

June 20, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 05-41507  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CAYETANO BRIONES, also known as Jose Gonzalez-Hernandez, also  
known as Javier Fuentes-Arriaga,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:05-CR-507-ALL  
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Before STEWART, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:\*

Cayetano Briones appeals following his guilty plea conviction for attempted illegal reentry into the United States. Briones 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). Because the Government has not invoked the waiver provisions in the plea

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

agreement, the waiver does not bind Briones. See United States v. Story, 439 F.3d 226, 230-31 (5th Cir. 2006).

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

The judgment of the district court is AFFIRMED.