Guideline Sentencing Update

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General Application Principles

Amendments

Ninth Circuit holds that applying § 1B1.11(b)(3) to increase offense level under guideline amended after some of defendant's offenses occurred violates ex post facto clause. Defendant was convicted of five counts of mail fraud, four of which occurred before a 1989 amendment to USSG § 2F1.1. For the amount of loss involved in defendant's five counts, the amended guideline would increase his offense level by eleven, instead of by eight under the 1988 guideline. The district court used the 1994 guidelines (which included the amendment), ruling that there was no ex post facto problem because the conduct charged in the fifth count occurred after the amendment.

The appellate court remanded. "The district court implicitly followed a Guidelines policy statement when it sentenced all five counts under the 1994 Guidelines. Effective as of the November 1, 1993 Guidelines, USSG § 1B1.11(b)(3) p.s. explains that, 'If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual should be applied to both offenses.' . . . We have not previously applied policy statement § 1B1.11(b)(3). Generally speaking, Commission policy statements *are* binding on us. . . . However, we need not apply the Guidelines where they *would* violate the Constitution, regardless of the intent of the Commission. . . . Under the facts of this case, we find that the policy statement § 1B1.11(b)(3) violates the ex post facto clause of the Constitution."

"We *have* required all single-count conduct to be sentenced under a single Guidelines manual. . . . We have also required that all continuing offenses be sentenced under one Guidelines manual: the later one. . . . However, we have applied more than one Guidelines manual to multiple counts involving offenses completed at different times, and we must do so in this case."

"Application of the policy statement in this case would violate the Constitution; its application would cause Ortland's sentence on earlier, completed counts to be increased by a later Guideline. . . . The harm caused by the earlier offenses *can* be counted in sentencing the later one. . . . That does not mean that the punishment for the earlier offenses themselves can be increased, simply because the punishment for the later one can be. In fact, were the later count to fall at some time after sentencing, all that would remain would be the earlier sentences, which would be too long." The court vacated and remanded for resentencing "under the 1988 Guidelines on counts one through four and under the 1994 Guidelines on count five."

U.S. v. Ortland, 109 F.3d 539, 546–47 (9th Cir. 1997).

See *Outline* at I.E

Offense Conduct

Mandatory Minimums and Other Issues

Second Circuit holds that § 2D1.1(b)(6) reduction can apply to defendant who is not subject to mandatory minimum. "This case presents the question of whether U.S.S.G. § 2D1.1(b)(4) (now § 2D1.1(b)(6)) can be applied in cases in which the defendant is not subject to a statutory mandatory minimum sentence. The district court concluded, over the objection of both the defendant and the government, that Section 2D1.1(b)(4) is not applicable in such a case. Applying the plain language of the Sentencing Guidelines, we disagree." The section states: "If the defendant meets the criteria set forth in subdivisions (1)–(5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels."

"Had the Sentencing Commission intended to limit the application of § 2D1.1 to those defendants who are subject to a mandatory minimum sentence, it could easily have done so . . . . Instead, Congress and the Commission chose to draft [§ 2D1.1(b)(6)] in such a way that, by its plain terms, it applies whenever the offense level is 26 or greater and the defendant meets all of the criteria set forth in § 5C1.2(1)–(5), regardless of whether § 5C1.2 applies independently to the case."

"Moreover, if the Commission had intended the two-level reduction to be given only to defendants who are subject to mandatory minimum sentences, it would logically have located the reduction directly within § 5C1.2, which applies only to those defendants who are subject to such mandatory sentences. Instead, it placed the reduction in § 2D1.1, which applies to *all* defendants who have been convicted of drug crimes, regardless of whether or not they are subject to mandatory minimum sentences." The court vacated and remanded, with instructions to determine whether defendant "has met the criteria listed in § 5C1.2(1)–(5). If he has, he should be given a two-point reduction pursuant to § 2D1.1(b)[(6)]."

U.S. v. Osei, 107 F.3d 101, 102–05 (2d Cir. 1997) (per curiam).

