

July 30, 2007

IN THE UNITED STATES COURT OF APPEALS

Charles R. Fulbruge III
Clerk

FOR THE FIFTH CIRCUIT

No. 06-40995
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-

Appellee,

versus

RAUL MANUEL MEDINA-MEDINA,

Defendant-

Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:05-CR-1828-ALL

Before DeMOSS, STEWART and PRADO, Circuit Judges.

PER CURIAM:*

Raul Manuel Medina-Medina (Medina) appeals his conviction and sentence for illegal reentry. Medina argues, and the Government correctly concedes, that the district court plainly erred in assessing a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii) on the basis of Medina's

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

1996 Texas conviction for retaliation; therefore, his sentence should be vacated and his case remanded for resentencing. *See United States v. Martinez-Mata*, 393 F.3d 625, 628-29 (5th Cir. 2004).

Medina's constitutional challenge to 8 U.S.C. § 1326(b) is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). Although Medina 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. 2005). Medina 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.

AFFIRMED IN PART; VACATED IN PART; REMANDED FOR RESENTENCING.