

October 22, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41786
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO CUELLAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. L-02-CR-985-ALL

Before KING, Chief Judge, and JOLLY and STEWART, Circuit Judges.

PER CURIAM:*

Fernando Cuellar appeals his guilty plea conviction for possession with intent to distribute over 100 kilograms of marijuana. Cuellar argues that 21 U.S.C. §§ 841 (a) and (b) were rendered facially unconstitutional by Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Cuellar concedes that his argument is foreclosed by our opinion in United States v. Slaughter, 238 F.3d 580, 581-82 (5th Cir. 2000), cert. denied, 532 U.S. 1045 (2001),

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

which rejected a broad Apprendi-based attack on the constitutionality of that statute. He raises the issue only to preserve it for Supreme Court review. 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). No such decision overruling Slaughter exists. Accordingly, Cuellar's argument is foreclosed.

The Government has moved for a summary affirmance in lieu of filing an appellee's brief. In its motion, the Government asks that an appellee's brief not be required. The motion is GRANTED.

AFFIRMED; MOTION GRANTED.