

SEP 29 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>JOSE OSORIO-REYES,</p> <p style="text-align: center;">Defendant - Appellant.</p>

No. 10-50449

D.C. No. 3:09-cr-03593-MMA-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Submitted September 27, 2011 **

Before: HAWKINS, SILVERMAN and W. FLETCHER, Circuit Judges.

Jose Osorio-Reyes appeals the sentence imposed following his guilty plea to attempted entry after deportation in violation of 8 U.S.C. § 1326. Osorio-Reyes contends that the district court erred by applying 8 U.S.C. § 1326(b) to enhance his

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

sentence. Specifically, he argues that *Almendarez–Torres v. United States*, 523 U.S. 224 (1998), which permits enhancement based on the existence of a prior felony, has been overruled by *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), and *United States v. O’Brien*, 130 S. Ct. 2169 (2010), so that his prior felony conviction must be either admitted or proved to a jury beyond a reasonable doubt. The district court did not err by treating Osorio-Reyes’ prior felony conviction as a sentencing enhancement and increasing his statutory maximum sentence. *See United States v. Valdovinos–Mendez*, 641 F.3d 1031, 1036 (9th Cir. 2011) (holding that *Almendarez–Torres* has not been overruled by *Nijhawan* and continues to constitute binding authority); *United States v. Grajeda*, 581 F.3d 1186, 1197 (9th Cir. 2009) (holding that *Almendarez–Torres* is binding unless it is expressly overruled by the Supreme Court).

AFFIRMED.