

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

April 24, 2008

\_\_\_\_\_  
No. 07-40554  
Summary Calendar  
\_\_\_\_\_

Charles R. Fulbruge III  
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SALVADOR BRISENO-BENAVIDEZ

Defendant-Appellant

\_\_\_\_\_  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 7:07-CR-68-1  
\_\_\_\_\_

Before SMITH, BARKSDALE, and ELROD, Circuit Judges.

PER CURIAM:\*

Salvador Briseno-Benavidez pleaded guilty to illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a) and (b). He appeals both his conviction and sentence.

Briseno maintains the district court erred by imposing a 16-level, crime-of-violence increase under U.S.S.G. § 2L1.2(b)(1)(A)(ii), based on his prior Texas conviction for burglary of a habitation. Although post-Booker, the Sentencing

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Guidelines are advisory only, and an ultimate sentence is reviewed for reasonableness under an abuse-of-discretion standard, the district court must still properly calculate the guideline-sentencing range for use in deciding on the sentence to impose. *Gall v. United States*, 128 S. Ct. 586, 596 (2007). In that respect, its application of the guidelines is reviewed de novo; its factual findings, only for clear error. E.g., *United States v. Villegas*, 404 F.3d 355, 359 (5th Cir. 2005).

Briseno asserts the definition of habitation under Texas law is broader than the generic, contemporary meaning of dwelling as used in the enumerated offense of burglary of a dwelling in the Sentencing Guidelines. Although he acknowledges this court's precedent to the contrary, Briseno asserts it has been overruled by the Supreme Court's decision in *James v. United States*, 127 S. Ct. 1586, 1599-1600 (2007). This contention is without merit; *James* did not involve an enumerated offense. See *United States v. Gomez-Guerra*, 485 F.3d 301, 303 & n.1 (5th Cir. 2007). As a result, the district court did not err in determining that Briseno's prior conviction was a crime of violence. See *United States v. Valdez-Maltos*, 443 F.3d 910, 911 (5th Cir.), cert. denied, 127 S. Ct. 265 (2006).

In the light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Briseno 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 argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). *United States v. Pineda-Arellano*, 492 F.3d 624, 625 (5th Cir. 2007), cert. denied, 128 S. Ct. 872 (2008).

AFFIRMED.