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Case at a Glance

The sentence of a person convicted of a federal crime is determined under federal statutes and under the Federal Sentencing Guidelines and these two sentences can be different. Federal law also provides for sentences below the minimum sentences imposed by statute or under the Guidelines for substantial cooperation with the prosecution. At issue in this case is whether or not a motion to impose a sentence below the Guidelines minimum sentence also acts as a motion to impose a sentence below the statutory minimum sentence.



Cooperating with the Prosecutor: How Many Motions Does It Take to Secure a Sentence That Is Less Than the Mandatory Minimum Provided By Statute?

by Jimmy Gurule

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In enacting the Sentencing Reform Act of 1984, *see, e.g.*, 18 U.S.C. §§ 3551-3559 and 3742 and 28 U.S.C. §§ 991-998 (1988), Congress dramatically reformed sentencing in the federal criminal justice system by explicitly rejecting the existing use of indeterminate sentencing in favor of a mandatory guideline system of sentencing. "Under the indeterminate sentencing system, Congress defined the maximum sentence, the judge imposed sentence within the statutory range (which usually could be replaced with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment." *Mistretta v. United States*, 488 U.S. 361, 365 (1989).

In effect, under indeterminate sentencing, federal criminal statutes specified a wide range of penalties but delegated to the sentencing judge almost unfettered discretion to decide the appropriate sentence to be imposed. Moreover, with the advent of parole, corrections personnel of the Executive Branch were granted the discretion to release a prisoner prior to the expiration of the sentence imposed. Thus, in the federal government's indeterminate sentencing scheme, the actual

sentence served was not necessarily the sentence imposed by the sentencing judge.

Over time, indeterminate sentencing came in for harsh criticism. "Serious disparities in sentences . . . were common." *Mistretta*, 488 U.S. at 365-66. Similarly situated defendants convicted of engaging in the same criminal conduct were sentenced to disparate, unwarranted sentences. "Fundamental and widespread dissatisfaction with the uncertainties and disparities [in sentencing] continued to be expressed." *Mistretta*, 488 U.S. at 366.

To remedy these concerns, Congress, as part of the Sentencing Reform Act, created the United States Sentencing Commission (the "Sentencing Commission" or the "Commission"). 28 U.S.C. §§ 991-998. The Commission was instructed by Congress to promulgate a series of guidelines — now known as the Federal Sentencing Guidelines (the "Sentencing Guidelines" or the "Guidelines") — to establish a sentencing scheme that would "provide certainty and

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fairness in meeting the purposes of sentencing, avoiding unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted. 28 U.S.C. § 991(b)(1)(B).

The Commission's mandatory Sentencing Guidelines were intended to establish a range of determinate sentences for categories of offenses and offenders according to various specified factors. Perhaps most important in the shift from indeterminate to determinate sentencing, the Sentencing Guidelines significantly curtailed the previously unfettered discretion of federal district court judges in sentencing offenders by providing that the maximum range of the sentence to be imposed ordinarily may not exceed the minimum by more than 25 percent, or six months, whichever is greater. 28 U.S.C. § 994(b)(2).

Significantly, Congress authorized a downward departure from the applicable sentencing range set out in the Sentencing Guidelines "on motion of the Government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." See 28 U.S.C. § 994(n); Sentencing Guidelines § 5K1.1. Further, Congress provided that on the Government's motion, a court may impose a sentence below the mandatory minimum term set by statute to reflect the defendant's "substantial assistance in the investigation or prosecution of another person who committed an offense." 18 U.S.C. § 3553(e). It is this downward departure sentencing authority — the judicial authority to impose a sentence less than the Guidelines and less than the statutorily prescribed minimum sentences —

based on an offender's substantial assistance that is at issue in this case.

ISSUE

Once a federal prosecutor asks for a downward departure in sentencing in recognition of an offender's substantial assistance to law enforcement, does the sentencing judge have authority to impose a sentence that is less than both the statutory minimum sentence and the minimum sentence prescribed in the Sentencing Guidelines, even when the Government seeks only a downward departure from the Guidelines sentence?

FACTS

Juan Melendez was charged with possession and conspiracy in connection with the sale and distribution of more than five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a) and 846. Upon conviction, the statutorily prescribed minimum prison sentence is 10 years. 21 U.S.C. § 841(b)(1)(A) (1988 & Supp. VII 1995).

