

August 12, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41693
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO Z. MORALES, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-999-1

Before BENAVIDES, DENNIS and OWEN, Circuit Judges.

PER CURIAM:*

Francisco Morales appeals from a guilty-plea conviction for transporting an undocumented alien within the United States for financial gain by means of a motor vehicle; 8 U.S.C.

§ 1324(a)(1), (B)(i). Morales has abandoned on appeal his argument that the district court's three-level increase under U.S.S.G. § 2L1.1(b)(A) violated his Sixth Amendment rights. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Morales renews his argument, preserved in the district court, that his constitutional rights were violated when the district court assessed a three-level increase, pursuant to U.S.S.G. § 2L1.1(b)(5), based on judicially determined facts, citing Blakely v. Washington, 124 S. Ct. 2531 (2004). In light of the Supreme Court's recent decision in United States v. Booker, 125 S. Ct. 738, 756 (2005), the three-level increase violated Morales's Sixth Amendment right to a trial by jury, and the Government has not carried its burden of demonstrating that the error was harmless beyond a reasonable doubt. Accordingly, Morales's sentence is VACATED, and the case is REMANDED FOR RESENTENCING. See United States v. Pineiro, 410 F.3d 282, 285-86 (5th Cir. 2005).

VACATED AND REMANDED FOR RESENTENCING.