

October 21, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40449
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE LUIS OLALDE-SERNA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:03-CR-1001-1

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

Jose Luis Olalde-Serna appeals his guilty-plea conviction and sentence for being found illegally present in the United States after deportation pursuant to 8 U.S.C. § 1326(a) and (b). Olalde-Serna argues, pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are elements of the offense, not sentence enhancements, making those provisions unconstitutional. He concedes that this argument is foreclosed by Almendarez-Torres

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

v. United States, 523 U.S. 224 (1998), and he raises it for possible review by the Supreme Court.

This argument is foreclosed by Almendarez-Torres, 523 U.S. at 235. We must follow the precedent set in Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000) (internal quotation and citation omitted).

Olalde-Serna also argues that the district court improperly sentenced him based on facts not admitted or found by a jury in violation of Blakely v. Washington, 124 S. Ct. 2531 (2004). This argument is foreclosed by United States v. Pineiro, 377 F.3d 464, 465-66 (5th Cir. 2004), petition for cert. filed (July 14, 2004).

AFFIRMED.