To be included in *Outline* at II.A.3; see also V.F.1

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Possession of Weapon by Drug Defendant

Fifth Circuit holds that carrying weapon as part of job does not preclude § 2D1.1(b)(1) enhancement. Defendant was an INS agent who was part of a drug conspiracy that transported cocaine and marijuana from Mexico to Houston in INS vehicles. He was present during at least one transport where, as part of his job, he carried a gun. However, the district court declined to enhance his sentence for possessing a firearm during a drug offense under § 2D1.1(b)(1), and the government appealed.

The appellate court reversed and remanded. "Possession of a firearm will enhance a defendant's sentence under U.S.S.G. § 2D1.1(b)(1) where a temporal and spatial relationship exists between the weapon, the drug-trafficking activity, and the defendant. . . . This enhancement provision will not apply where the defendant is able to show that it is 'clearly improbable' that the weapon was connected with an offense. U.S.S.G. § 2D1.1 n.3. . . . Under the facts of this case, we cannot say that Marmolejo has borne his burden of proving that it is 'clearly improbable' that his gun was connected to his offense. . . . That carrying a gun was an incidence of his position does not undo the benefit that drug traffickers received from having an armed guard protect their goods. Marmolejo used his position to transport drugs and therefore any incidence of that position which further facilitated the transport should properly be taken into account at sentencing."

U.S. v. Marmolejo, 106 F.3d 1213, 1216 (5th Cir. 1997). *See also U.S. v. Sivils*, 960 F.2d 587, 596 (6th Cir. 1992) (§ 2D1.1(b)(1) properly applied to county sheriff who carried weapon as part of job); *U.S. v. Ruiz*, 905 F.2d 499, 508 (1st Cir. 1990) (same, for police officer).

See *Outline* at II.C.4

Sentencing Procedure

Plea Bargaining

Tenth Circuit holds that Rule 11(e)(1)(C) plea agreement that specifies sentencing range is binding and district court cannot depart downward. Defendant and the government entered into a plea agreement that stated, in part: "The United States has made an AGREEMENT pursuant to Rule 11(e)(1)(C), Fed. R. Crim. P., that a specific offense level is the appropriate disposition of this case. The United States and defendant have agreed that the offense level is 16." The district court determined that the guideline range was 21–27 months and, after ruling that it lacked authority to consider defendant's motion for downward departure, sentenced him to 27 months. Defendant appealed, arguing that because the agreement specified a sentencing range rather than an exact term of months it was not a Rule 11(e)(1)(C) agreement that bound the court, and that, even if the agreement fell under Rule 11(e)(1)(C), the district court had jurisdiction to depart downward.

The appellate court affirmed, concluding first that "a plea agreement specifying a sentence at a particular guideline range is specific enough to fall within the language of [Rule] 11(e)(1)(C)." *See also U.S. v. Nutter*, 61 F.3d 10, 11–12 (2d Cir. 1995) (range of 155–181 months specific enough to satisfy 18 U.S.C. § 3742(c)(1) and Rule 11(e)(1)(C)); *U.S. v. Mukai*, 26 F.3d 953, 954–55 (9th Cir. 1994) (plea agreement providing for five to seven years' imprisonment was Rule 11(e)(1)(C) agreement); *U.S. v. Lambey*, 974 F.2d 1389, 1396 (4th Cir. 1992) (indicating that specifying a sentencing range would satisfy Rule 11(e)(1)(C)); *U.S. v. Kemper*, 908 F.2d 33, 36 (6th Cir. 1990) (agreement that assumed sentence within range of 27–33 months was binding under Rule 11(e)(1)(C)).

Defendant's second argument "contradicts the plain language of Rule 11," which states that if a Rule 11(e)(1)(C) agreement is accepted "the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." Fed. R. Crim. P. 11(e)(3). "Based on the clear language of Rule 11(e)(1)(C) and the applicable case law, Veri had no reason to believe the district court would entertain a motion for downward departure when the plea agreement specified a disposition at offense level sixteen and included no provision for downward departure." *See also Mukai*, 26 F.3d at 956–57 (where agreement allowed for downward departure only within sentencing range specified in Rule 11(e)(1)(C) agreement, district court could not depart below that range); *U.S. v. Cunavelis*, 969 F.2d 1419, 1422 (2d Cir. 1992) (district court had no authority to go beyond four-level reduction specified in Rule 11(e)(1)(C) agreement in making departure under § 5K1.1). *Cf. U.S. v. Swigert*, 18 F.3d 443, 445–46 (7th Cir. 1994) (where Rule 11(e)(1)(C) agreement called for specific "term of imprisonment," district court could not impose split sentence of imprisonment and community confinement or home detention under § 5C1(d)(2)).

