

October 21, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-40220  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OCIEL MARTINEZ-MARTINEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:03-CR-777-ALL  
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Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:\*

Ociel Martinez-Martinez (Martinez) appeals his conviction and sentence for illegal reentry following deportation. He argues 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 foreclosed by United States v. Caicedo-Cuero,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

312 F.3d 697, 706-11 (5th Cir. 2002), cert. denied, 538 U.S. 1021 (2003), and United States v. Hinojosa-Lopez, 130 F.3d 691, 694 (5th Cir. 1997). Therefore, Martinez has not demonstrated plain error.

Martinez also argues 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). He acknowledges that his argument is foreclosed, but seeks to preserve the issue for possible Supreme Court review. As Martinez concedes, this issue 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).

AFFIRMED.