

December 10, 2003

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 03-50468  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES FLEMING,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. SA-01-CR-386-ALL  
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Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:\*

Charles Fleming appeals his guilty plea conviction for possession of cocaine base. Fleming argues that 21 U.S.C. § 841(b)(1)(B) was rendered facially unconstitutional by Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Fleming 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), which rejected a broad Apprendi-based

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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, Fleming'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.