U.S. v. Veri, 108 F.3d 1311, 1313–15 (10th Cir. 1997).

See *Outline* at VI.F.2 and IX.A.4

Departures

Mitigating Circumstances

Fourth Circuit acknowledges that, after *Koon*, post-offense rehabilitation may provide basis for departure. Defendant sought a downward departure based upon his post-offense rehabilitation efforts. Although the district court was inclined to depart, it held that it could not under *U.S. v. Van Dyke*, 895 F.3d 984, 986–87 (4th Cir. 1990) (holding that post-offense rehabilitation may be considered for acceptance of responsibility reduction but not for departure). During the pendency of defendant's appeal, the Supreme Court decided *Koon v. U.S.*, 116 S. Ct. 2035 (1996), which addressed the analysis courts should follow for departures.

The appellate court remanded, recognizing that "*Koon* rejected the reasoning that we employed in *Van Dyke* and made clear that . . . only those factors on which the Commission has forbidden reliance . . . *never* may provide an appropriate basis for departure. . . . All others potentially may provide a basis for departure under appropriate circumstances." Therefore, "it is clear that our holding in *Van Dyke* that post-offense rehabilitation can never form a proper basis for departure has been effectively overruled by *Koon*. The Sentencing Commission has not expressly forbidden consideration of post-offense rehabilitation efforts; thus, they potentially may serve as a basis for departure. Because the acceptance of responsibility guideline takes such efforts into account in determining a defendant's eligibility for that adjustment, however, post-offense rehabilitation may provide an appropriate ground for departure only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted."

U.S. v. Brock, 108 F.3d 31, 33–35 (4th Cir. 1997). *Accord U.S. v. Sally*, 116 F.3d 76, 79–82 (3d Cir. 1997).

See *Outline* at VI.C.2.a and X.A.1

Adjustments

Acceptance of Responsibility

Seventh Circuit outlines when attorney's statements may be attributed to defendant for § 3E1.1 purposes. On the issue of whether a particular drug deal should have been considered relevant conduct, defendant remained silent. However, his attorney made both legal and factual arguments against using that deal in setting defendant's offense level. The district court held that it was relevant conduct, and also concluded that the attorney's factual arguments, which attempted to deny or minimize defendant's involvement in that deal, were false denials of relevant conduct that, under § 3E1.1, comment. (n.1(a)), warranted denial of the acceptance of responsibility reduction. Defendant appealed, arguing that his attorney's challenges were not to the facts but to the legal conclusions drawn from facts he had admitted.

The appellate court first agreed that a defendant should be able to challenge the legal conclusion of whether admitted facts constitute relevant conduct and remain eligible for the § 3E1.1 reduction. "We think this situation is closely analogous to challenging the constitutionality of a statute while admitting the conduct which would violate the statute, or challenging the applicability of a statute to the facts. In both cases, the application notes to the Guidelines suggest that such challenges do not deprive an otherwise eligible defendant of the reduction for acceptance of responsibility."

Here, however, defendant's attorney challenged facts as well as legal conclusions, and the court recognized the district court's frustration with the way it was done. "The defendant and his attorney appear to have been attempting to manipulate the Guidelines. The attorney directed his client to remain silent about relevant conduct, apparently in order to keep his client within Application Note 1(a) . . . . The attorney then challenged facts comprising relevant conduct in the course of argument and in the written objections to the PSR. . . . Because the Guidelines provide that an otherwise eligible defendant may remain silent as to relevant conduct without losing the acceptance of responsibility reduction, the attorney presumably believed his client had everything to gain and nothing to lose from this strategy. But in this case, the district court called the attorney's bluff, and attributed the attorney's factual challenges to [defendant]."

