

FILED

June 22, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 03-40291
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE CAZARES-ALVARADO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. M-02-CR-138-3

Before BARKSDALE, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Jose Cazares-Alvarado appeals his guilty-plea conviction and sentence for conspiracy to possess with intent to distribute more than five kilograms of cocaine. He argues that the district court erred when it denied a reduction in his total offense level based on his mitigating role in the offense and that 21 U.S.C. §§ 841 and 860 are facially unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Cazares-Alvarado concedes that his second argument is foreclosed but nevertheless raises the issue to preserve it for possible further review.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Cazares-Alvarado's construction of a hidden compartment in which to conceal the large amount of cocaine involved in his offense was not "peripheral to the advancement of the illicit activity." See United States v. Thomas, 932 F.2d 1085, 1092 (5th Cir. 1991). The district court therefore did not clearly err in determining that Cazares-Alvarado was not entitled to a mitigating role reduction pursuant to U.S.S.G. § 3B1.2. See United States v. Zuniga, 18 F.3d 1254, 1261 (5th Cir. 1994).

Cazares-Alvarado's argument regarding the constitutionality of the statutes of conviction, raised for the first time on appeal, is foreclosed by our decision in United States v. Slaughter, 238 F.3d 580, 582 (5th Cir. 2000). Cazares-Alvarado has failed to demonstrate error, plain or otherwise, regarding Apprendi. See id.

The judgment of the district court is therefore AFFIRMED.