

**FILED**

August 21, 2007

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III  
Clerk

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No. 05-50169  
Conference Calendar

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UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

STEPHEN PROVENCIO

Defendant-Appellant

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:04-CV-487  
USDC No. 1:03-CR-70-3

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Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:\*

Stephen Provencio, federal inmate # 28915-180, appeals the denial of his motion for 28 U.S.C. § 2255 relief, in which he challenged his guilty plea conviction for possession with intent to distribute 3, 4-methylenedioxymethamphetamine. The district court granted a certificate of appealability (COA) on whether *United States v. Booker*, 543 U.S. 220 (2005),

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

applied retroactively to Provencio's § 2255 motion. The Government moves for summary affirmance in lieu of filing a brief or for an extension of time to file an appellate brief should the court deny its motion for summary affirmance.

Booker does not apply retroactively to Provencio's § 2255 motion. See *United States v. Gentry*, 432 F.3d 600, 604-05 (5th Cir. 2005). Provencio's argument that the district court violated his due process rights when it denied him a three-level reduction for acceptance of responsibility is outside the scope of the district court's grant of a COA, and this court has already denied a COA on this issue. See *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

The judgment of the district court is AFFIRMED. The Government's motion for summary affirmance is GRANTED; the Government's motion for an extension of time to file an appellate brief is DENIED.