

November 16, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30610
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MARVIN K. SULLIVAN,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:04-CV-1087
USDC NO. 6:01-CR-60049-1

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

The Government appeals the district court's order granting release pending the appeal of the denial of Marvin K. Sullivan's 28 U.S.C. § 2255 motion challenging his 2001 conviction for making and subscribing a false return. On appeal, Sullivan contends that the decision in United States v. Booker, 543 U.S. 220 (2005), should be applied to his case, that he was denied the opportunity to call an Assistant United States Attorney as a witness in connection with his argument that the Government

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

breached the plea agreement, and that the Bureau of Prisons (BOP) changes regarding placement of prisoners in community confinement centers violates due process and the prohibition against ex post facto laws.

Sullivan does not raise substantial constitutional claims upon which he has the high probability of success. In light of Sullivan's failure to establish a high probability of success on a constitutional claim and the lack of an extraordinary circumstance, the district court erred in granting Sullivan's motion for release pending appeal. See Calley v. Callaway, 496 F.2d 701, 702 (5th Cir. 1974).

Accordingly, the judgment of the district court is REVERSED, and the case is REMANDED for the district court to set a reporting date for Sullivan of not more than 90 days from the date of this opinion.