

March 8, 2006

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III  
Clerk

---

No. 04-41677  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS FRANCISCO MORALES-AGUSTINE,

Defendant-Appellant.

-----  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 5:04-CR-921-ALL  
-----

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Jesus Francisco Morales-Agustine (Morales) appeals the 80-month sentence imposed following his guilty-plea conviction of illegal reentry into the United States after being deported.

Morales contends that his sentence is illegal under United States v. Booker, 543 U.S. 220 (2005), because it was imposed pursuant to a mandatory application of the United States Sentencing Guidelines. He thus alleges a "Fanfan" error. See United States v. Walters, 418 F.3d 461, 463 (5th Cir. 2005). Fanfan error is not a structural error. Id. However, the

---

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Government concedes that the Fanfan error was preserved, so we review for harmless error. See id. at 464. The Government has failed to carry its burden of showing beyond a reasonable doubt that the district court's Fanfan error had no effect Morales's sentence. See id. We therefore vacate the sentence and remand for resentencing in accordance with Booker. See id.

Morales contends that the sentence-increasing provisions of 8 U.S.C. § 1326(b) are unconstitutional and that this court should remand his case for resentencing to no more than two years in prison under 8 U.S.C. § 1326(a). As he concedes, this contention is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998).

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.