

October 20, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40148
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN WAYNE CLEAVER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:02-CR-100-3

Before DAVIS, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

John Wayne Cleaver appeals his guilty-plea conviction and sentence for conspiracy to possess with intent to distribute or dispense 3, 4-methylenedioxy-methamphetamine ("MDMA" or "ecstasy"), cocaine, methamphetamine and/or gamma /hydroxybutyrate. See 21 U.S.C. § 846. Cleaver claims the court erred, pursuant to United States v. Booker, 543 U.S. 220 (2005), in assessing sentencing increases for relevant conduct based upon uncorroborated statements and for his leadership role in the offense. Cleaver's objections to the Presentence Investigation

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Report and at sentencing sufficiently apprised the court that he was making a Sixth Amendment objection to being sentenced based on facts not found by a jury. See United States v. Akpan, 407 F.3d 360, 376 (5th Cir. 2005). The increases violated Cleaver's Sixth Amendment right to a trial by jury, and the Government has not met its burden of demonstrating the error was harmless beyond a reasonable doubt. See United States v. Pineiro, 410 F.3d 282, 285-86 (5th Cir. 2005).

SENTENCE VACATED AND REMANDED FOR RESENTENCING.