.