

November 9, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40232
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENITO AVILA-SALDANA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:04-CR-511-ALL

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:*

Benito Avila-Saldana appeals his guilty-plea conviction of illegal reentry into the United States after having been deported. Avila-Saldana argues that Almendarez-Torres v. United States, 523 U.S. 224 (1998), has been undercut by later Supreme Court opinions, particularly Apprendi v. New Jersey, 530 U.S. 466 (2000). Thus, he argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b) are unconstitutional. Avila-Saldana recognizes that relief is foreclosed but 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

that he wishes to raise the issue for possible further review in the Supreme Court.

Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90. We must follow the precedent set in Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." United States v. Mancia-Perez, 331 F.3d 464, 470 (5th Cir. 2003) (quotation marks and citation omitted). Therefore, Avila-Saldana's argument fails. See id. The judgment of the district court is AFFIRMED.