

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-4480

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TERRELL BARTEL ANTHONY MILLER,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. N. Carlton Tilley, Jr., Senior District Judge. (1:09-cr-00272-NCT-2)

Submitted: September 30, 2011

Decided: October 3, 2011

Before DUNCAN, DAVIS, and DIAZ, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Steven Kiersh, Washington, DC, for Appellant. John W. Stone, Jr., Acting United States Attorney, Randall S. Galyon, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Terrell Bartel Anthony Miller appeals his conviction for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (2006). He asserts that his prior North Carolina conviction for possession with intent to sell and deliver marijuana was not a felony and therefore could not support his federal indictment. We conclude that our recent decision in United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc), calls into question whether Miller's predicate conviction was "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g).

Because we cannot determine on the record before us whether, in light of Simmons, Miller's North Carolina conviction is a felony or a misdemeanor, we vacate the judgment and remand this case to the district court for the court to make such determination in the first instance. Should the district court determine that the prior conviction is a felony, it may reimpose the judgment. Should the district court conclude, however, that Miller's predicate North Carolina conviction is a misdemeanor, we are confident that the court will ensure that appropriate remedial action follows.

The clerk is directed to issue the mandate forthwith. We dispense with oral argument because the facts and legal

contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

VACATED AND REMANDED