

August 3, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10251
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN ARMIJO-AREVALO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:04-CR-310-ALL

Before SMITH, GARZA, and PRADO, Circuit Judges.

PER CURIAM:*

Martin Armijo-Arevalo pleaded guilty to being found in the United States following deportation in violation of 8 U.S.C. § 1326(a), (b)(1) and (b)(2). Because Armijo-Arevalo had been deported subsequent to an aggravated felony conviction, his offense level was enhanced by eight points under the Sentencing Guidelines.

Armijo-Arevalo's argument that the treatment of prior convictions as sentencing factors rather than offense elements under 18 U.S.C. § 1326(b)(1), (b)(2) is unconstitutional is

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998).

Armijo-Arevalo also argues that his sentence should be vacated pursuant to United States v. Booker, 125 S. Ct. 738 (2005), because it was imposed under a mandatory Sentencing Guidelines regime. Armijo-Arevalo was sentenced on February 4, 2005, and Booker was decided on January 12, 2005. The district court specifically noted that the guidelines were advisory. The record shows that the district court did not err by treating the guidelines as mandatory. Armijo-Arevalo asserts no other error in his sentence, other than the foreclosed issue discussed above.

Armijo-Arevalo also makes ex-post-facto arguments concerning his resentencing on remand. As remand and resentencing are unnecessary, these arguments are moot.

For the foregoing reasons, the judgment of the district court is AFFIRMED.