

Guideline Sentencing Update

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Offense Conduct

Drug Quantity

More circuits examine effect of *Apprendi* decision on sentencing. The Fifth Circuit remanded some of the sentences in a drug conspiracy case in light of *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). The court noted that it has “continually endorsed” handling drug quantity as “a sentencing enhancement entrusted to the judge’s determination rather than an element of the offense which must be determined by the jury.” However, the court did not reconcile its precedent with *Apprendi*’s holding that the jury must find drug amounts that increase a sentence above the maximum otherwise authorized by the jury verdict, “because the government ‘conced[es] that the *Apprendi* decision applies to 21 U.S.C. § 841.’”

The district court had followed the usual procedure of determining drug amounts based on a preponderance of the evidence; neither the indictment nor the jury verdict specified amounts for any defendant. Most defendants were sentenced below the statutory maximum for their basic offense of conviction, given their criminal history. However, one defendant’s two life sentences, based on the court’s quantity findings, were remanded because they exceeded the thirty-year maximum for his basic offenses of conviction. The appellate court also remanded several supervised release terms that exceeded the maximum terms allowed for the base offenses.

The court rejected one defendant’s claim that *Apprendi* should be read broadly to preclude giving him “a higher sentence within [the statutory] range based on the application of a Sentencing Guidelines enhancement.” Although *Apprendi* did not resolve that issue, “[g]iven that the more limited reading of *Apprendi* is a more plausible reading of the case, and given the profound effect a broader rule would have on existing Supreme Court and Fifth Circuit precedent, we believe the limited reading of *Apprendi* is the more desirable one.”

U.S. v. Meshack, No. 99-50669 (5th Cir. Aug. 28, 2000) (Garza, J.). See also *U.S. v. Smith*, 223 F.3d 554, — (7th Cir. 2000) (for defendants who were convicted of operating continuing criminal enterprise under 21 U.S.C. § 848(a), which carries sentence of thirty years to life, *Apprendi* did not require submitting facts to jury that, under § 848(b), would require mandatory life sentence).

The Ninth Circuit did specifically rule on *Apprendi*’s effect on its prior precedent. Finding that *Apprendi* requires “that a fact that increases the prescribed statutory maximum penalty to which a criminal defendant is ex-

posed . . . be submitted to a jury and proven beyond a reasonable doubt,” the court held “that the amount of drugs for which a defendant is sentenced under 21 U.S.C. § 841(b)(1) is such a fact, and that our existing precedent to the contrary is overruled to the extent that it is inconsistent with *Apprendi*.”

Defendant was convicted of conspiracy to possess with intent to distribute marijuana. The jury verdict did not specify any quantity of marijuana, so “the only sentence under § 841 justifiable under the facts as found by the jury would be a sentence . . . of not more than five years applicable to possession of less than 50 marijuana plants. See 21 U.S.C. § 841(b)(1)(D). The trial court’s finding that Nordby possessed 1000 or more plants under § 841(b)(1)(A)(vii) increased Nordby’s sentence to ‘not [] less than 10 years or more than life’ and a possible fine. Thus, the judge’s finding, made under a preponderance standard, increased the statutory maximum penalty for Nordby’s crime from five years to life.”

“We conclude that the district court erred by sentencing Nordby under 21 U.S.C. §§ 841 and 846 for manufacturing, possessing with intent to distribute, and conspiring to possess with intent to distribute 1000 or more marijuana plants without submitting the question of marijuana quantity to the jury and without a finding that the marijuana quantity had been proved beyond a reasonable doubt. We further conclude that the constitutional rule in *Apprendi* undermines our existing precedent holding that a defendant’s sentence under § 841 can be based on a judge’s finding at sentencing of drug quantity under a preponderance-of-the-evidence standard.” The court held that, even under plain error review, defendant was entitled to resentencing “subject to the maximum sentence supported by the facts found by the jury beyond a reasonable doubt, consistently with *Apprendi* and this opinion.”

U.S. v. Nordby, No. 99-10191 (9th Cir. Sept. 11, 2000) (Canby, J.). Cf. *In re Joshua*, No. 00-14328 (11th Cir. Aug. 30, 2000) (per curiam) (denying application to file second or successive § 2255 motion based on *Apprendi* because “the Supreme Court has not declared *Apprendi* to be retroactive to cases on collateral review”).