The charges against Melendez stemmed from his participation in a conspiracy to purchase 225 kilograms of cocaine from confidential informants of the United States Customs Service. The drug conspiracy was cut short, however, when Government agents made a controlled delivery of 30 kilograms of cocaine and arrested Melendez's co-conspirators.

Melendez originally pleaded not guilty. However, plea negotiations ensued and he signed a cooperating plea agreement. The agreement provided that in return for a guilty plea and Melendez's cooperation with the Government's investigation of the conspiracy, the Government would seek a downward departure from the applicable sentence under the Sentencing Guidelines. The plea

agreement did not make reference to any downward departure with respect to the statutory mandatory minimum sentence of 10 years' imprisonment.

In the routine presentence report for Melendez, the federal probation officer determined that the applicable sentencing range under the Sentencing Guidelines was 135 to 168 months' imprisonment. The Government, in accordance with the plea agreement, asked the sentencing judge for a downward departure from the Guidelines range in recognition of Melendez's substantial assistance.

The judge granted the Government's request with respect to the Sentencing Guidelines. However, because the Government had not sought a downward departure from the statutory 10-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A), the judge ruled that he had no authority to depart from that minimum. Accordingly, the judge sentenced Melendez to 10 years' imprisonment or 120 months'.

Melendez appealed to the Third Circuit which affirmed by a two-to-one vote. 55 F.3d 130 (3d Cir. 1995). In so holding, the majority rejected Melendez's contention that the Government's motion to depart from the sentencing range prescribed by the Sentencing Guidelines also permits the sentencing judge to impose a sentence below the statutory mandatory minimum. In rejecting this argument, the Third Circuit majority held that a motion for downward departure for purposes of the Sentencing Guidelines unaccompanied by a similar motion for purposes of 18 U.S.C. § 3553(e) "does not authorize a sentencing court to impose a sentence lower than the statutory minimum." 55 F.3d at 136.

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The Third Circuit majority reasoned that Congress authorized sentences below the statutory mandatory minimum only on a prosecutor's motion under 18 U.S.C. § 3553(e). In requiring a motion by the federal prosecutor, the majority concluded that "Congress gave the prosecutor the sole key that affords access to a sentence below a statutory minimum." 55 F.3d at 134. In the majority's view, Congress intended that the prosecutor, not the sentencing court, evaluate the offender's cooperation and whether or not it warranted overriding Congress' judgment concerning the appropriate minimum sentence for the offender's criminal conduct.

The Third Circuit majority went on to observe that Section 5K1.1 of the Sentencing Guidelines which authorizes downward departures in sentencing applies only to a sentence imposed below the Guidelines range, not to one below the statutory mandatory minimum. According, to the majority, nothing in Section 5K1.1 suggests that a judge's downward departure authority extends beyond the Guidelines to the mandatory minimum sentence imposed by a congressional statute.

The Third Circuit majority characterized the root issue as "whether the prosecutor in a given case will be able to grant access to a Guideline departure for cooperation and at the same time retain control of access to a departure from a lower, statutory minimum." 55 F.3d at 135. The majority opined that the literal language of Section 5K1.1 indicates that a prosecutor has this option, an option that, in the view of the Third Circuit majority, is supported by sound policy reasons. Here, the majority observed that the process for departing downward based on the offender's substantial assistance works best if the amount of the reward can be graduated to reflect the value of the offender's assis-

tance. Such calibration is best left to the prosecutor who is in a better position than the sentencing judge to make this assessment.

The Supreme Court now reviews the decision of the Third Circuit majority, having granted Melendez's petition for a writ of certiorari. 116 S. Ct. 417 (1995).

CASE ANALYSIS

This case is about the interrelationship, if any, between a federal sentencing statute, 18 U.S.C. § 3553(e), and a provision of the Sentencing Guidelines, § 5K1.1. The sentencing statute provides that, on motion of the United States, the sentencing court "shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." The Guidelines provide that, on motion of the United States "stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who committed an offense," the sentencing judge may depart from the range prescribed by the Sentencing Guidelines.

Melendez maintains that Congress intended a unitary approach to downward departures based on an offender's substantial assistance. Thus, he argues that a single Government motion acknowledging an offender's substantial assistance is enough to authorize a downward departure with respect to both the statutory mandatory minimum sentence and the Guidelines sentencing range. According to Melendez, it is not necessary for the Government to file a motion under 18 U.S.C. § 3553(e) in order for the judge to depart from the statutory minimum sentence of 10 years' imprisonment; it is enough that, as in his case, the Government filed a motion under Guidelines Section 5K1.1.

