

**FILED**

**December 14, 2005**

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 05-40738  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ISAURO PENA-GARZA,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 7:04-CR-449-ALL  
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Before KING, Chief Judge, and HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:\*

Isauro Pena-Garza appeals his guilty-plea conviction and sentence for being found in the United States, without permission, following deportation. See 8 U.S.C. § 1326(a), (b). Pena-Garza argues that the sentencing provisions in 8 U.S.C. § 1326(b) are unconstitutional. Pena-Garza's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Pena-Garza contends that Almendarez-Torres was incorrectly decided and that a majority of

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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). Pena-Garza 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.

Pena-Garza also argues that the district court erred by requiring, as a condition of supervised release, that he cooperate in the collection of his DNA as directed by his probation officer. Pena-Garza's complaint is not ripe for review. See United States v. Riascos-Cuenu, \_\_\_ F.3d \_\_\_, No. 05-20037, 2005 WL 2660032 at \*1-2 (5th Cir. Oct. 18, 2005); United States v. Carmichael, 343 F.3d 756, 761-62 (5th Cir. 2003). The appeal of this claim is dismissed for lack of jurisdiction.

Pena-Garza has not established error with respect to his conviction and sentence. Accordingly, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED; APPEAL DISMISSED IN PART FOR LACK OF JURISDICTION.