

FILED

February 23, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41083
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTURO GUITIERREZ-TOVAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-987-1

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Arturo Gutierrez-Tovar (Gutierrez) appeals his guilty plea conviction for illegally reentering the United States after having been convicted of an aggravated felony and deported. As Gutierrez acknowledges, his challenge to the district court's eight-level sentence enhancement pursuant to U.S.S.G.

§ 2L1.2(b)(1)(C) is foreclosed by circuit precedent. See United States v. Hinojosa-Lopez, 130 F.3d 691, 693-94 (5th Cir. 1997); see also United States v. Rivera, 265 F.3d 310, 312-13 (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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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). Gutierrez cites no authority affecting the binding precedential value of Rivera and Hinojosa-Lopez.

Gutierrez also argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (b)(2) are unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Gutierrez's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Gutierrez contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi, 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). Gutierrez 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.

AFFIRMED.

No. 05-41083

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