

August 17, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-40968  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAVIER GONZALEZ-HERNANDEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 5:04-CR-304-1  
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Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:\*

Javier Gonzalez-Hernandez appeals from his conviction of illegal reentry following deportation.

Gonzalez contends that the "felony" and "aggravated felony" sentencing-enhancement provisions of 8 U.S.C. § 1326(b) are facially unconstitutional because Almendarez-Torres v. United States, 523 U.S. 224 (1998), has been undercut by later Supreme Court opinions. Gonzalez concedes that his argument is foreclosed by existing precedent, but he raises it to preserve it

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

for further review. Gonzalez contends that Blakely v. Washington, 124 S. Ct. 2531 (2004), is applicable to his sentence if Almendarez-Torres is overruled. Gonzalez's Almendarez-Torres contention is foreclosed. See United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000).

Gonzalez contends that his sentencing under the formerly mandatory Sentencing Guidelines was plainly erroneous and reversible pursuant to United States v. Booker, 125 S. Ct. 738 (2005). Gonzalez cannot demonstrate reversible plain error because he cannot show that the district court's error affected his sentence. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732-33 (5th Cir. 2005), petition for cert. filed (July 25, 2005) (No. 05-5556).

AFFIRMED.