

October 17, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11052
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAVIER HUERTA, also known as Big Boy,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:03-CR-369-4

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Javier Huerta appeals his guilty-plea conviction for conspiracy to distribute and possess with intent to distribute 100 kilograms or more of marijuana. He argues that the written judgment of conviction does not accurately reflect the offense to which he pleaded guilty.

As the Government has explicitly declined to invoke the appeal waiver regarding the issue raised by Huerta, the appeal waiver is not binding on this appeal. See United States v. Story, 439 F.3d 226, 231 (5th Cir. 2006).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

As the Government concedes, the written judgment describes the nature of Huerta's offense as conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 100 kilograms or more of marijuana while the record shows that Huerta pleaded guilty only to conspiracy to distribute and possess with intent to distribute 100 kilograms or more of marijuana. This error is a clerical error subject to correction pursuant to FED. R. CRIM. P. 36. See United States v. Sapp, 439 F.2d 817, 821 (5th Cir. 1971). Accordingly, we affirm Huerta's conviction and sentence and remand this case to the district court for correction of the clerical error in the judgment pursuant to Rule 36.

AFFIRMED; MOTION To GRANT RELIEF REQUESTED GRANTED; REMANDED FOR CORRECTION OF CLERICAL ERROR IN JUDGMENT.