The Sixth Circuit applied *Apprendi* in a case where defendant pled guilty to distribution of heroin pursuant to a plea agreement. The agreement stated that defendant understood her maximum term of imprisonment was twenty years for distribution, but that if the district court found that death resulted from the distribution, 21 U.S.C. § 841(b)(1)(A)–(C), she would be sentenced to

a term of 20 years to life. The district court found, by a preponderance of the evidence, that defendant's distribution of heroin did cause a death, and sentenced her to 292 months in prison. Defendant appealed, claiming that *Jones v. U.S.*, 119 S. Ct. 1215 (1999), dictates that the factual determination as to whether death resulted should have been determined beyond a reasonable doubt.

The appellate court "agree[d] that *Jones* and the subsequent Supreme Court decisions elaborating on *Jones* compel a finding that the death resulted beyond a reasonable doubt." Although "Congress was fairly clear in delineating that the 'if death results' provision is a sentencing provision," the *Apprendi* Court "freed itself from the strictures of legislative intent" in holding that "any fact" (other than a prior conviction) that increases the statutory maximum must be proved beyond a reasonable doubt. "Our duty, in light of this clear dictate from the Court, is to examine whether the sentencing factor in this case was a factual determination, and whether that determination increased the maximum penalty for the crime charged in the indictment. We find that the statute at question here today, 18 U.S.C. §841, provides for a factual determination of whether the distribution of drugs caused death or serious bodily injury, and that the factual determination significantly impacts the sentence imposed by the court, increasing the maximum penalty from 20 years to that of life imprisonment."

While defendant "waived her right to a jury trial of the issue of whether her distribution of heroin caused the death," she "did not waive the right to have a court decide any remaining elements of the offense beyond a reasonable doubt, as opposed to making those determinations by a mere preponderance of the evidence. Because the provisions at issue are factual determinations and because they increase the maximum penalty to which Rebmann was exposed, we find that they are elements of the offense which must be proven beyond a reasonable doubt." Because it was not clear from the record that the district court would have reached the same conclusion under the stricter standard, the court remanded "for a determination of whether [the] death was caused by the distribution of heroin beyond a reasonable doubt."

U.S. v. Rebmann, No. 98-6386 (6th Cir. Aug. 28, 2000) (Merritt, J.).

See *Outline* at II.A.3.a and c

Departures

Mitigating Circumstances

Replacing earlier decisions, Seventh and Ninth Circuits hold that departures based on sentencing disparities were properly denied and discuss limited circumstances in which disparity might warrant departure. In the Seventh Circuit, three defendants were convicted on three counts related to a bank robbery. One defendant

pled guilty to all charges under a plea agreement and cooperated with the government. He received a departure for extraordinary family circumstances and also for substantial assistance under §5K1.1 (but not 18 U.S.C. §3553(e)). Although subject to a prison term of 117–131 months, which included a mandatory sixty-month sentence, he was sentenced to twelve months of home confinement. The government did not appeal the departure.

The other two defendants went to trial and received sentences of 138 and 195 months in prison. They unsuccessfully moved for downward departures under the rationale of *U.S. v. Meza*, 127 F.3d 545, 549–50 (7th Cir. 1996), which had stated that, although a disparity between co-defendants' sentences that results from the proper application of the Guidelines can never be a basis for departure, an "unjustified disparity" may warrant departure. The defendants claimed that the large difference between their sentences and their codefendant's was such an "unjustified disparity" because the district court wrongly departed below the sixty-month minimum sentence without a government motion under §3553(e). The appellate court originally agreed, finding that the departure below the minimum was in fact an improper application of the Guidelines and remanding for consideration of "whether the unjustified disparity . . . should serve as a basis for a downward departure" in light of *Meza*. See *U.S. v. McMutuary*, 176 F.3d 959, 967–70 (7th Cir.), *reh'g granted and opinion vacated*, 200 F.3d 499 (7th Cir. 1999).

