



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 28, 2006

Hon. Richard Cushing Donovan, Clerk
United States Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, Massachusetts 02210

Re: U.S. v. Mateo, No. 05-1805, and U.S. v. Jones, No. 05-1541

Dear Mr. Donovan:

On March 23, 2006, this Court entered an order noting that the government had taken inconsistent positions in these appeals on the question whether, following United States v. Booker, 543 U.S. 220 (2005), the district court is required to provide notice before it sentences a defendant outside the advisory Guidelines range. The Court invited the government to file a supplemental brief if it wished to modify its position in either case. As explained below, the sentencing court does have an obligation to provide prior notice before deviating from the Guidelines range on a ground that was not identified in the presentence report or by the parties. In both of these cases, the district court erred in failing to notify the parties that it was considering an upward deviation. We continue to believe, as set forth in the briefs previously filed, that Mateo's sentence should be affirmed, but that Jones's sentence should be vacated and remanded for resentencing.

In Burns v. United States, 501 U.S. 129 (1991), the Supreme Court construed a prior version of Federal Rule of Criminal Procedure 32 to require a sentencing court to give notice to the parties before departing sua sponte from the Guidelines range. 501 U.S. at 135-139; see id. at 135 n.4 (notice requirement applies to both upward and downward departures). The Court acknowledged that the rule contained no "express language" requiring prior notice of sua sponte departures, id. at 132, 136, but concluded that reading Rule 32 to dispense with notice would be inconsistent with the rule's "purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." Id. at 137.

After Burns, Rule 32 was amended to provide that the district court, before it “depart[s] from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party’s prehearing submission, * * * must give the parties reasonable notice” of “any ground on which the court is contemplating a departure.” Fed. R. Crim. P. 32(h). Although Rule 32(h) by its terms applies only to “departures” from the Guidelines range, the need for “full adversary testing of the issues relevant” to sentencing, 501 U.S. at 135, continues to apply in the advisory Guidelines system. This Court has made clear that “the guidelines continue * * * to be an important consideration in sentencing,” United States v. Jimenez-Beltre, 2006 WL 562154, at *2 (1st Cir. Mar. 9, 2006) (en banc), and that a district court should first calculate the Guidelines range, “including any proposed departures,” before making the “further determination whether other factors identified by either side warrant an ultimate sentence above or below the guideline range.” Id. at *3. It would make little sense to require notice of potential departure grounds, while forcing the government and the defendant to “guess when or on what grounds” a district court might deviate from the Guidelines. Burns, 501 U.S. at 137. Accordingly, a district court should provide notice to the parties when it is contemplating a sua sponte deviation (whether upward or downward) from the advisory Guidelines range.

United States v. Antonio Mateo (No. 05-1805). The district court deviated sua sponte from the Guidelines range of 30-37 months, sentencing Mateo to 48 months of imprisonment based on his status as a “fourth-time offender” and his “continuous pattern of criminal behavior.” Although the court erred in failing to provide the parties with notice that it was considering a deviation on this ground, the error does not require a remand for resentencing. As explained in the government’s principal brief (at 13-14), because Mateo did not object to the absence of notice at sentencing, his claim is reviewed under the plain error standard. Neither the Supreme Court nor this Court has previously considered whether notice of sua sponte deviations is required, and the error therefore is not “plain” or “obvious.” See Gov’t Br. 16-17. In addition, Mateo does not challenge the facts on which the court relied or suggest any additional evidence he could have offered at sentencing if he had received notice of the court’s contemplated departure. See Gov’t Br. 21. Thus, he cannot show that the error affected his substantial rights. Accordingly, Mateo’s sentence should be affirmed.

United States v. Matthew Jones (No. 05-1541). The district court sentenced Jones to 180 months of imprisonment, explaining that it was deviating from the Guidelines range of 100-125 months on several grounds, including Jones's having absconded to Alabama after state charges were filed against him, and the resulting disruption and expense of capturing him. Neither the PSR nor the government had recommended an upward deviation. At the sentencing hearing, Jones's counsel twice objected to the court's failure to provide prior notice that it was considering deviating on these grounds and requested an opportunity to brief the issues. It was evident that counsel was not entirely prepared to address the newly identified bases for an upward deviation. See Gov't Br. 4-5, 13-14. In these circumstances, the government does not contend that the error was harmless, and agrees that a remand for resentencing is required.

Very truly yours,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2006, I served two copies of the foregoing letter brief of the United States, by fax and by first class mail, postage prepaid, on:

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