

May 20, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-20852  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEPHEN ALAN GARDNER,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:04-CR-177-ALL  
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Before GARZA, DEMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:\*

Stephen Alan Gardner challenges the validity of the sentences imposed upon his convictions for distribution of child pornography and possession of child pornography involving the sexual exploitation of minors. See 18 U.S.C. §§ 2252(a)(2), (a)(5)(B), (b)(1), & (b)(2), and 2256(8)(A). He argues that under United States v. Booker, 125 S. Ct. 738 (2005), and Blakely v. Washington, 124 S. Ct. 2531 (2004), the guidelines enhancements and upward departure from the guidelines violated

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

his Sixth Amendment rights. Gardner has not shown, however, that the district court would have sentenced him differently under an advisory guidelines scheme rather than the mandatory scheme in place at the time he was sentenced. See United States v. Akpan, \_\_\_ F.3d \_\_\_, No. 03-20875, 2005 WL 852416 at \*13 (5th Cir. Apr. 14, 2005). He has therefore failed to show that the district court plainly erred. See United States v. Mares, 402 F.3d 511, 513 (5th Cir. 2005).

AFFIRMED.