

December 10, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-20408
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALMA VIOLETA CRUZ-ORTEGA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-02-CR-704-1

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

Alma Violeta Cruz-Ortega appeals from her conviction of possession with intent to distribute 100 grams or more of heroin. She contends that the district court erred by not adjusting her offense level for her minor role in the offense and, for the first time on appeal, that 21 U.S.C. § 841 is facially unconstitutional pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Cruz concedes that her *Apprendi* contention is foreclosed

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

by the caselaw of this court, but she seeks to preserve the issue for further review.

First, Cruz's sentence was based on her own activity in the offense, and the district court did not err by finding that Cruz was a critical link in the transportation of heroin into the United States. See *United States v. Zuniga*, 18 F.3d 1254, 1261 (5th Cir. 1994); U.S.S.G. § 3B1.2, comment. (n.3(A)). Second, *Apprendi* did not render 21 U.S.C. § 841 facially unconstitutional. *United States v. Slaughter*, 238 F.3d 580, 583 (5th Cir. 2000). Cruz has failed to demonstrate error, plain or otherwise, regarding *Apprendi*. See FED. R. CRIM. P. 52(b).

AFFIRMED.