

October 21, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-50491
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RITA BECERRA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:94-CR-79-1-SS

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

Rita Becerra, federal prisoner # 25886-077, appeals from the denial of her petition for a writ of error coram nobis. She challenges her 1994 conviction and sentence for conspiracy to possess with intent to distribute methamphetamine, arguing that she was erroneously sentenced based on possession of d-methamphetamine, that her guilty plea was involuntary, that her sentence violated both Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 124 S. Ct. 2531 (2004), and

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

that the rule of lenity requires that the drug of conviction be deemed l-methamphetamine. She has also moved for a stay of the appeal pending the Supreme Court's clarification of Blakely.

Becerra is still incarcerated; therefore, she is not entitled to petition the court for a writ of error coram nobis. See United States v. Esobue, 357 F.3d 532, 534 (5th Cir. 2004). Furthermore, Becerra cannot avail herself of the remedy of coram nobis because she has not shown that sound reasons exist for her failure to raise her claims earlier, and her "regurgitation" of claims substantially similar to those raised in her 28 U.S.C. § 2255 motion is insufficient to meet the exacting standard for relief. See id. at 535.

Becerra's citation to Blakely is unavailing in regard to both her appeal and her request for a stay; this court has held that Blakely did not render the federal Sentencing Guidelines unconstitutional. United States v. Pineiro, 377 F.3d 464, 473 (5th Cir. 2004), petition for cert. filed (U.S. Jul. 14, 2004) (No. 04-5263); cf. Wicker v. McCotter, 798 F.2d 155, 157-58 (5th Cir. 1986).

The appeal is frivolous, and it is dismissed. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2. Further frivolous filings will subject Becerra to sanctions.

APPEAL DISMISSED; MOTION FOR STAY DENIED; SANCTION WARNING ISSUED.