

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

United States Court of Appeals
Fifth Circuit

FILED

April 17, 2012

Lyle W. Cayce
Clerk

No. 11-40516
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MALONE BURNS,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:09-CR-135-1

Before JONES, Chief Judge, and JOLLY and SMITH, Circuit Judges.

PER CURIAM:*

Malone Burns appeals the 188-month sentence imposed for his conviction for possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1). In his sole issue on appeal, he contends that the district court erred by refusing to apply the Fair Sentencing Act of 2010 (FSA) to his sentence. His argument is foreclosed by our decision in *United States v. Tickle*, 661 F.3d 212, 215 (5th Cir. 2011), *petitions for cert. filed* (Dec. 15, 2011) (No. 11-8023) and (Dec. 27, 2011) (No. 11-8268), which held that the FSA does not apply

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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retroactively to defendants whose sentencing occurred after the FSA's effective date but whose offenses occurred before the effective date. Although the Supreme Court has recently granted certiorari in two Seventh Circuit cases that held that the FSA does not apply retroactively, our precedent is nevertheless binding. *See United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008).

The judgment of the district court is AFFIRMED.