

FILED

January 26, 2005

Charles R. Fulbruge III
Clerk

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 04-20545
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-

Appellee,

versus

JESUS ROBERTO FLORES-GUZMAN,

Defendant-

Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-CR-439-ALL

Before WIENER, BENAVIDES and STEWART, Circuit Judges.

PER CURIAM:*

Jesus Roberto Flores-Guzman (Flores-Guzman) appeals his guilty-plea conviction and sentence for illegal reentry following deportation in violation of 8 U.S.C. § 1326.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

For the first time on appeal, Flores-Guzman contends that the “felony” and “aggravated felony” provisions of 8 U.S.C.

§ 1326(b) are unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). He also contends that Blakely v. Washington, 124 S. Ct. 2531 (2004), applies in determining his sentence. Flores-Guzman acknowledges that his arguments are foreclosed, but he seeks to preserve the issues for possible Supreme Court review.

As Flores-Guzman concedes, his arguments are foreclosed. See Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998).

Also for the first time on appeal, Flores-Guzman contends that the district court plainly erred in prohibiting him from “drinking or using any addictive substances” as a special condition of his supervised release. Because the special condition is not reasonably related to the nature of the offense or Flores-Guzman’s characteristics and involves a greater deprivation of liberty than is reasonably necessary to deter criminal conduct, protect the public, and provide Flores-Guzman with necessary treatment, we agree that the district court plainly erred in prohibiting Flores-Guzman from “drinking or using any addictive substances” during his supervised release. See United States v. Ferguson, 369 F.3d 847, 853-54 (5th Cir. 2004). Accordingly, we VACATE the sentence in part and REMAND for the district court to modify the special conditions of Flores-Guzman’s supervised release in a manner consistent with this opinion.

AFFIRMED IN PART. VACATED AND REMANDED IN PART.