

June 20, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41459
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OLEGARIO ESQUIVEL-HUERTA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:05-CR-245-ALL

Before STEWART, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

Olegario Esquivel-Huerta appeals his guilty plea conviction and sentence for being unlawfully present in the United States after deportation following an aggravated felony conviction. He argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), and he contends that his challenge is not barred by the appeal-waiver provision in his plea agreement. The Government seeks enforcement of the waiver

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

provision. We assume, arguendo only, that the waiver does not bar the instant appeal.

Esquivel-Huerta's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Esquivel-Huerta contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi, 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). Esquivel-Huerta 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.