

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

August 3, 2010

Lyle W. Cayce
Clerk

No. 09-40885

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FRANCISCO ZAVALA-FLORES,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:09-CR-597-1

Before BENAVIDES, PRADO and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Francisco Zavala-Flores appeals his 57 month sentence for being illegally present in the United States following deportation. He argues that the district court erred in enhancing his criminal history category pursuant to U.S.S.G. § 4A1.1(f) on the ground that three indecency with a child convictions in violation of TEXAS PENAL CODE § 21.11(a)(2)(A) were crimes of violence for which he received a single sentence. Zavala-Flores properly concedes that his

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

argument is subject to review for plain error because he did not raise the issue at sentencing.

To establish plain error, Zavala-Flores must identify a forfeited error that is clear or obvious and that affects his substantial rights. *See Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009). Whether the convictions at issue are crimes of violence within the meaning of § 4A1.1(f) is an issue of first impression in this circuit. Thus, if error occurred, it was not clear or obvious and does not warrant relief on plain error review. *See United States v. Ellis*, 564 F.3d 370, 376-78 (5th Cir.), *cert. denied*, 130 S. Ct. 371 (2009); *Puckett*, 129 S. Ct. at 1429.

AFFIRMED.