

August 17, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50126
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SOTERO ALVARADO-JIMENEZ, also known as
Alvarado Sotero-Jimenez,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:04-CR-1528-ALL

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

Sotero Alvarado-Jimenez ("Alvarado") appeals the sentence imposed following his conviction for illegally reentering the United States following a prior deportation, in violation of 8 U.S.C. § 1326. Finding no error, we affirm.

Alvarado first argues that, in light of United States v. Booker, 125 S. Ct. 738 (2005), the district court erred in imposing a sentence utilizing the Sentencing Guidelines as mandatory. We review for plain error. See United States v.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Mares, 402 F.3d 511, 520 (5th Cir. 2005), petition for cert. filed (No. 04-9517) (U.S. Mar. 31, 2005). Application of the Guidelines as mandatory, even absent a Sixth Amendment violation as is the case here, is plain or obvious error after Booker. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 733 (5th Cir. 2005), petition for cert. filed (July 25, 2005) (No. 05-5556). However, Alvarado cannot show that the error affected his substantial rights because the record does not indicate that the district court would have imposed a lower sentence under an advisory, rather than a mandatory, Guidelines scheme. See id.; Mares, 402 F.3d at 522.

Alvarado's second argument, that 8 U.S.C. §§ 1326(b)(1) and (b)(2) are unconstitutional, is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235, 239-47 (1998). See United States v. Martinez-Mata, 393 F.3d 625, 629 n.3 (5th Cir. 2004), cert. denied, 125 S. Ct. 1877 (2005). Alvarado concedes this point, but raises it to preserve the matter for further review.

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