

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40488
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH SIMMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. L-01-CR-1109-ALL

December 12, 2002

Before JOLLY, JONES, and CLEMENT, Circuit Judges.

PER CURIAM:*

Joseph Simms appeals his guilty plea conviction and sentence for possessing with the intent to distribute less than 50 kilograms of marijuana. Simms argues that 21 U.S.C. § 841, the statute under which he was convicted and sentenced, was rendered facially unconstitutional by Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Simms concedes that his argument is foreclosed by our opinion in United States v. Slaughter, 238 F.3d 580, 581-

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

82 (5th Cir. 2000)(revised opinion), cert. denied, 532 U.S. 1045 (2001), 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, Simms's argument is indeed foreclosed. The judgment of the district court is AFFIRMED.

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.