

March 1, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-51107
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TIMOTHY WAYNE WETLESEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:04-CR-110-ALL

Before JOLLY, DAVIS and OWEN, Circuit Judges.

PER CURIAM:*

Timothy Wayne Wetlesen appeals his sentence imposed pursuant to a plea of guilty to attempt to manufacture methamphetamine. See 21 U.S.C. § 841(a)(1). He argues that pursuant to United States v. Booker, 543 U.S. 220 (2005), his case should be remanded for resentencing because the district court erred in sentencing him pursuant to the then-mandatory Sentencing Guidelines.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

By sentencing Wetlesen under a mandatory guidelines regime, the district court committed what this court refers to as Fanfan error. See United States v. Walters, 418 F.3d 461, 463-64 (5th Cir. 2005). The Government concedes that Wetlesen preserved his Fanfan argument by raising an objection in the district court pursuant to Blakely v. Washington, 542 U.S. 296 (2004). Given the district court's statement that it would impose the same sentence in the event the Guidelines were declared unconstitutional, the Government has carried its burden of demonstrating harmless error beyond a reasonable doubt. See e.g., United States v. Saldana, 427 F.3d 298, 314 (5th Cir. 2005), cert. denied, 2006 WL 37834 (Jan. 9, 2006).

AFFIRMED.