

August 17, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-40919  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN MANUEL ALEJO-AGRAMON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:04-CR-190-ALL  
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Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:\*

Juan Manuel Alejo-Agramon (Alejo-Agramon) 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, Alejo-Agramon contends that the district court plainly erred by characterizing his state felony conviction for simple possession of marijuana as an "aggravated felony" for purposes of U.S.S.G. § 2L1.2(b)(1)(C) and 8 U.S.C. § 1101(a)(43)(B), when that same offense was punishable only as a misdemeanor under federal law. This issue, however, is

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

foreclosed by United States v. Caicedo-Cuero, 312 F.3d 697, 706-11 (5th Cir. 2002), and United States v. Hinojosa-Lopez, 130 F.3d 691, 694 (5th Cir. 1997).

Alejo-Agramon also contends, for the first time on appeal, 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). As he concedes, this argument is 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).

Finally, Alejo-Agramon contends that the district court committed reversible plain error when it sentenced him pursuant to the mandatory United States Sentencing Guidelines system held unconstitutional in United States v. Booker, 125 S. Ct. 738 (2005). He argues that the error was plain, structural, and presumptively prejudicial. We review for plain error. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732 (5th Cir. 2005), petition for cert. filed (July 25, 2005)(No. 05-5556).

The district court erred when it sentenced Alejo-Agramon pursuant to the mandatory Guidelines system. See id. at 733. However, the error was not structural or presumptively prejudicial. See United States v. Martinez-Lugo, 411 F.3d 597, 601 (5th Cir. 2005); United States v. Malveaux, 411 F.3d 558, 560 n.9 (5th Cir. 2005), petition for cert. filed (July 11, 2005) (No. 05-5297). Further, Alejo-Agramon has failed to point

to anything in the record indicating that the district court would have reached a different conclusion had it known that the Sentencing Guidelines were advisory. See United States v. Mares, 402 F.3d 511, 521-22 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005) (No. 04-9517). Although the district court sentenced Alejo-Agramon at the lowest end of the guideline range, it found no reason to depart from that range. See United States v. Bringier, 405 F.3d 310, 317 & n.4 (5th Cir. 2005), petition for cert. filed (July 26, 2005) (No. 05-5535). Therefore, Alejo-Agramon has not demonstrated that his substantial rights were affected, and he has failed to establish plain error. See Mares, 402 F.3d at 522.

AFFIRMED.