

April 22, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40753
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDUARDO MARQUEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. M-02-CR-65-1

Before DAVIS, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Eduardo Marquez ("Marquez") pled guilty to possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). He argues that the district court plainly erred by assigning an initial offense level of 28 for possession of 1.2 kilograms of cocaine and that the drug type and quantity provisions of § 841(a) and (b) are unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Though the district court may have failed to properly select the initial offense level, this court's rule for correcting sentencing range errors is clear: even where clear error exists, the error will not be corrected as plain error if the original sentence could be imposed on remand. United States v. Leonard, 157 F.3d 343, 346 (5th Cir. 1998). As Marquez concedes, his second argument is foreclosed by United States v. Slaughter, 238 F.3d 580, 582 (5th Cir. 2000), cert. denied, 532 U.S. 1045 (2001). In the absence of any convincing argument, the sentence imposed by the district court is AFFIRMED.