Melendez supports his argument by citing language from the Sentencing Reform Act establishing the Sentencing Commission. Congress expressly directed the Commission to ensure that the Sentencing Guidelines would allow sentences "lower than established by statute as a minimum sentence to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 28 U.S.C. § 994(n).

Melendez stresses that the above-quoted provision references 18 U.S.C. § 3553 and uses much the same language as the latter provision and, accordingly, they should be applied together and in consonance. For example, Melendez points out that both provisions contain reference to a defendant's substantial assistance and both define substantial assistance in terms of "investigating or prosecuting another person who has committed an offense." Moreover, this precise language is tracked by the language of Guidelines Section 5K1.1.

Melendez reasons that the use of identical language and identical standards provides strong evidence that Congress envisioned a unitary structure for downward departures below both the statutory mandatory minimum sentence and the applicable Guidelines range in recognition of an offender's substantial assistance. Moreover, Congress delegated to the Commission the responsibility to create a mechanism to implement downward sentencing departures from statutory mandatory minimum sentences and the Commission responded by drafting and implementing Section 5K1.1. According to Melendez, Guidelines Section 5K1.1 is the conduit created by the Commission for implementing the authority Congress granted to federal district judges under 18 U.S.C. §



3553(e) to depart from congressionally established mandatory minimum sentences.

Melendez's arguments are not without some force. At least four federal circuit courts of appeals have adopted the position advanced by Melendez. *United States v. Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991).

The Government, however, has the Third Circuit and the Eighth Circuit, *United States v. Rodriguez-Morales*, 958 F.2d 1141 (8th Cir. 1992), in its camp when it argues that the plain language of Guidelines Section 5K1.1 does not support Melendez. In particular, Section 5K1.1 authorizes a downward departure only from the sentencing range prescribed by the Guidelines; nowhere is there any reference to a downward departure from mandatory minimum sentences imposed by statute.

From the Government's perspective the only judicial authority for imposing a sentence below the statutory mandatory minimum is the authority set forth in 18 U.S.C. § 3553(e) and that authority is triggered by a motion from the prosecutor. Since no such motion was filed in this case, the sentencing judge correctly ruled that he could not impose a sentence that was less than the 10-year mandatory minimum provided by 21 U.S.C. § 841(b)(1)(A).

The Government counters Melendez's contention that Guidelines Section 5K1.1 implements 18 U.S.C. § 3553(e) by pointing out that the Commission's commentary to Section 5K1.1 recognizes that a downward departure from a statutory mandatory minimum sen-

tence may be justified "under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n)." According to the Government, one of those circumstances, as set forth in 18 U.S.C. § 3553(e), is a motion of the prosecutor. In the absence of such a motion by the Government's prosecutor, as in this case, there is simply no authority for a federal judge to sentence even a cooperating offender to a sentence below the statutory mandatory minimum.

The difficulty with the Government's position is that if Congress through 28 U.S.C. § 994(n) directed the Commission to create a mechanism to implement downward departures in sentencing authorized by 18 U.S.C. § 3553(e) and if Guidelines Section 5K1.1 is not that mechanism, then the Commission has not complied with Congress' express mandate. This, however, is highly unlikely considering that the Guidelines became effective in 1987.

SIGNIFICANCE

A substantial split in the federal courts of appeals exists, as noted above, regarding whether or not the district court has authority to sentence an offender who has given the Government substantial crime-fighting assistance to a prison term below the statutory mandatory minimum when the Government files a downward departure motion from the Guidelines range but not from the statutory minimum sentence. Resolving this conflict is critical to ensuring that the Guidelines are applied in a fair and evenhanded manner.

Recall that the intent of Congress in enacting the Sentencing Guidelines as part of the Sentencing Reform Act was to reduce sentencing disparities. Similarly situated offenders who commit the same criminal offense should be sentenced similarly. This purported hallmark of the

Sentencing Guidelines would be seriously eroded if an offender before one federal judge is sentenced below the statutory mandatory minimum sentence based on the mere filing of a substantial assistance motion under Guidelines Section 5K1.1, while an offender before another federal judge is sentenced to the statutory mandatory minimum sentence because the prosecutor may have filed a Section 5K1.1 motion but did not file a motion under 18 U.S.C. § 3553(e) expressly asking for a sentence below the statutory minimum. It is anticipated that the Supreme Court's decision will resolve this dilemma.

ATTORNEYS OF THE PARTIES

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AMICUS BRIEFS

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