

**FILED**

February 24, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 05-40573  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

EDUARDO SAENZ,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 5:04-CR-2031-ALL  
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Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:\*

Eduardo Saenz pleaded guilty to transporting an undocumented alien for purpose of commercial advantage or private financial gain within the United States by means of a motor vehicle. Saenz was sentenced to a 44-month term of imprisonment and to a three-year period of supervised release. Saenz gave timely notice of his appeal.

Saenz's offense occurred prior to the decision in United States v. Booker, 543 U.S. 220 (2005), and he was sentenced after

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Booker was decided. Saenz argues that, although he is entitled to retroactive application of Booker's Sixth Amendment holding, the remedial portion of Booker's holding, which made the Sentencing Guidelines advisory, may not be applied in his case without violating the Due Process and Ex Post Facto Clauses of the Constitution. Saenz thus argues that the district court should have applied the sentencing guidelines as mandatory in his case but should not have enhanced his sentence based on facts that were not charged in the indictment and were neither admitted by him nor found by a jury beyond a reasonable doubt. As Saenz concedes, this question is foreclosed. See United States v. Austin, 432 F.3d 598, 599-600 (5th Cir. 2005); United States v. Scroggins, 411 F.3d 572, 575-76 (5th Cir. 2005). He has raised the issue to preserve it for further review. The judgment is AFFIRMED.