

United States Court of Appeals  
for the Fifth Circuit

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No. 22-50136  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**  
November 29, 2022

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

JESUS IVAN DAVILA,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 3:21-CR-615-1

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Before BARKSDALE, HIGGINSON, and HO, *Circuit Judges.*

PER CURIAM:\*

Jesus Ivan Dominguez appeals his within-Guidelines 100-months' prison sentence following his guilty-plea conviction for illegal reentry after removal, in violation of 8 U.S.C. § 1326. (Although the official case caption lists the defendant's name as "Jesus Ivan Davila", he filed a notice of true

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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name in the district court that his name is “Jesus Ivan Dominguez”, which is how he is referred in this opinion.) Two business days before sentencing, the probation officer supplemented the presentence investigation report with information alleging Dominguez’ gang affiliation. Dominguez contends: the district court violated Federal Rule of Criminal Procedure 32 by relying on this information in determining his sentence.

We agree with Dominguez that he did not waive this claim. His, and his counsel’s, acknowledging at sentencing they had read and discussed the supplemental information is insufficient to establish Dominguez was aware of any Rule 32 violations and chose to relinquish any and all challenges to them. *E.g., United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006) (“[W]aiver is the intentional relinquishment of a known right.”).

On the other hand, Dominguez did not raise the issue on appeal in district court (as he concedes). The issue’s not having been preserved, review is only for plain error. *E.g., United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, he must show a forfeited plain error (clear-or-obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, our court has the discretion to correct the reversible plain error, but generally should do so only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings”. *Id.* (citation omitted).

Assuming, without deciding, Dominguez established the requisite clear-or-obvious error, he fails to show it affected his substantial rights. *E.g., United States v. Nino-Carreon*, 910 F.3d 194, 197 (5th Cir. 2018) (“defendant ordinarily must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different” (citations omitted)).

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The record does not reflect the court relied on the gang-affiliation allegation when imposing sentence. The supplemental information did not affect his Guidelines range, and he received the lowest sentence within that range. At sentencing, his counsel acknowledged his requested variance or departure, for a term of just over twelve months, was “very significant”. Dominguez’ assertion that the allegation was the sentencing hearing’s central focus is not enough to establish what effect, if any, it had on the court’s implicit denying of his request. *E.g., id.* (“no reasonable probability that [Dominguez’] sentence would have been different”). *Contra United States v. Johnson*, 956 F.3d 740, 746 (5th Cir. 2020) (Rule 32 violation affected substantial rights where “court expressly relied” on undisclosed information “in imposing its above-guidelines sentence”).

Dominguez also contends the recidivism enhancement in 8 U.S.C. § 1326(b) is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As he concedes, this issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *E.g., United States v. Pervis*, 937 F.3d 546, 553–54 (5th Cir. 2019) (holding *Almendarez-Torres* survived *Apprendi*). He raises the issue only to preserve it for possible future review.

AFFIRMED.