

**July 23, 2003**

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III  
Clerk

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No. 02-21292  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VALENTINE CHAVEZ-VASQUEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-02-CR-311-1  
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Before JONES, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:\*

Valentine Chavez-Vasquez ("Chavez") appeals the sentence imposed following his guilty plea for illegal re-entry into the United States following deportation. Chavez appeals the district court's imposition of a \$500 fine, arguing that the district court erred reversibly by imposing a fine based on his ability to earn money while in prison. Chavez argues that 28 C.F.R. § 345.35(a) prohibits deportable aliens from placement in

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Federal Prison Industries ("FPI") jobs. Chavez also contends that U.S.C. § 1326(b) is unconstitutional based on Apprendi v. New Jersey, 530 U.S. 466 (2000).

Chavez did not raise below the issue of inability to work in prison, so we will review it for plain error only. Because Chavez does not argue and has not demonstrated that he is "currently under an order of deportation, exclusion, or removal," he has not shown that he is ineligible for an FPI job assignment under 28 C.F.R. § 345.35(a). The district court's determination that Chavez has the future ability to pay the fine through prison earnings is not clearly, much less plainly, erroneous.

Chavez' contention that the enhancement provisions in 8 U.S.C. § 1326(b) is unconstitutional lacks merit because Apprendi did not overrule Almendarez-Torres v. United States, 523 U.S. 24 (1998). See Apprendi, 530 U.S. at 489-90; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000).

For the foregoing reasons, Chavez' sentence is AFFIRMED.