

February 9, 2007

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-51435
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALFREDO RIVERA-BERNAL, also known as Noe Gomez-Robles, also
known as Samuel Rivera-Bernal,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-03-CR-1549-PRM

Before JONES, Chief Judge, and JOLLY and OWEN, Circuit Judges.

PER CURIAM:*

Alfredo Rivera-Bernal (Rivera) appeals the sentence imposed following his guilty-plea conviction for illegal reentry. Rivera argues for the first time on appeal that the district court's mandatory application of the Sentencing Guidelines violates United States v. Booker, 543 U.S. 220 (2005).

To establish plain error, Rivera must show: (1) error; (2) that is plain; (3) that affects his substantial rights; and (4) that affects the fairness, integrity, or public reputation of

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

judicial proceedings. United States v. Mares, 402 F.3d 511, 520 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005). Mandatory application of the Guidelines is error that is plain. United States v. Duarte-Juarez, 441 F.3d 336, 338 (5th Cir.), cert. denied, 127 S. Ct. 161 (2006). However, Rivera has not met his burden to show “‘with a probability sufficient to undermine confidence in the outcome, that if the judge had sentenced him under an advisory sentencing regime rather than a mandatory one, he would have received a lesser sentence.’” See id. (quoting United States v. Infante, 404 F.3d 376, 394-95 (5th Cir. 2005)). Rivera concedes that the record does not establish whether the district court would have imposed a lower sentence had it known that the Guidelines were advisory. Accordingly, Rivera has not shown plain error, and the judgment of the district court is AFFIRMED.