

June 16, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-41400  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEONEL AVILA-CARBAJAL,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 5:03-CR-1601-ALL  
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Before SMITH, GARZA, and PRADO, Circuit Judges.

PER CURIAM:\*

Leonel Avila-Carbajal appeals from his guilty-plea conviction and sentence for attempted reentry after deportation. Avila-Carbajal argues that the district court erred by sentencing him under the mandatory Sentencing Guidelines held unconstitutional in United States v. Booker, 543 U.S. 220 (2005). We agree. However, Avila-Carbajal's argument that such error was structural is foreclosed. See United States v. Martinez-Lugo, 411 F.3d 597, 600 (5th Cir.), cert. denied, 126 S. Ct. 464

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

(2005). Because the Government has failed to show that the error was harmless beyond a reasonable doubt, Avila-Carbajal's sentence must be vacated and the case remanded for resentencing. See United States v. Walters, 418 F.3d 461, 463 (5th Cir. 2005); United States v. Pineiro, 410 F.3d 282, 287 (5th Cir. 2005).

Avila-Carbajal's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Avila-Carbajal contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), we have repeatedly rejected such arguments on the basis that Almendarez-Torres remains binding. See United States v. Garza-Lopez, 410 F.3d 268, 276 (5th Cir.), cert. denied, 126 S. Ct. 298 (2005). Avila-Carbajal properly concedes that his argument is foreclosed in light of Almendarez-Torres and circuit precedent, but he raises it here to preserve it for further review.

For the foregoing reasons, we AFFIRM Avila-Carbajal's conviction, VACATE Avila-Carbajal's sentence, and REMAND for resentencing in accordance with this opinion.