

June 22, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-50749
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OLIVO MEJIA-SOLANO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:04-CR-74-1-AML

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Olivo Mejia-Solano (Mejia) appeals his sentence following his guilty-plea conviction of illegal reentry, in violation of 8 U.S.C. § 1326(a) and (b)(2). The district court sentenced him to 41 months of imprisonment, three years of supervised release, and a \$100 special assessment.

Mejia argues that 8 U.S.C. § 1326(b) is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000), because it does not require the fact of a prior felony or aggravated-felony

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

conviction to be charged in the indictment and proved beyond a reasonable doubt. As Mejia concedes, this argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), and Almendarez-Torres was not overruled by Apprendi. See United States v. Sarmiento-Funes, 374 F.3d 336, 346 (5th Cir. 2004).

For the first time on appeal, Mejia argues that, under United States v. Booker, 125 S. Ct. 738 (5th Cir. 2005), this court must vacate his sentence and remand for resentencing because the mandatory guideline regime was in place at the time of his sentencing. An unpreserved challenge to the computation of a defendant's sentence under the formerly mandatory sentencing guidelines is reviewed for plain error. United States v. Mares, 402 F.3d 511, 520-21 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005) (No. 04-9517).

The district court's application of the guidelines in their mandatory form constituted error that is "plain" for purposes of satisfying the first two prongs of the plain error analysis. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 733 (5th Cir. 2005). Mejia also bears the burden of demonstrating "that the sentencing judge--sentencing under an advisory scheme rather than a mandatory one--would have reached a significantly different result." See Mares, 402 F.3d at 521. Mejia has failed to make such a showing. Accordingly, the judgment of the district court is AFFIRMED.