

April 24, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40577
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VICTOR MANUEL MENDOZA-OCHOA, also known as
Tomas Claro-Alfaro,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. M-01-CR-754-1

Before DAVIS, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Victor Manuel Mendoza-Ochoa appeals from his guilty-plea conviction of possession with intent to distribute cocaine. He contends, for the first time on appeal, that 21 U.S.C. § 841 was rendered unconstitutional by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because drug types and quantities should be treated as elements of the offense of possession with intent to distribute. Mendoza concedes that his argument runs counter to this court's

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

caselaw; he raises the issue to preserve it for Supreme Court review.

Because Mendoza did not raise his *Apprendi* issue in the district court, his contention is reviewed under the plain-error standard. *United States v. Vasquez*, 298 F.3d 354, 356 (5th Cir.), *cert. denied*, 123 S. Ct. 546 (2002). *Apprendi* did not render 21 U.S.C. § 841 facially unconstitutional. *Id.* at 360. Mendoza has not shown error, plain or otherwise.

AFFIRMED.