

May 23, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-11233  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN VEGA-PEREZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:04-CR-192-ALL-H  
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Before SMITH, GARZA, and PRADO, Circuit Judges.

PER CURIAM:\*

Martin Vega-Perez (Vega) appeals his sentence following his guilty plea conviction for illegal reentry following deportation. He argues that his sentence is unconstitutional in light of United States v. Booker, 543 U.S. 220 (2005), because it was increased based upon facts which were not alleged in his indictment, proven to a jury beyond a reasonable doubt, or admitted by him at his guilty plea. He further contends that his sentence is unconstitutional because he was sentenced pursuant to

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

the mandatory federal sentencing guideline system declared unconstitutional in Booker.

In the instant case, there was no Booker error or Sixth Amendment violation because the only enhancement to Vega's sentence was due to his prior felony conviction. See Booker, 543 U.S. at 244. Nevertheless, the district court did err in sentencing Vega pursuant to a mandatory guidelines system. See United States v. Walters, 418 F.3d 461, 463 (5th Cir. 2005). The Government concedes that Vega preserved this error for appeal. The Government, however, has not shown beyond a reasonable doubt that the error was harmless. See Walters, 418 F.3d at 463; United States v. Woods, 440 F.3d 255, 258-261 (5th Cir. 2006). Accordingly, Vega's sentence is vacated, and this case is remanded for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.