

November 9, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11081
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FABIAN MARTINEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:04-CR-205-16

Before BARKSDALE, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:*

Appealing the Judgment in a Criminal Case, Fabian Martinez raises arguments that are foreclosed by United States v. Austin, 432 F.3d 598, 599-600 (5th Cir. 2005), which held that the application of the remedial opinion of United States v. Booker, 543 U.S. 220 (2005), to a sentencing hearing where the underlying offense was committed pre-Booker does not violate constitutional due process or ex post facto requirements. In light of the foregoing, we assume, arguendo only, that the appeal waiver does not bar the instant appeal. The Government's motion for summary

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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affirmance is GRANTED, and the judgment of the district court is AFFIRMED.