

February 23, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41699
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EFRAIN PICENO-BAEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-1158-ALL

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Efrain Piceno-Baez (Piceno) pleaded guilty and was convicted of attempted illegal reentry after deportation. He was sentenced to 21 months of imprisonment and three years of supervised release.

Piceno contends that the district court erred by characterizing his state felony conviction for possession of crack cocaine as an "aggravated felony" for purposes of U.S.S.G. § 2L1.2. Relief on this issue is precluded. See United States

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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. Caicedo-Cuero, 312 F.3d 697, 700-06 (5th Cir. 2002); United States v. Hinojosa-Lopez, 130 F.3d 691, 693-94 (5th Cir. 1997).

Piceno also asserts that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b) are unconstitutional. Piceno's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Piceno contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), we have repeatedly rejected such arguments on the basis that Almendarez-Torres remains binding. See United States v. Garza-Lopez, 410 F.3d 268, 276 (5th Cir.), cert. denied, 126 S. Ct. 298 (2005). Piceno properly concedes that his argument is foreclosed in light of Almendarez-Torres and circuit precedent, but he raises it here to preserve it for further review.

Accordingly, the judgment of the district court is AFFIRMED.