

December 17, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40686
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS PEREZ-TOSTADO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:03-CR-894-ALL

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

PER CURIAM:*

Carlos Perez-Tostado appeals his guilty-plea conviction and sentence for illegal reentry following deportation in violation of 8 U.S.C. § 1326.

For the first time on appeal, Perez-Tostado 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

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

sentence. Perez-Tostado acknowledges that his arguments are foreclosed, but he seeks to preserve the issues for possible Supreme Court review.

Perez-Tostado's arguments are not precluded by the terms of the appellate-waiver provision. Nevertheless, as Perez-Tostado concedes, his arguments are foreclosed. See Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998); United States v. Pineiro, 377 F.3d 464, 473 (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).

AFFIRMED.