

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-4900  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TERRY WAYNE TOWNLEY,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Western District of Louisiana  
(CR 91 20008 01)

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(March 9, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:<sup>1</sup>

Terry Wayne Townley was convicted of conspiracy to commit kidnapping, in violation of 18 U.S.C. § 1201(c), and received a sentence of 25 years (300 months) imprisonment, five years supervised release, and restitution in the amount of \$1,326.45. He appeals his sentence. We remand for resentencing.

I.

After terrorizing her for several months, Townley kidnapped his former girlfriend, held her for nearly ten days at knife and

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

gun-point, and forced her to have sex with him. He pleaded guilty to count I of a superseding indictment in exchange for the dismissal of the remaining three counts. Townley's presentence report (PSR) placed his total offense level at 29 and his criminal history category at IV. Unexplainably, the PSR ignored, U.S.S.G. § 2A4.1(b)(5), which calls for a three point increase in a kidnapper's total offense level if he sexually exploits his victim. At any rate, the PSR's numbers yielded a guideline range of imprisonment for 121-151 months. The PSR recommended an upward departure because Townley's criminal history category did not adequately take into account Townley's harassment of his victim prior to the abduction.

Townley objected to this recommendation. At the sentencing hearing, the district court upwardly departed from the guideline range and sentenced Townley to a 25-year (300 month) term of imprisonment, a five-year term of supervised release, and restitution in the amount of \$1,326.45. In so doing, the district court found that (1) Townley's criminal history category did not take into account the seriousness of his criminal background or his propensity for future criminal conduct; (2) Townley's conduct prior to the actual kidnapping was extreme and similar to that of a stalker; 3) the victim sustained psychological and emotional injury necessitating continued psychological counseling; 4) Townley used a knife and gun to threaten his codefendant and his victim during the commission of the crime; and 5) Townley treated his victim in a cruel and degrading manner during the kidnapping, including forcing her to have sex with him.

## II.

Townley complains that the district court did not adequately explain why Townley's criminal history category did not take into account the seriousness of his criminal background or his propensity for future criminal conduct. Townley also argues that the district court based the departure on factors already taken into account by the guidelines.

Although the district court thoughtfully articulated its reasons for departing, we find merit to Townley's second argument. The recent Supreme Court case of **Williams v. United States**, 112 S.Ct. 1112, 117 L.Ed.2d 341, 351-52 (1992), therefore compels us to remand for resentencing. We decline to address Townley's first argument, partially because our holding makes it unnecessary to do so, and partially because the district court, at the time of sentencing, did not have the benefit of our recent en banc opinion, **United States v. Lambert**, No. 91-1856, 1993 WL 35719 (5th Cir.).

In **Williams**, the Supreme Court held that a reviewing court may not affirm a sentence in which a district court's departure from the guideline range is based on both valid and invalid factors. **Williams**, 117 L.Ed.2d at 351-52. Therefore, if we conclude that the district court relied on an improper ground in departing from the guideline range, "a remand is appropriate unless [we] conclude[], on the record as a whole, that the error was harmless." **Williams**, 117 L.Ed.2d at 355.

Among its reasons for upwardly departing, the district court cited Townley's use of a knife and gun to threaten his codefendant and victim, and the fact that he sexually exploited his victim.

The offense conduct guideline for kidnapping deals with both of these aggravating circumstances as specific offense characteristics. U.S.S.G. § 2A4.1(3), (5). So they can be grounds for upward departure only if the district court finds that they exist "to a degree" not "adequately taken into consideration by the Sentencing Commission in formulating the guidelines." U.S.S.G. § 5K2.0; **see also** § 5K2.8. No such finding was made.

The district court also noted that Townley caused "psychological and emotional injury . . . necessitating continued psychological counseling." Reliance on this factor requires a finding that the victim suffered greater than normal psychological harm from the offense that is likely to be of extended duration. U.S.S.G. § 5K2.3; **U.S. v. Lara**, 975 F.2d 1120, 1127-28 (5th Cir. 1992). Again, no such finding was made.

### III.

Because the district court made insufficient findings to support departure on a number of the grounds listed above, and because the error was not harmless, we vacate the sentence and remand for resentencing.

VACATED and REMANDED.