

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10284
Summary Calendar

YSIDRO CASTILLO, JR.,

Petitioner-Appellant,

versus

SAM L. PRATT, Warden;
KATHLEEN HAWK SAWYER, Director;
JOHN ASHCROFT, Attorney General,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:01-CV-1226-R)

September 6, 2002

Before DAVIS, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Ysidro Castillo, Jr., federal prisoner # 24866-077, appeals the denial of his 28 U.S.C. § 2241 petition. He contends that (1) the district court violated Apprendi v. New Jersey, 530 U.S. 466 (2000) by sentencing him on the basis of the quantity of drugs stated in the presentence report, because the jury

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

did not determine the drug amount, and (2) Apprendi is retroactively applicable to his 28 U.S.C. § 2241 petition.

We have not yet decided whether Apprendi applies retroactively on collateral review, see United States v. Clark, 260 F.3d 382 (5th Cir. 2001). Even so, Castillo's Apprendi claim lacks merit. True, after Apprendi, the jury should have been charged to find the drug amount. See United States v. Miranda, 248 F.3d 434, 445 (5th Cir. 2001), cert. denied, 122 S. Ct. 410 (2001), and 122 S. Ct. 823 (2002). Nevertheless, Castillo has failed to show that the error, although plain, seriously affected the fairness of the proceedings. See United States v. Cotton, 122 S. Ct. 1781, 1785-86 (2002). Therefore, regardless whether Apprendi applies retroactively to cases on collateral review, Castillo cannot show that the district court's failure to instruct the jury on drug quantity entitles him to 28 U.S.C. § 2241 relief. Accordingly, the district court's judgment is

AFFIRMED.