

October 3, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-41193  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE CORTEZ-VILLANUEVA, also known as Jose Luis  
Hernandez-Cortez,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:04-CR-336-ALL  
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Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Jose Cortez-Villanueva ("Cortez") appeals his sentence following his guilty-plea conviction for illegal reentry after deportation. We pretermitt discussion of the validity of his appeal waiver because, for the reasons discussed below, Cortez is not entitled to relief.

Cortez argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

in light of the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Cortez's argument concerning the constitutionality of 8 U.S.C. § 1326(b) is, as he concedes, foreclosed. See Almendarez-Torres v. United States, 523 U.S. 224 (1998); United States v. Izaquirre-Flores, 405 F.3d 270, 277-78 (5th Cir. 2005), petition for cert. filed (July 22, 2005) (No. 05-5469).

Cortez also argues for the first time in a supplemental brief that the district court erred by sentencing him under the mandatory Guideline regime held unconstitutional in United States v. Booker, 125 S. Ct. 738 (2005). We review this argument for plain error. See United States v. Martinez-Lugo, 411 F.3d 597, 600 (5th Cir. 2005). Our review of the record does not reveal that the district court's error affected the outcome of the sentencing proceedings. See id. at 600-01. Therefore, Cortez has failed to establish that the error affected his substantial rights and he consequently cannot meet the plain error standard of review. Id.

AFFIRMED.