IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3588
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EMILIO EDUARDO HERNANDEZ,

Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-93-28 N

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(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

A district court's factual findings regarding the quantity of drugs to be used to determine a defendant's sentence are normally reviewed for clear error. United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992). However, because Emilio Hernandez did not object, in the district court, to the amount of marihuana used to calculate his base offense level, his arguments pertaining to this issue will be reviewed only for plain error. See United States v. Pofahl, 990 F.2d 1456, 1479 (5th Cir.), cert. denied, 114 S.Ct. 266 (1993). Plain error is clear or

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

obvious error that affects substantial rights and undermines "the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993) (internal quotation and citation omitted). "Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991) (citation omitted).

The district court's finding that Hernandez's sentence should be based on 800 pounds of marihuana was, therefore, not plain error. Moreover, as Hernandez acknowledges, there is no provision for the retroactive application of application note 17[**] to § 2D1.1, effective November 1, 1993. See § 1B1.10(d) (Nov. 1993) (referring to amendments listed in Appendix C that are retroactively applied).

This appeal borders on being frivolous. We caution counsel. Counsel is subject to sanctions. Counsel has no duty to bring frivolous appeals; the opposite is true. See United States v. Burleson, ___ F.3d ___, (5th Cir. May 18, 1994, No. 93-2619).

Accordingly, the sentence imposed by the district court is AFFIRMED.

[**] The amendment authorizes downward departure "[i]f, in a reverse sting . . . the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent[.]" U.S.S.G. § 2D1.1, comment. (n.17).