

February 23, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-41500  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROGACIANO JAIMES BETANCOURT-CRUZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:04-CR-538-ALL  
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Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:\*

Rogaciano Jaimes Betancourt-Cruz appeals his sentence imposed following his guilty conviction plea for illegal reentry into United States following deportation. Betancourt-Cruz was sentenced to a term of imprisonment of 57 months, to be followed by a three-year term of supervised release. We need not decide the applicability of the waivers in this case because the issues raised by Betancourt-Cruz are without arguable merit.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Betancourt-Cruz argues that his sentence under the mandatory guidelines system was plain error that affected his substantial rights because the district court would have imposed a different sentence under an advisory guidelines system. He relies on the fact that the district court imposed a sentence at the bottom of the sentencing guidelines range. He also contends that the sentence affected the fairness and integrity of the judicial proceeding.

In the remedial portion of United States v. Booker, 125 S. Ct. 738, 764-65 (2005), the Supreme Court excised 18 U.S.C. § 3553(b)(1) of the Sentencing Reform Act, rendering the Federal Sentencing Guidelines effectively advisory. After Booker, it is clear that application of the Federal Sentencing Guidelines in their mandatory form constitutes error that is plain. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732-33 (5th Cir.), cert. denied, 126 S. Ct. 267 (2005). Betancourt-Cruz must show that the error affected his substantial rights, and he has not done so. See Valenzuela-Quevedo, 407 F.3d at 733-34. His sentence at the bottom of the sentencing guidelines range is not sufficient to make the required showing. See United States v. Bringier, 405 F.3d 310, 318 n.4 (5th Cir.), cert. denied, 126 S. Ct. 264 (2005).

Betancourt-Cruz argues that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1) & (2) are unconstitutional, relying on the Supreme Court's suggestion in

Apprendi v. New Jersey, 530 U.S. 466 (2000) that Almendarez-Torres v. United States, 523 U.S. 224 (1998) was wrongly decided.

Betancourt-Cruz's constitutional challenge is foreclosed by Almendarez-Torres v. United States. Although Betancourt-Cruz contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi, we have repeatedly rejected such arguments on the basis that Almendarez-Torres remains binding. See United States v. Garza-Lopez, 410 F.3d 268, 276 (5th Cir.), cert. denied, 126 S. Ct. 298 (2005). Betancourt-Cruz properly concedes that his argument is foreclosed in light of Almendarez-Torres and circuit precedent, but he raises it here to preserve it for further review.

AFFIRMED.