

August 17, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41090
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MOISES ELISEO GARDUNO-HERMOSA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-280-1

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

Moises Eliseo Garduno-Hermosa (Garduno) appeals the sentence imposed following his conviction for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine. Garduno argues for the first time on appeal that the district court erred by sentencing him under a mandatory sentencing guidelines scheme, that this issue is subject to de novo review, and that prejudice should be presumed. See United States v. Booker, 125 S. Ct. 738 (2005).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Garduno concedes that pursuant to United States v. Mares, 402 F.3d 511 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005) (No. 04-9517), plain error review applies and that he cannot establish that the district court's error affected his substantial rights. He raises the issue solely to preserve Supreme Court review.

Because Garduno has not established that the district court plainly erred in sentencing him, his sentence is AFFIRMED. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732-34 (5th Cir. 2005), petition for cert. filed (July 25, 2005) (No. 05-5556).