

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-11381
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROGELIO DELGADO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:97-CR-312-3-R

April 10, 2001

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:*

The Government has filed a motion to dismiss as frivolous Rogelio Delgado's appeal from the district court's order denying Delgado's Fed. R. Crim. P. 36 motion to amend judgment. Delgado asserted in his motion that the district court's failure to apply U.S.S.G. § 5C1.2, the safety valve provision, at sentencing was a mere oversight.

Rule 36 authorizes the district court to correct clerical mistakes in judgments, orders, or other parts of the record arising from oversight or omission. This rule cannot be employed

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

to amend the substantive terms of a sentence otherwise correctly imposed. See United States v. Massey, 827 F.2d 995, 1005 n.1 (5th Cir. 1987). Delgado is seeking a substantive amendment to the sentence imposed based on the application of the safety valve provision. Thus, the district court did not err in determining that Rule 36 could not be employed to amend the judgment in conformity with Delgado's motion.

Because Delgado has failed to raise an issue of arguable merit, the Government's motion is GRANTED and the appeal is dismissed as frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2. Delgado's motion to remand the case to the district court is DENIED.

MOTION TO DISMISS GRANTED; MOTION TO REMAND DENIED; APPEAL DISMISSED.