

United States Court of Appeals  
Fifth Circuit

**FILED**

February 26, 2007

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 05-40022

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAGDALENO REYES-BAUTISTA,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 5:04-CR-1494-ALL

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**ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES**

Before JOLLY, DAVIS, and OWEN, Circuit Judges.

PER CURIAM:\*

In our previous opinion in this case, we affirmed Defendant-Appellant Reyes-Bautista's conviction but vacated his sentence and remanded his case for resentencing consistent with United

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\*Pursuant to 5<sup>TH</sup> 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 R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5<sup>TH</sup> CIR. R. 47.5.4.

States v. Booker and United States v. Fanfan.<sup>1</sup> Although we vacated Reyes-Bautista's sentence, we rejected his argument that the district court mischaracterized his state felony conviction for possession of a controlled substance as an "aggravated felony" for purposes of U.S.S.G. § 2L1.2(b)(1)(C).<sup>2</sup>

After Lopez v. Gonzalez<sup>3</sup> was decided, the Supreme Court vacated our judgment and remanded this case for reconsideration in light of Lopez. Upon reconsideration and in light of Lopez, we conclude that, in addition to the Fanfan error, the district court erred by characterizing Reyes-Bautista's state felony as an "aggravated felony" and enhancing his sentence under U.S.S.G. § 2L1.2(b)(1)(C).<sup>4</sup>

The conviction is AFFIRMED, but we VACATE Reyes-Bautista's sentence and REMAND the case for resentencing consistent with our opinion on February 21, 2006 and the Supreme Court's decision in Lopez.

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<sup>1</sup>See United States v. Reyes-Bautista, 167 F. App'x 996, 997 (5th Cir. 2006) (unpublished) (per curiam).

<sup>2</sup>Id.

<sup>3</sup>127 S.Ct. 625 (2006)

<sup>4</sup>See United States v. Estrada-Mendoza, 475 F.3d 258 (5th Cir. 2007).