

June 21, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40587
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELIAS CHAPA-GUTIERREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:03-CR-335-1

Before STEWART, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

Elias Chapa-Gutierrez (Chapa) appeals the 33-month sentence imposed following his jury trial conviction for transporting illegal aliens within the United States. Chapa argues that, in light of United States v. Booker, 543 U.S. 220 (2005), his sentence must be vacated because it was enhanced on the basis of judicial factual findings. Specifically, he challenges the increase in his base offense level pursuant to U.S.S.G.

§ 2L1.1(b) (5).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Chapa concedes that he did not raise a constitutional challenge to his sentence before the district court and that review is for plain error. See United States v. Mares, 402 F.3d 511, 520 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005). The district court did commit Booker error because Chapa's sentence was enhanced based on facts not alleged in the indictment or proved to a jury beyond a reasonable doubt. See Booker, 543 U.S. at 244. However, Chapa fails to meet his burden of showing that the error affected his substantial rights. See Mares, 402 F.3d at 521. Chapa has not identified anything in the record indicating that the district court would have imposed a lower sentence under an advisory guidelines scheme. See id.

AFFIRMED.