

June 30, 2005

Charles R. Fulbruge III
Clerk

REVISED JUNE 30, 2005

In the

United States Court of Appeals
for the Fifth Circuit

m 04-41290

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SALVADOR VEGA-DIAZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
m 5:04-CR-473-1

Before DAVIS, SMITH, and DENNIS,
Circuit Judges.

PER CURIAM:*

Having pleaded guilty of illegal re-entry
after deportation, Salvador Vega-Diaz appeals

his forty-six-month sentence of imprisonment,
which is to be followed by a three-year term of
supervised release. He argues that his sen-
tence under a mandatory application of the
sentencing guidelines must be vacated in light
of *United States v. Booker*, 125 S. Ct. 738
(2005). We review this issue for harmless
error, because Vega-Diaz did raise it in the
district court.

Our review of the record convinces us that
the district court would have imposed a lower
sentence under advisory guidelines. Conse-

* Pursuant to 5TH CIR. R. 47.5, the court has de-
termined that this opinion should not be published
and is not precedent except under the limited cir-
cumstances set forth in 5TH CIR. R. 47.5.4.

quently, we vacate the sentence and remand for resentencing. *United States v. Pennell*, 409 F.3d 240, 246 (5th Cir. 2005); *United States v. Gracia-Cantu*, 302 F.3d 308, 313 (5th Cir. 2002).

The decision to remand makes it unnecessary for us to address whether the enhancement of Vega-Diaz's sentence based on prior drug trafficking convictions pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(i) constitutes reversible error in light of *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 353-60 (5th Cir. 2005). *United States v. Angeles-Mendoza*, 407 F.3d 742, 754 & nn.26-27 (5th Cir. 2005). The district court will have the benefit on remand of the record supplements provided by the government relative to this issue.

Finally, Vega-Diaz argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(a) and (b) are unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). We agree with Vega-Diaz's concession that this issue is foreclosed. See *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998); *United States v. Manciaperez*, 331 F.3d 464, 470 (5th Cir. 2003).

The judgment of sentence is VACATED and REMANDED for resentencing.