

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

October 20, 2011

Lyle W. Cayce  
Clerk

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No. 09-50489  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FLORENTINO TOVAR-RIVAS; ROBERTO GARCIA-VALLES,

Defendants-Appellants

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:08-CR-448-6

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Before GARZA, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:\*

Following a jury trial, Florentino Tovar-Rivas (Tovar) and Roberto Garcia-Valles (Garcia) were convicted of conspiracy to possess with the intent to distribute cocaine and of possession with the intent to distribute cocaine. Tovar's counsel, the Federal Public Defender (FPD), raises a single issue on appeal. Counsel argues that 21 U.S.C. § 841(b)(1)(A), the statute under which Tovar was convicted, is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The FPD concedes that this argument is foreclosed by this

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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court's precedent in *United States v. Slaughter*, 238 F.3d 580, 582-84 (5th Cir. 2000), and he raises the issue solely to preserve it for possible further review. Because Tovar's argument is foreclosed, the Government's motion for summary affirmance is GRANTED, its alternative motion for an extension of time is DENIED as unnecessary, and the judgment of the district court is AFFIRMED.

Garcia's appointed counsel has moved for leave to withdraw and has filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *United States v. Flores*, 632 F.3d 229 (5th Cir. 2011). Garcia has filed a response. Insofar as Garcia argues that his counsel was ineffective, the general rule in this circuit is that a claim of "ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations." *United States v. Cantwell*, 470 F.3d 1087, 1091 (5th Cir. 2006). Because the present record is not sufficiently developed and Garcia has not even identified an issue for appeal, we will not consider Garcia's claim on direct appeal. *Cantwell*, 470 F.3d at 1091.

We have reviewed counsel's brief, Garcia's response, and the relevant portions of the record. We concur with counsel's assessment that the appeal presents no nonfrivolous issue for appellate review. Accordingly, counsel's motion for leave to withdraw is GRANTED, counsel is excused from further responsibilities herein, and the APPEAL IS DISMISSED. *See* 5TH CIR. R. 42.2.