

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20734
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH AYERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-01-CR-82-1

April 11, 2002

Before SMITH, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:*

Kenneth Ayers appeals his guilty-plea conviction for possession with the intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(C). He argues that under Apprendi v. New Jersey, 530 U.S. 466 (2000), 21 U.S.C. § 841 is facially unconstitutional; however, he concedes that this court rejected an Apprendi-based challenge to the constitutionality of § 841 in United States v. Slaughter, 238 F.3d 580, 581-82 (5th Cir. 2000), cert. denied, 121 S. Ct. 2015 (2001). He asserts that he is raising the issue to preserve it

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

for en banc or Supreme Court review. He did not raise the issue in the district court.

In Slaughter, 238 F.3d at 582, we held that there is "nothing in the Supreme Court decision in Apprendi which would permit [this court] to conclude that 21 U.S.C. § 841(a) and (b) ... are unconstitutional on their face." A panel of this court cannot overrule a prior panel's decision in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court. Burge v. Parish of St. Tammany, 187 F.3d 452, 466 (5th Cir. 1999). Moreover, the Ninth Circuit has reversed its decision in United States v. Buckland, 259 F.3d 1157, 1160-68 (9th Cir. 2001), rev'd en banc, 277 F.3d 1173 (9th Cir. 2002), the only circuit-level decision that supported Ayers's argument.

AFFIRMED.