

October 20, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-41569
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MANUEL VILLANUEVA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:03-CR-914-01

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

Manuel Villanueva appeals from his conviction of transporting illegal aliens. He contends that the district court erred by adjusting his offense level based on his intentionally or recklessly creating a substantial risk of death or serious bodily injury, pursuant to U.S.S.G. § 2L1.1(b)(5). Villanueva seeks leave to file a supplemental brief in which he contends that the adjustment violated Blakely v. Washington, 124 S. Ct. 2531 (2004), because it was based on facts that were not charged in his indictment, were not found by a jury beyond a reasonable

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

doubt, and were not admitted by him at his plea hearing. The motion to file it is GRANTED.

The district court's finding that Villanueva had used heroin shortly before driving was not clearly erroneous. See United States v. Humphrey, 104 F.3d 65, 71 (5th Cir. 1997). Villanueva correctly concedes that his Blakely contention is foreclosed by United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004), petition for cert. filed (July 14, 2004) (No. 04-5263).

AFFIRMED; MOTION GRANTED