

December 17, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40558
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUMBERTO LOPEZ-CRUZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-44-ALL

Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges.

PER CURIAM:*

Humberto Lopez-Cruz ("Lopez") pleaded guilty to illegally re-entering the United States after having been deported and after having been convicted of an "aggravated felony," a violation of 8 U.S.C. § 1326(a) and (b). The district court sentenced him to 66 months in prison and to three years of supervised release.

For the first time on appeal, Lopez argues that 8 U.S.C. § 1326(b) is unconstitutional under Apprendi v. New Jersey, 530

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

U.S. 466 (2000), because it does not require the fact of a prior felony or aggravated-felony conviction to be charged in the indictment and proved beyond a reasonable doubt. As Lopez concedes, this argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), and Almendarez-Torres was not overruled by Apprendi. See United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000).

Lopez also argues that the Supreme Court's holding in Blakely v. Washington, 124 S. Ct. 2531 (2004), should be applied to sentences determined under the United States Sentencing Guidelines. He concedes that this argument is foreclosed by this court's recent opinion in United States v. Pineiro, 377 F.3d 464, 465 (5th Cir. 2004), petition for cert. filed (U.S. July 14, 2004) (No. 04-5263), but he raises it to preserve it for possible further review.

AFFIRMED.