

February 23, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40819
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TITO HERRERA-TREJO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-2108-ALL

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Tito Herrera-Trejo (Herrera) appeals his guilty-plea conviction and sentence for re-entry of a deported alien. Herrera argues that the district court erred by characterizing his state felony conviction for possession of a controlled substance as an "aggravated felony" under U.S.S.G.

§ 2L1.2(b)(1)(C). Herrera's argument is without merit. See United States v. Hernandez-Avalos, 251 F.3d 505, 508 (5th Cir.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

2001); United States v. Hinojosa-Lopez, 130 F.3d 691, 694 (5th Cir. 1997).

Herrera also argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional. This constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Herrera 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). Herrera 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.