

August 9, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40570
c/w No. 04-40572
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MANUEL REYES-RODRIGUEZ,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-301-ALL

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:*

In this consolidated appeal, Manuel Reyes-Rodriguez appeals only from his guilty-plea conviction for illegal reentry following deportation (No. 04-40572); Reyes-Rodriguez voluntarily abandons any challenge with respect to the revocation of his supervised release relating to his prior illegal reentry conviction (No. 04-40570).

For the first time on appeal, Reyes-Rodriguez contends that the "felony" and "aggravated felony" provisions of 8 U.S.C.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

§ 1326(b) are unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Reyes-Rodriguez acknowledges that this argument is foreclosed, but he seeks to preserve the issue for possible Supreme Court review. See Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998); United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000).

He also argues that, in light of United States v. Booker, 125 S. Ct. 738 (2005), the district court plainly erred in sentencing him under a mandatory guidelines system. After Booker, it is clear that application of the federal sentencing guidelines in their mandatory form constitutes error that is plain. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732-33 (5th Cir. 2005). Reyes-Rodriguez's contention that this error is structural and gives rise to a presumption of prejudice is unavailing. See United States v. Malveaux, ___ F.3d ___ No. 03-41618, 2005 WL 1320362 at *1 n.9 (5th Cir. Apr. 11, 2005). Reyes-Rodriguez must show that the error affected his substantial rights, and he has not done so. See Valenzuela-Quevedo, 407 F.3d at 733-34. The judgment of the district court is therefore AFFIRMED.