IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-7097
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN MALDONADO RAMIREZ,

Defendant-Appellant.

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Appeal from the United States District Court for the
Southern District of Texas
(CR C 90 231 01)

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(December 30, 1992)

Before GARWOOD, JONES and EMILIO GARZA, Circuit Judges.*

PER CURIAM:

Defendant-appellant Juan Maldonado Ramirez (Ramirez) appeals his sentence following resentencing.

In June 1990 Ramirez was charged in a one-count indictment with possessing with intent to distribute approximately fourteen kilograms of marihuana on May 25, 1990, contrary to 21 U.S.C. §§

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

841(a)(1) and 841(b)(1)(D). His guilty plea to this charge was accepted in August 1990 and in November 1990 he was sentenced by the district court, Judge Head, to forty-eight months' confinement to be following by five years' supervised release.

The presentence report (PSR) calculated Ramirez's base offense level at 16 and his criminal history category as III, resulting in a guidelines range of 27-33 months. The statutory maximum was sixty months. The PSR denied any offense level reduction for acceptance of responsibility. Four criminal history points were assigned on the basis of one point each for a 1980 assault conviction and a 1988 marihuana possession conviction for which Ramirez had received a five-year suspended sentence and five years' probation; two additional points were assigned because the instant offense was committed while Ramirez was on probation for the 1988 offense. The PSR also noted that Ramirez, who was born in 1950, had a 1976 conviction for aiding and abetting the illegal entry of aliens into the United States (for which he received a six-month suspended sentence and three years' probation), three arrests (in 1981, 1983 and 1985) for public intoxication, and a 1985 arrest for assault; no criminal history points were assigned for any of these matters. The PSR also noted that on three occasions while on pretrial release from the instant offense Ramirez, on July 4, 5, and 6, 1990, attempted to broker large marihuana sales, from which he hoped to be compensated at $25 per pound. No criminal history points were assigned by the PSR for this conduct, although the PSR did rely on it in recommending denial of offense level adjustment

for acceptance of responsibility. Ramirez had not been indicted for these July 1990 incidents, but he admitted his role therein to the probation officer, who also verified that with the state authorities; this was reflected in the PSR and confirmed by testimony at the November 1990 sentencing hearing. Indeed, at that hearing Ramirez admitted this, as did his counsel.

Ramirez objected to the PSR only because of its failure to grant adjustment for acceptance of responsibility. The court overruled that objection. The court plainly recognized that the correct criminal history category under the guidelines was III, the base offense level was 16, and the guidelines range was 27 to 33. However, the court expressly elected to depart upward from the guideline range, principally because of the July 4, 5, and 6, 1990 conduct, and imposed a 48-month sentence.

Ramirez appealed to this Court, challenging only his sentence. He raised two claims. First, he argued that the district court erred by refusing to grant a two-level offense level reduction for acceptance of responsibility. His second argument was that the district court erred by upwardly departing on the basis of his July 1990 conduct, as he had pleaded guilty to the instant offense thereafter and he had not been indicted for the July conduct. In an unpublished July 29, 1991 opinion, *United States v. Ramirez*, No. 90-2968 (5th Cir.), we affirmed in part, and vacated and remanded in part for resentencing. We held the denial of acceptance of responsibility was proper. With respect to Ramirez's second contention, we held that "the record makes it plain that the

court's sentencing departure was based on its conclusion that Ramirez's criminal history score inadequately reflected the seriousness of his past criminal conduct or the likelihood that the defendant will commit other crimes." We held that a departure for that reason was authorized by section 4A1.3 of the sentencing guidelines and that Ramirez's July 1990 conduct was established with sufficient reliability and "is an example of conduct warranting such a departure."

We pointed out, however, that when departure is based on such a ground, the district court should state to what specific criminal history category it is departing and if such category is not the one next higher than that calculated under the guidelines the court must explain why that next higher category is inadequate. We noted that the guidelines range, with the criminal history calculated according to the guidelines as category III, was 27 to 33 months; with criminal history category IV, the range was 33 to 41 months; it required a criminal history category of V to have a guidelines range including 48 months' confinement. We held that the district court correctly calculated Ramirez's criminal history category as III and adequately explained why a criminal history category of III was inadequate, but erred when it imposed "a 48 month sentence without explaining why a sentence within a 33-41 months range, corresponding to a criminal history Category IV, was inadequate. Nor did the district court explain which category it was using." We went on to say that "because such an explanation is required under the guidelines, Ramirez's sentence is hereby vacated and this

case is remanded to the district court for resentencing."

At resentencing in January 1992, the district court, Judge Head, correctly described this Court's holding, and proceeded to sentence Ramirez to 41 months' confinement, followed by 5 years' supervised release, explaining that this was within the range for a criminal history category of IV, and that that was appropriate because the July 1990 conduct if prosecuted would result in a sentence of more than a year for which 3 more criminal history points would be assessed, for a total of 7, which would place Ramirez in criminal history category IV, producing a 33 to 41 month guidelines range.

Ramirez's appeal from this January 1992 sentence is now before us. He argues that the district court improperly computed his criminal history category. We reject this contention. It is clear that the district court had correctly computed the guidelines category as III and determined that Ramirez's criminal history score of four inadequately reflected the seriousness of his past criminal conduct and the likelihood that he would commit other crimes, and then elected to depart to a sentence within the range covered by category IV. That this was proper on the basis of the July 1990 conduct was established by our prior opinion. The district court adequately explained its sentence on resentencing and the resentencing was in full conformance with our prior opinion. While it represents a departure from the guideline range, it is an authorized and adequately explained departure for a legally valid reason based on an adequate factual showing.

Although it is unclear that Ramirez raises the issue, we also hold that the extent of the departure is reasonable. As the district court noted at resentencing "[t]he problem is he won't stop drug smuggling and drug dealing," and the guidelines criminal history score as calculated by the PSR fails to reflect Ramirez's "persistent three-year pattern of drug dealing from '88 through 1990."

Ramirez has demonstrated no reversible error. His conviction and sentence are

AFFIRMED.