

December 17, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40805
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUADALUPE NIEVES-ALVAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-103-ALL

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

PER CURIAM:*

Guadalupe Nieves-Alvarez ("Nieves") pleaded guilty to the offense of being unlawfully found in the United States after deportation subsequent to an aggravated felony, in violation of 8 U.S.C. § 1326(a) and (b). The district court sentenced him to 46 months in prison and three years of supervised release.

For the first time on appeal, Nieves argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional in light of Apprendi v.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

New Jersey, 530 U.S. 466 (2000). He concedes that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998). He also asserts that if Almendarez-Torres is overruled and Blakely v. Washington, 124 S. Ct. 2531 (2004), is held to apply to the federal sentencing guidelines, then the calculation of his sentence would be unconstitutional. Nieves's arguments are, as he concedes, foreclosed. See Almendarez-Torres, 523 U.S. at 235, 239-47; United States v. Pineiro, 377 F.3d 464, 465-66 (5th Cir. 2004), petition for cert. filed (U.S. July 14, 2004)(No. 04-5263); United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). Nieves's conviction and sentence are AFFIRMED.