

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 99-51201  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

APOLONIO PASTRANO, also  
known as Polo,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. SA-99-CV-380  
SA-93-CR-184-2  
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December 12, 2002

Before JOLLY, JONES, and CLEMENT, Circuit Judges.

PER CURIAM:\*

Apolonio Pastrano, federal prisoner # 65249-080, is appealing the district court's denial of his 28 U.S.C. § 2255 motion challenging his conviction for conspiracy to possess with intent to distribute marijuana. Relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), he argues that his conviction should be set aside because the quantity of drugs upon which he was

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

sentenced was not alleged in the indictment and was not submitted to the jury and proved beyond a reasonable doubt.

In United States v. Brown, 305 F.3d 304, 305-09 (5th Cir. 2002), a 28 U.S.C. § 2255 case, the court determined that the new rule of criminal procedure announced in Apprendi does not apply retroactively on collateral review of initial 28 U.S.C. § 2255 motions. Therefore, Pastrano's argument based on Apprendi fails. The district court's denial of Pastrano's 28 U.S.C. § 2255 motion is AFFIRMED.

The Government's motion for a summary affirmance is DENIED.