

December 17, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-40868  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUGO ALBERTO ARVIZU-GARCIA,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:04-CR-194-ALL  
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Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges.

PER CURIAM:\*

Hugo Alberto Arvizu-Garcia appeals the sentence imposed following his illegal reentry conviction. He argues for the first time on appeal that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional in light of Apprendi v. New Jersey 530 U.S. 466 (2000) and Blakely v. Washington, 124 S. Ct. 2531 (2004). He concedes that the issue is foreclosed but seeks its preservation for possible Supreme Court review.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Arvizu's arguments are not precluded by the terms of his appeal waiver; nevertheless, 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.), 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.