

June 22, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-41295  
c/w No. 04-41296  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

YSIDRO GOMEZ-GRACIANO,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:00-CR-34-ALL  
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Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Ysidro Gomez-Graciano (Gomez) appeals the sentence imposed following his guilty plea conviction for illegal reentry, in violation of 8 U.S.C. § 1326.\*\* He argues, for the first time on appeal, that the district court erred in sentencing him under a mandatory sentencing guidelines scheme, citing United States v. Booker, 125 S. Ct. 738, 756 (2005). He acknowledges that the

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

\*\* Gomez does not appeal the revocation of his supervised release or the sentence imposed following revocation based on this offense.

argument is reviewed for plain error but contends that he does not have to demonstrate any effect on his substantial rights because the error is structural and because prejudice should be presumed.

Plain error is the correct standard of review. See United States v. Malveaux, \_\_F.3d\_\_, No. 03-41618, 2005 WL 1320362 at \*1 n.9 (5th Cir. Apr. 11, 2005). The district court committed error that is plain when it sentenced Gomez under a mandatory sentencing guidelines regime. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 733 (5th Cir. 2005); United States v. Mares, 402 F.3d 511, 520-21 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005) (No. 04-9517). Gomez, however, fails to meet his burden of showing that the district court's error affected his substantial rights. See Valenzeuela-Quevedo, 407 F.3d at 733-34; Mares, 402 F.3d at 521. His argument that Mares was wrongly decided is unavailing. See United States v. Ruff, 984 F.2d 635, 640 (5th Cir. 1993).

As he concedes, Gomez's argument that the sentencing provisions in 8 U.S.C. § 1326(a) and (b) are unconstitutional is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998). See Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000); United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). The district court's judgment is AFFIRMED.