

FILED

December 17, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40794
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE REYES ESPINOZA-CORTEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-42-ALL

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

PER CURIAM:*

Jose Reyes Espinoza-Cortez appeals his guilty-plea conviction and sentence for illegal reentry following deportation. He 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 argues that he may not be convicted and sentenced under 8 U.S.C. § 1326(b) because the indictment did not allege that he was deported after a qualifying felony or aggravated felony and that

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Blakely v. Washington, 124 S. Ct. 2531 (2004), dictates that his sentence violates his Sixth Amendment rights. As Espinoza-Cortez concedes, these arguments are foreclosed. See Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998); United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000); see also United States v. Pineiro, 377 F.3d 464, 473 (5th Cir.), petition for cert. filed (U.S. July 14, 2004) (No. 04-5263).

AFFIRMED.