

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

February 2, 2007

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAYMUNDO CHAVEZ-AVILA,
a/k/a Ray Avilar-Noyola,

Defendant-Appellant.

No. 06-4169
(District of Utah)
(D.C. No. 2:05-CR-902-TS)

ORDER AND JUDGMENT*

Before **BRISCOE, McKAY, and McCONNELL**, Circuit Judges.

In December 2005, Raymundo Chavez-Avila was indicted for illegal reentry following deportation in violation of 8 U.S.C. § 1326(a). Concurrently with the indictment, the government filed a notice of its intent to seek a sentencing enhancement under 8 U.S.C. § 1326(b), which increases the maximum penalty for a violation of § 1326(a) from two years to twenty years if the

*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

defendant was previously deported “subsequent to a conviction for commission of an aggravated felony.” 8 U.S.C. § 1326(b). This enhancement applies to Mr. Chavez-Avila because he was convicted in 1992 of “Possession/Sale of a Controlled Substance” in California.² R. Vol. I, Doc. 2, at 1. Mr. Chavez-Avila eventually pleaded guilty and was sentenced to seventy months imprisonment, the low end of his applicable advisory guidelines range.

On appeal, Mr. Chavez-Avila urges us to vacate his sentence because it is longer than § 1326(a)’s two-year statutory maximum. He argues that the government must allege his prior felony conviction in the indictment and prove it at trial before he is subject to § 1326(b)’s enhancement provision—actions the government did not take in his case.

To his credit, Mr. Chavez-Avila concedes that his argument is foreclosed by the Supreme Court’s decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and our post-*Booker* cases discussing *Almendarez-Torres*’ continuing viability, see *United States v. Moore*, 401 F.3d 1220, 1223–24 (10th Cir. 2005). As we explained in *Moore*, it is not our prerogative to overrule a Supreme Court case, however uncertain its underpinnings may be in light of subsequent developments. *See id.* Thus, Mr. Chavez-Avila wisely admits that the only

²This state conviction does not pose problems similar to those addressed in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), because it was for more than the mere possession prohibited by 21 U.S.C. § 844. *See Lopez*, 127 S. Ct. at 629.

legitimate reason “[h]e raises th[is] issue [is] to preserve it for further review in the Supreme Court.” Appellant’s Br. 7.

Accordingly, we hold that Mr. Chavez-Avila’s sentence is proper based on *Almendarez-Torres*. The judgment of the United States District Court for the District of Utah is **AFFIRMED**.

Entered for the Court,

Michael W. McConnell
Circuit Judge