

August 17, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50972
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

YASSER RIVERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. DR-03-CR-299-1-AML

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

Yasser Rivera appeals from his conviction of importing five kilograms or more of cocaine and possessing with intent to distribute five kilograms or more of cocaine. Rivera contends for the first time on appeal that his sentence violated the Sixth Amendment because it was based on over 50 kilograms of cocaine, more than the five kilograms of cocaine alleged in the indictment and found by the jury.

The district court plainly erred by basing Rivera's sentence on the extra verdict factual finding that more than 50 kilograms

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

of cocaine were involved in Rivera's offense. See United States v. Booker, 125 S. Ct. 738, 756 (2005). However, Rivera has not demonstrated that the result likely would have been different but for the district court's error, had the district court sentenced him under an advisory guideline sentencing scheme. See United States v. Mares, 402 F.3d 511, 522 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005) (No. 04-9517).

AFFIRMED.