

March 27, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-51365
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALFREDO ESCOBAR-GAETA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:04-CR-785-ALL-PRM

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges

PER CURIAM:*

Having pleaded guilty, Alfredo Escobar-Gaeta appeals his concurrent sentences for conspiracy to import more than 100 kilograms of marijuana, importation of more than 100 kilograms of marijuana, conspiracy to possess with intent to distribute more than 100 kilograms of marijuana, and possession with intent to distribute more than 100 kilograms of marijuana. Escobar-Gaeta argues that the sentences violate United States v. Booker, 125 S. Ct. 738 (2005). We conclude that Escobar-Gaeta's objections to

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

his sentence in the district court preserved his arguments for appellate review. United States v. Olis, 429 F.3d 540, 544 (5th Cir. 2005); United States v. Akpan, 407 F.3d 360, 375-76 (5th Cir. 2005). When reviewing a Booker claim that has been preserved, we will ordinarily vacate and remand unless the Government can show beyond a reasonable doubt that the error was harmless. See United States v. Pineiro, 410 F.3d 282, 285 (5th Cir. 2005).

The imposition of a sentence based on facts exceeding those stipulated by Escobar-Gaeta when he pleaded guilty was erroneous. Id. The Government's brief does not address the issue of harmless error, and our review of the record reveals nothing to suggest that the Booker error did not influence the district court's selection of a sentence. See id. Accordingly, Escobar-Gaeta's sentences are VACATED and this matter is REMANDED for resentencing.