

June 21, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20444
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEVEN D. LUCK,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CR-115-ALL

Before STEWART, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

Steven D. Luck appeals his sentence for bank robbery in violation of 18 U.S.C. § 2113(a). Luck's offenses occurred prior to the decision in United States v. Booker, 543 U.S. 220 (2005), and he was sentenced after Booker was decided. Luck argues that, although he is entitled to retroactive application of Booker's Sixth Amendment holding, the remedial portion of Booker's holding, which made the Sentencing Guidelines advisory, may not be applied in his case without violating the Due Process and Ex Post Facto Clauses of the Constitution. He thus argues that

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

the district court should have applied the Guidelines as mandatory in his case but should not have enhanced his sentence based on facts that were not charged in the superceding information and were neither admitted by him nor found by a jury beyond a reasonable doubt. As Luck concedes, this argument is foreclosed. See United States v. Austin, 432 F.3d 598, 599-600 (5th Cir. 2005); United States v. Scroggins, 411 F.3d 572, 575-76 (5th Cir. 2005). He has raised the issue to preserve it for further review. Accordingly, the district court's judgment is AFFIRMED.