

June 20, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-20378  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EVENCIO RUBIO-RUBIO,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:03-CR-170-ALL  
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Before DAVIS, SMITH and DENNIS, Circuit Judges

PER CURIAM:\*

Evencio Rubio-Rubio appeals his sentence following his guilty-plea conviction for illegal reentry after deportation, a violation of 8 U.S.C. § 1326. Rubio-Rubio argues that the district court erred by imposing his sentence under the mandatory guidelines scheme held unconstitutional in United States v. Booker, 125 S. Ct. 738 (2005). Because Rubio-Rubio did not raise this issue in the district court, review is limited to plain error. See United States v. Vonn, 535 U.S. 55, 59 (2002). The district court erred

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

in imposing Rubio's sentence under the mandatory Guidelines scheme, and this error was obvious after Booker. See United States v. Valenzuela-Quevedo, \_\_ F.3d \_\_, No. 03-41754, 2005 WL 941353 at \*4 (5th Cir. Apr. 25, 2005). However, Rubio-Rubio has not shown that the error affected his substantial rights as he has not shown that the record shows the district court judge would have imposed a different or lesser sentence under a Booker advisory regime. See id. at \*\*4-5. Therefore, he has not met the requirements to show plain error.

AFFIRMED.