

June 22, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41258
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO JAVIER HERNANDEZ-NEGRETE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-150-ALL

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Francisco Javier Hernandez-Negrete ("Hernandez") appeals following his guilty-plea conviction and 57-month sentence of imprisonment on one count of being found in the United States, without permission, following removal after having been convicted of an aggravated felony.

For the first time on appeal, Hernandez argues that the sentencing provisions in 8 U.S.C. § 1326(b) are unconstitutional because they do not require the fact of a prior felony or

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

aggravated felony conviction to be charged in the indictment and proved beyond a reasonable doubt. He contends that his sentence is invalid, and he argues that it should not exceed the two-year maximum term of imprisonment prescribed in 8 U.S.C. § 1326(a).

Hernandez acknowledges that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but he 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).

AFFIRMED.