

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

October 17, 2007

No. 06-40718
Summary Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA ,

Plaintiff-Appellee,

v.

GABRIEL HERNANDEZ-IGNACIO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
No. 7:05-CR-1119

Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Gabriel Hernandez-Ignacio pleaded guilty of being present illegally in the United States after deportation and was sentenced to 57 months in prison and

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

two years of supervised release. For the first time on appeal, Hernandez-Ignacio argues that the 16-level crime-of-violence increase under U.S.S.G. § 2L1.2(b)(1)-(A)(ii) is erroneous because his Texas conviction of aggravated assault does not qualify as a crime of violence under either definition applicable to that provision. In *United States v. Guillen-Alvarez*, 489 F.3d 197, 199-201 (5th Cir. 2007), cert. denied, 2007 WL 2590919 (U.S. Oct. 9, 2007) (No. 07-6315), this court held that aggravated assault under TEX. PENAL CODE § 22.02(a) qualifies as a conviction for an enumerated offense of aggravated assault and a crime of violence under § 2L1.2(b)(1)(A)(ii). The 16-level crime-of-violence increase under that subsection was not imposed in error, plain or otherwise. See *United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005).

In light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Hernandez-Ignacio challenges the constitutionality of § 1326(b)'s treatment of prior felony and aggravated felony convictions as sentencing factors rather than elements of the offense that must be found by a jury. This court has held that this issue is "fully foreclosed from further debate." *United States v. Pineda-Arellano*, 492 F.3d 624, 625 (5th Cir. 2007), petition for cert. filed (Aug. 28, 2007) (No. 07-6202).

AFFIRMED.