

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2423

United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	District Court for the
v.	*	District of Nebraska.
	*	
Jose Trinidad Hernandez-Olea,	*	[UNPUBLISHED]
	*	
Appellant.	*	

Submitted: May 12, 2005
Filed: May 18, 2005

Before WOLLMAN, BYE, and COLLOTON, Circuit Judges.

PER CURIAM.

Jose Hernandez-Olea appeals the sentence imposed by the district court¹ claiming error stemming from an increase in his sentence due to judicial factfinding regarding the amount of methamphetamine attributable to Hernandez-Olea and possession of a firearm. Hernandez-Olea did not object to judicial factfinding at trial and his claim is therefore reviewed only for “plain error.” United States v. Olano, 507 U.S. 725 (1993). To show plain error, Hernandez-Olea must “show a ‘reasonable

¹The Honorable Richard G. Kopf, Chief Judge, United States District Court for the District of Nebraska.

probability,' based on the appellate record as a whole, that but for the error he would have received a more favorable sentence.” United States v. Pirani, No 03-2871, slip op. at 11 (8th Cir. Apr. 29, 2005) (en banc). The record before the court shows that Hernandez-Olea has not met his burden. There is nothing to suggest that the district court would impose a lesser sentence on remand, and ““where the effect of the error on the result in the district court is uncertain or indeterminate -- where we would have to speculate -- the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error.”” Id. at 13 (quoting United States v. Rodriguez, 398 F.3d 1291, 1301 (11th Cir. 2005)). Thus, Hernandez-Olea has failed to meet his burden under plain error review.

We therefore affirm the district court.
