

July 12, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 04-41009

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TEHRAN ANDRE BATEY,

Defendant-Appellant.

-----  
Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 1:03-CR-67-2  
-----

Before KING, Chief Judge, DAVIS, Circuit Judge, and ROSENTHAL,  
District Judge.\*

PER CURIAM:\*\*

Tehran Batey appeals the sentence he received following his guilty plea for possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a). He renews his argument, preserved in the district court, that his constitutional rights were violated when the district court assessed a two-level

---

\* District Judge for the Southern District of Texas, sitting by designation.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

enhancement for possession of a firearm, pursuant to § 2D1.1(b)(1) (2003), citing Blakely v. Washington, 159 L.Ed. 2d 403 (2004).

The government concedes that it cannot meet its burden under a harmless error analysis that the mandatory nature of the guidelines did not contribute to the sentence imposed. United States v. Akpan, \_\_\_ F.3d \_\_\_, No. 03-20875, 2005 WL 852416 at \*12 (5th Cir. April 14, 2005). Accordingly, Batey's sentence must be vacated and remanded for resentencing consistent with Booker, 125 S.Ct. 738 (2005).

VACATED and REMANDED.