

April 13, 2007

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-40020
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARGARITO PECENO-MONTANEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas, Laredo
USDC No. 5:04-CR-1414-ALL

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before JONES, Chief Judge, and BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

This court previously affirmed the conviction and sentence of the Appellant Margarito Peceno-Montanez ("Montanez"). On December 11, 2006, the Supreme Court vacated and remanded the case for reconsideration in light of Lopez v. Gonzalez, 127 S. Ct. 625 (2006).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

In light of Lopez, the district court erred by enhancing Montanez's sentence based on a Texas conviction for simple possession of a controlled substance. Because Montanez has completed the confinement portion of his sentence, any argument that the prison term should be reduced is moot and the only portion of the sentence remaining for consideration is the defendant's term of supervised release.

However, as the Federal Public Defender notes, Montanez presumably has been deported. In order to resentence him and reduce his term of supervised release, FEDERAL RULE OF CRIMINAL PROCEDURE 43 requires the defendant to be present and have the opportunity to allocute. Because the defendant has been deported and is legally unable, without permission of the Attorney General, to reenter the United States to be present for a resentencing proceeding, there is no relief we are able to grant Montanez and his appeal is moot. See United States v. Rosenbaum-Alanis, No. 05-41400, 2007 WL 926832 (5th Cir. March 29, 2007). The appeal is therefore **DISMISSED**.