United States Court of Appeals
Fifth Circuit

F I L E D

August 4, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10518

UNITED STATES OF AMERICA

             Plaintiff - Appellee

v.

ROBERTO FERNANDEZ-RODRIGUEZ

             Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Dallas

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:[*]

     The Supreme Court vacated the sentence in this case and
remanded the case to this Court to reconsider in light of *United
States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005).
Subsequently, we requested letter briefs from the parties with
respect to *Booker* issues. Having reviewed the parties' letter
briefs, we affirm the judgment of the district court.

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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this opinion should not be published and is not precedent except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.

Appellant's *Booker* claim is foreclosed by the waiver of an appeal provision in his plea agreement. As conceded in Appellant's letter brief, this Court's precedents would not recognize an infirmity in the waiver even after *Booker*. *See United States v. Cortez*, ___ F.3d ___, No. 04-10152, 2005 WL 1404944 (5th Cir. June 16, 2005).

Moreover, even if waiver of an appeal provision would not foreclose consideration under this Court's precedents, Appellant's *Blakely*/now-*Booker* claim was raised for the first time on direct appeal. If addressed, that claim would be reviewed for plain error, and Appellant has failed to show that the district court would have imposed a lesser sentence under an advisory guidelines system. Thus, the error, while clear and obvious, has not been shown to affect Appellant's substantive rights. *See United States v. Dominguez Benitez*, 542 U.S. 74, ___, 124 S. Ct. 2333, 2339 (2004). Accordingly, for the foregoing reasons, we AFFIRM the judgment of the district court.