

February 23, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT³

No. 05-40463
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERTO ROMERO-MONTIEL, also known as Roberto Romero,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-1726-ALL

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Roberto Romero-Montiel appeals his conviction and sentence under 8 U.S.C. § 1326 for attempting to illegally re-enter the United States after having been deported. Romero-Montiel argues that the district court erred in ordering, as a condition of supervised release, that he cooperate with the probation officer in the collection of DNA. His claim is not ripe for judicial review in light of our holding in United States v. Riascos-Cuenu, 428 F.3d 1100, 1102 (5th Cir. 2005), petition for cert. filed

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

(Jan. 9, 2006) (No. 05-8662). Accordingly, we dismiss this portion of the appeal for lack of jurisdiction.

Romero-Montiel also argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b) are unconstitutional. His challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Romero-Montiel 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.), cert. denied, 126 S. Ct. 298 (2005). Romero-Montiel 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.

JUDGMENT AFFIRMED; APPEAL DISMISSED IN PART.