

May 31, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40987
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRY A. SIMPSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:03-CR-189-RAS-ALL

Before GARWOOD, STEWART, and PRADO, Circuit Judges.

PER CURIAM:*

Terry A. Simpson appeals his sentence following his guilty-plea conviction to receipt of child pornography. He renews his claim that the district court erred by adjusting his offense level by four levels under U.S.S.G. § 2G2.2(b)(3) because the factual finding supporting the adjustment was made by the district court and was not made by a jury or admitted by him, thus violating the Fifth and Sixth Amendments under Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, 125 S. Ct. 738 (2005). The Government concedes that Simpson's

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

sentence is erroneous after Booker, that it cannot prove beyond a reasonable doubt that the district court would have imposed the same sentence if it knew that the guidelines were only discretionary, and that the case should be remanded for resentencing. Simpson's sentence is thus vacated and the case is remanded for resentencing. United States v. Akpan, ___ F.3d ___, No. 03-20875, 2005 WL 852416 at *11-12 (5th Cir. Apr. 14, 2005).

VACATED AND REMANDED FOR RESENTENCING.