

November 9, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40513
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE LUIS MATUTE, also known as Ruben Dario Reyes-Zapata,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:04-CR-1012-ALL

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:*

Jose Luis Matute appeals his guilty-plea conviction and sentence for being found present in the United States following deportation without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. Matute argues, pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are elements of the offense, not sentence enhancements, making those provisions

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

unconstitutional. He concedes that this argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but raises it for possible review by the Supreme Court.

"Apprendi did not overrule Almendarez-Torres." United States v. Rivera, 265 F.3d 310, 312 (5th Cir. 2001); see Apprendi, 530 U.S. at 489-90. We must follow the precedent set in Almendarez-Torres unless the Supreme Court itself determines to overrule it. See Rivera, 265 F.3d at 312.

AFFIRMED.