

June 10, 2004

Charles R. Fulbruge III  
Clerk

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 03-41451  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-

Appellee,

versus

PEDRO AVILLA,

Defendant-

Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. L-03-CR-455-ALL  
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Before SMITH, DeMOSS and STEWART, Circuit Judges.

PER CURIAM:\*

Pedro Avilla appeals his guilty-plea conviction and sentence for being found in the United States after deportation in violation of 8 U.S.C. § 1326(b). Avilla argues that the district court erred in increasing his offense level by 16 points based on his prior aggravated assault conviction pursuant to U.S.S.G. § 2L1.2(b)(1)(A). Avilla did not object to this enhancement in the district court and,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

therefore, review is limited to plain error. See United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994). Because Avilla had a prior conviction for aggravated assault which falls within the definition of a crime of violence under the application notes to § 2L1.2, the 16-level enhancement of Avilla's sentence under § 2L1.2(b)(1)(A) was not error, plain or otherwise. See § 2L1.2, comment. (n.1(B)(ii)); United States v. Ramirez, \_\_\_ F.3d \_\_\_ (5th Cir. Apr. 5, 2004), 2004 WL 828096 at \*3.

For the first time on appeal, Avilla argues that the “felony” and “aggravated felony” provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional in view of Apprendi v. New Jersey, 530 U.S. 466 (2000). He concedes that this argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but states that he is raising it to preserve it for further review. Apprendi did not overrule Almendarez-Torres. United States v. Hernandez-Avalos, 251 F.3d 505, 507 & n.1 (5th Cir. 2001). We must follow Almendarez-Torres until the Supreme Court overrules it. Hernandez-Avalos, 251 F.3d at 507 n.1.

AFFIRMED.