The appellate court found such an attribution "troubling for a number of reasons," and instructed district courts on how to handle future cases. "In a case such as this one, where the defendant remains otherwise silent as to relevant conduct but his lawyer challenges certain facts alleged in the PSR, we think the court should attempt to ensure that the defendant understands and approves the argument before attributing the factual challenges in the argument to the defendant for purposes of assessing acceptance of responsibility. . . . If the defendant does understand and agree with the argument, then the factual challenges can be and should be attributed to him. If the defendant rejects the attorney's argument, the court can simply disregard it. Such a procedure would insure that a defendant would be unable to reap the benefit of his attorney's factual challenges without risking the acceptance of responsibility reduction."

In addition, "[w]hen an attorney challenges the facts set out in the PSR during argument, we think the court should put counsel to his or her proof. The court should ask whether the attorney intends to present evidence in support of these fact challenges. If so, the argument can go forward. If not, the argument is really baseless, and the court need not allow an attorney to waste the court's time with a baseless argument when there is no evidence supporting the factual challenges. . . . If the attorney proffers evidence, we can safely assume the defendant himself is challenging the facts, and the court can then decide whether the challenge is frivolous."

Here, it was not clear whether defendant understood and agreed with his attorney's arguments; thus, the acceptance of responsibility reduction could not be denied on this ground. However, the district court gave another, independent reason for denying the reduction—that defendant "was insincere in his apology to the court, and that he did not actually accept responsibility for his offense." Because that finding was not clearly erroneous, the appellate court affirmed.

U.S. v. Purchess, 107 F.3d 1261, 1267–69 (7th Cir, 1997).

See *Outline* at III.E.2 and 3

Determining the Sentence

Consecutive or Concurrent Sentences

Eleventh Circuit holds that government cannot omit relevant conduct to avoid concurrent sentences under § 5G1.3(b). Defendant stole cars and ran "chop shops" for several years. In 1992 he was sentenced in state court to 12 years for three car thefts. Two years later he pled guilty in federal court to conspiracy to run a chop shop operation. The presentence report, based on information supplied by the government, calculated the offense level by using all the cars involved in the chop shop conspiracy except for the three involved in the state conviction. Because the state thefts were thus not "fully taken into account in the determination of the offense level for the instant offense," § 5G1.3(b), the sentencing court exercised its discretion under § 5G1.3(c) to make the federal sentence consecutive to the undischarged state sentence. Defendant appealed, arguing that the state thefts were relevant conduct requiring application of § 5G1.3(b), and that the government omitted them because their inclusion would not have increased his sentence (his guideline range was 100–125 months, but the statutory maximum for his offense of conviction was only 60 months).

The appellate court agreed, concluding that "the Government deliberately refrained from portraying [the state thefts] as relevant conduct for one reason—to manipulate the application of the guidelines so that his federal sentence would run consecutively to the state sentences." Such manipulation is "contrary to both the letter and spirit of the guidelines. First, section 1B1.3 states that a defendant's offense level '*shall* be determined on the basis of' all relevant conduct. U.S.S.G. § 1B1.3(a) (emphasis added). . . . Second, the guidelines were written to prevent the Government from manipulating indictments and prosecutions to increase artificially a defendant's sentence or sentences for the same criminal conduct." Moreover, deliberately omitting relevant conduct would violate the guidelines' "real offense" sentencing approach. "We therefore conclude that when a defendant is serving an undischarged sentence resulting from conduct that is required to be considered in a subsequent sentencing proceeding as relevant conduct pursuant to section 1B1.3, section 5G1.3(b) provides that the subsequent sentence should run concurrently to the undischarged sentence."

Because defendant's state thefts were, in fact, conduct relevant to the federal offense of conviction, they should have been "fully taken into account" in setting the offense level. "[T]he district court consequently erred in concluding that section 5G1.3(b) does not require the instant sentence to run concurrently to the state sentences." However, the court noted that, even though § 5G1.3(b) requires concurrent sentences, the district court retains discretion to consider an upward departure on remand.

U.S. v. Fuentes, 107 F.3d 1515, 1521–27 (11th Cir. 1997).

See *Outline* generally at V.A.3

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