On rehearing, the appellate court determined "that the interpretation of the term 'unjustified disparity,' provided as dicta in *Meza*, which would require the sentencing court to consider all unjustified sentencing disparities between co-defendants as a basis to depart from the applicable Guidelines range, focuses too narrowly on comparison of sentences of participants in one offense, rather than on comparison of sentences of all persons convicted of the same offense, nationwide." After looking at the relevant Guidelines and statutes, and considering the problems—including *increased* disparity—that could result from departures based on disparities among codefendants, the court reached a different conclusion:

In light of the promulgation of Guidelines with the intent to create uniformity of sentencing nationwide for all similarly situated defendants, we believe that the Sentencing Commission implicitly considered the potential for disparity of sentences, whether justified or unjustified, between co-defendants in its creation of an applicable sentencing range. As such, we conclude that disparities between the sentences of co-defendants ordinarily should not be considered as a factor in the decision to depart from the Guidelines. Because district courts must only consider factors that have not been considered by the Sentencing Commission, see 28 U.S.C. §3553(b), our holding that the naked existence of an unjustified disparity between the sentences of co-conspirators should not

be considered as a basis for departure from the applicable sentencing range of the Guidelines does not conflict with the proscription in *Koon* that the appellate courts not create new classes of impermissible grounds for departure. As such, we believe that the sentencing court should consider only an “unjustified disparity” in the sentencing of co-defendants when the sentence imposed on the appellant co-defendant is “unjustified” in length in comparison to the sentences imposed on all other individuals appropriately sentenced under the Guidelines for similar criminal conduct.

The court added that it did not hold “that unjustified disparities may never be considered as bases for departure. In certain circumstances, such as when an unjustified disparity is created by the abuse of prosecutorial discretion, . . . the sentencing court may consider the disparity as a factor in the determination whether to depart from the sentence of a co-defendant. In addition, a sentencing court abuses its discretion by deciding to depart from the applicable sentencing range for the sentence of any defendant, whenever such departure creates an unjustified disparity between the sentence of that defendant and the sentences of all other similarly situated individuals nationwide.” On the record before it, the court affirmed the denial of departures because “even though there was an unjustified sentence disparity relative to their co-defendant . . . , there was no unjustified or unwarranted disparity in these appellants’ sentences, as those terms are used in *Koon* or in §3553(a)(6).”

U.S. v. McMutuary, 217 F.3d 477, 488–90 (7th Cir. 2000). Cf. *U.S. v. Martin*, 221 F.3d 52, 57–58 (1st Cir. 2000) (remanded: “perceived disparity between the defendant’s [sentencing range] and the national median sentence for persons convicted of federal drug-trafficking offenses” is improper ground for departure). *But see U.S. v. Wright*, 211 F.3d 233, 238–39 (5th Cir. 2000) (remanding district court’s conclusion that it could not consider downward departure “based on discrepancies in sentences among co-defendants”—after *Koon*, such a departure should not be considered categorically prohibited); *U.S. v. Daas*, 198 F.3d 1167, 1180–81 (9th Cir. 1999) (remanded: same— “[d]ownward departure to equalize sentencing disparity is a proper ground for departure under the appropriate circumstances”).

In the Ninth Circuit case, defendant pled guilty to illegally reentering the United States after being deported, 8 U.S.C. § 1326(a), and admitted to a prior aggravated felony, which subjected him to a longer sentence under § 1326(b). He argued that he should receive a downward departure based on an alleged disparity between his sentence—70–87 months—and lower sentences similarly situated defendants had received in other California districts at that time. Defendants in the Southern District, for example, were eligible to participate in a “fast-track”

plea-bargaining program whereby defendants—including some who would normally qualify for a § 1326(b) increase—were allowed to plead guilty under § 1326(a) for a maximum sentence of two years; defendants who faced sentencing under § 1326(b) were offered plea bargains that limited sentences to five years. The district court concluded that this was not a valid basis for departure as long as defendant was properly sentenced under the guidelines that applied to him.

