

December 21, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20484
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEPHEN PAUL MARCENKO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-CR-90-7

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges

PER CURIAM:*

Stephen Paul Marcenko appeals the sentence imposed following his guilty-plea conviction for fraud in connection with identification documents in violation of 18 U.S.C. § 1028(a)(1). He argues that, in light of United States v. Booker, 125 S. Ct. 738 (2005), the district court plainly erred in sentencing him under a mandatory guidelines system.

After Booker, it is clear that application of the federal sentencing guidelines in their mandatory form constitutes error

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

that is plain. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732-33 (5th Cir.), cert. denied, 126 S. Ct. 267 (2005). Marcenko's contention that this error is structural and gives rise to a presumption of prejudice is unavailing. See United States v. Malveaux, 411 F.3d 558 (5th Cir.), cert. denied, 126 S. Ct. 194 (2005). He must show that the error affected his substantial rights, and he has not done so. See Valenzuela-Quevedo, 407 F.3d at 733-34. The judgment of the district court is therefore AFFIRMED.