

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 91-6308  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MACEDONIO RAMIREZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
M91 CR 128 04

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May 13, 1993

Before JOLLY, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Appellant, Macedonio Ramirez, pleaded guilty to kidnapping. The district court sentenced Ramirez to 250 months imprisonment followed by four years of supervised release. Ramirez's offense level of 32 and criminal history category of I resulted in a sentencing range of 121 to 151 months of imprisonment. However, the district court departed upward pursuant to § 5K2.1, because of the death of the victim, to a sentence of 250 months imprisonment.

Ramirez appeals claiming that the district court abused its

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<sup>1</sup> Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

discretion by the extent of the upward departure. He contends that the district court did not consider the extent to which adjustments had already been made for personal injury. We examine for gross abuse of discretion. United States v. Murillo, 902 F.2d 1169, 1171 (5th Cir. 1990).

Under the applicable guideline "[i]f the victim sustained permanent or life-threatening bodily injury, increase by four levels." U.S.S.G. § 2A4.1(b)(2)(A). The guidelines define "permanent and life-threatening bodily injury" as "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent." U.S.S.G. § 1B1.1, comment. (n.1(h)). Thus an adjustment for serious bodily injury does not preclude a § 5K2.1 departure for death because the guideline definition of the term does not include death. United States v. Billingsley, 978 F.2d 861, 866 (5th Cir. 1992), cert. denied, 113 S.Ct. 1661 (1993). Although permanent or life-threatening bodily injury can mean injury involving a substantial risk of death, the state of death itself is not contemplated by the term's definition.

The sentencing court must provide acceptable reasons for the departure, and the sentence imposed must be reasonable in light of the court's rationale. United States v. Carpenter, 963 F.2d 736, 744 (5th Cir.), cert. denied, 113 S.Ct. 355 (1992); Murillo, 902 F.2d at 1172. Departure on the basis of death is permitted only when there exists a "'nexus' between the harm caused and the

offense of the conviction.'" Billingsley, 978 F.2d at 866 (internal quotations and citation omitted). There is such a nexus here.

Ramirez's sworn statement attached to his pre-sentence report states that after an altercation in a bar, Ramirez, his brother, and two other individuals kidnapped the victim because they believed the victim had a gun and would use it on Ramirez's brother. The men entered Mexico where they beat the victim. Rameriz then hit the victim several times with a shovel, striking him at least once on the head. From this evidence, it was reasonable for the district court to find a nexus between the victim's death and Rameriz's offense of kidnapping.

Considering the circumstances surrounding the victim's death, the extent of the district court's departure was not a gross abuse of discretion. Under less egregious circumstances, we have refused to disturb a § 5K2.1 departure to a sentence of 30 years for kidnapping. See United States v. Melton, 883 F.2d 336, 338-39 (5th Cir. 1989) (kidnap victim died when she either jumped or was pushed out of kidnapper's car while traveling at 65 miles per hour).

Rameriz also argues that the extent of the district court's departure was unreasonable because the court failed to consider incrementally higher offense levels and failed to explain why those offense levels were inadequate. Appellant reasons that, because the district court must follow this procedure when departing upward because of inadequate criminal history category, the same process should apply to upward departures based on inadequate offense

levels. This argument is foreclosed by United States v. Lee, \_\_\_ F.2d \_\_\_ (5th Cir. April 12, 1993, No. 92-1022), 1993 WL 106482 at \*3. Although the district court must evaluate each successive criminal history category above or below the guidelines range for a departure based on criminal history category, the same step-by-step analysis does not apply to departures for inadequate offense levels.

AFFIRMED.