

January 20, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-11519
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARCUS NELSON DEES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:04-CR-69-ALL-Y

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Marcus Nelson Dees appeals his 60-month sentence following his guilty plea to possession of sexually explicit visual depictions of a minor, which images had been shipped and transported in interstate commerce. Dees argues that he was sentenced in contravention of United States v. Booker, 125 S. Ct. 738 (2005) because the sentencing enhancements under U.S.S.G. § 2G2.2(b)(1) and U.S.S.G. § 2G2.2(b)(3) were based on facts not admitted by him or found by a jury.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

In the present case, the district court stated that it would sentence Dees to the same sentence (60 months in prison) in the event that the guidelines were held unconstitutional. Thus, the Government has pointed to record evidence demonstrating beyond a reasonable doubt that the federal constitutional error of which Dess complains did not contribute to the sentence that he received. See United States v. Akpan, 407 F.3d 360, 377 (5th Cir. 2005). Therefore the decision of the district court is AFFIRMED.