

August 17, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-40940  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE ELIAS PERDOMO-CASTRO,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 7:04-CR-130-ALL  
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Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:\*

Jose Elias Perdomo-Castro ("Perdomo") appeals following his guilty plea to a charge of being present illegally in the United States after deportation, in violation of 8 U.S.C. § 1326. Perdomo argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) and (2) are unconstitutional. He correctly acknowledges that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

See United States v. Mancía-Pérez, 331 F.3d 464, 470 (5th Cir.), cert. denied, 540 U.S. 935 (2003).

Perdomo argues that the district court committed reversible error by imposing a sentence pursuant to the mandatory Federal Sentencing Guidelines system that was held unconstitutional in United States v. Booker, 125 S. Ct. 738 (2005). We review for plain error. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732 (5th Cir. 2005), petition for cert. filed (July 25, 2005) (No. 05-5556).

The district court committed error that is plain by sentencing Perdomo under a mandatory Sentencing Guidelines scheme. See id.; United States v. Mares, 402 F.3d 511, 520-21 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005) (No. 04-9517). However, Perdomo has not carried his burden of showing that the district court's error affected his substantial rights. See Valenzuela-Quevedo, 407 F.3d at 733-34; Mares, 402 F.3d at 521.

Accordingly, the district court's judgment is AFFIRMED.