The appellate court originally reversed, holding that “sentencing disparities among federal districts based on U.S. Attorneys’ plea-bargaining practices can be a ground for departure in the appropriate case.” Such a ground is not forbidden by the Sentencing Commission and is not otherwise mentioned in the Guidelines, so a district court should consider whether the factor takes a case out of the “heartland” of the applicable guideline. The court concluded that, “given the alleged sentencing disparity, the single most influential factor in an alien’s sentencing for a violation of § 1326 is the *location* of his arrest. . . . The ‘heartland’ of Guideline § 2L1.2 certainly does not take account of that variable.” The court also concluded that the effects of the different plea-bargaining policies ran counter to the statutory goal of “avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.” 28 U.S.C. § 991(b)(1)(B). The court remanded for reconsideration, but noted that its decision was “necessarily limited to the unique circumstances” of this case. *U.S. v. Banuelos-Rodriguez*, 173 F.3d 741, 743–47 (9th Cir.), *vacated for reh’g en banc*, 195 F.3d 454 (9th Cir. 1999).

On rehearing en banc, the court affirmed the district court’s refusal to depart. While acknowledging that “it was more likely that an illegal alien who was eligible for the enhancement provided by § 1326(b) would be sentenced under § 1326(b) if the alien was apprehended in the Central District” than in districts with the “fast-track” program, the court reasoned that “[n]othing about the . . . ‘fast-track’ program lessens the severity of Defendant’s conduct or makes his criminal or personal history more sympathetic. The fact that, had Defendant been apprehended in the Southern District, he might not have been punished to the fullest extent of the law, does not make his otherwise lawful sentence less justified. Thus, the existence of differing prosecutorial policies regarding § 1326 violators is not a ‘mitigating circumstance.’”

The court then noted that the Guidelines define the “heartland” as “a set of typical cases embodying the *conduct* that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where *conduct* significantly differs from the norm, the court may consider whether a departure is warranted.” (Emphasis added by court.) In the case at hand, “Defendant and his conduct fall squarely within the heartland of his offense of conviction.”

Furthermore, “the Guidelines have sought to achieve uniformity in sentencing only by attempting to equalize the sentences of those who have engaged in similar criminal conduct, have similar criminal backgrounds, *and* have been convicted of the same offense. . . . Here, Defendant agreed to plead guilty to violating § 1326(a) and to admit facts making him eligible for the enhancement provided by § 1326(b)(2). An alien who merely pleads guilty to a simple violation of § 1326(a) and an alien who pleads guilty to violating § 1326(a) and also admits facts demonstrating eligibility for the enhancement under § 1326(b)(2) are not pleading ‘guilty to essentially the same crime.’ . . . Granting a downward departure on the ground that Defendant received a longer sentence than other defendants who have been convicted of committing a different crime would be inappropriate.”

The court also concluded that the Sentencing Commission “considered the effects that the exercise of prosecutorial discretion has on the uniformity of sentences. The Guidelines allow sentencing courts to take certain limited actions in narrow circumstances to address a prosecutor’s inappropriate exercise of discretion. In all other circumstances, the Guidelines do not give courts the authority to interfere with a prosecutor’s exercise of discretion in charging and plea bargaining by departing from an applicable Guideline range.” In addition, “the legislative history of the Guidelines also supports our conclusion that sentencing disparities arising

from the charging and plea bargaining decisions of different United States Attorneys is not a proper ground for departing from an otherwise applicable Guideline range.” As defendant has not alleged, and no evidence shows, that there was any abuse of prosecutorial discretion, departure was not warranted.

U.S. v. Banuelos-Rodriguez, 215 F.3d 969, 973–78 (9th Cir. 2000) (en banc). *Accord U.S. v. Bonnet-Grullon*, 212 F.3d 692, 705–10 (2d Cir. 2000) (affirming district court’s ruling that it did not have authority to consider downward departure for § 1326 defendants who claimed that similarly situated defendants in some California districts receive significantly lower sentences; such departures are “categorically excluded by the terms of §§ 2L1.2 and 5K2.0, by the structure and theory of the Guidelines as a whole, and by the policy statements stating that the courts’ sentencing decisions are not to intrude on discretionary prosecutorial charging decisions except as the Guidelines provide”); *U.S. v. Armenta-Castro*, No. 99-4155 (10th Cir. Sept. 12, 2000) (Murphy, J.) (agreeing with Second and Ninth Circuits in similar case where it affirmed denial of departure for § 1326 defendant, concluding that “the governing provisions of the United States Code and the Sentencing Guidelines categorically proscribe the consideration of sentencing disparities flowing from the exercise of prosecutorial discretion in charging and plea bargaining practices.”).

See *Outline* at VI.E

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