

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8362

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SONNY MARQUEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas

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W 92 CR 45

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( May 6, 1993 )

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Sonny Marquez appeals his sentence. We vacate and remand.

Background

Marquez pled guilty to a one count indictment for possession

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of an unregistered firearm in violation of 26 U.S.C. §§ 5861(d) and 5871. This offense was related to a state conviction for aggravated robbery for which Marquez received a life sentence. The district court sentenced Marquez to 120 months imprisonment to run consecutive to the life sentence.

#### Analysis

Section 5G1.3(b) of the United States Sentencing Guidelines governs the imposition of consecutive or concurrent sentences and provides in pertinent part:

If . . . the undischarged term of imprisonment resulted from offense(s) that constituted part of the same course of conduct as the instant offense and have been fully taken into account in the determination of the offense level for the instant offense . . . the sentence for the instant offense shall be imposed to result in a combined sentence equal to the total punishment that would have been imposed under section 5G1.2 (Sentencing on Multiple Counts of Conviction) had all the sentences been imposed at the same time.

There is no dispute that § 5G1.3(b) is applicable -- the aggravated robbery was part of the same course of conduct as the firearm possession and was considered in determining the offense level for the firearm possession. Notwithstanding, neither the probation officer, government counsel, nor counsel for the defendant invited the court's attention to this section. The district court gave no consideration to § 5G1.3(b) in sentencing Marquez.

Recently, in **United States v. Gross**,<sup>1</sup> we held that application

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<sup>1</sup> 979 F.2d 1048 (5th Cir.1992).

of an out-dated version of § 5G1.3 constituted clear error. The district court may ignore the operation of § 5G1.3(b) only after determining to make an upward departure from the guidelines.<sup>2</sup> The failure to consider § 5G1.3(b) when applicable is plain error.

We, accordingly, VACATE and REMAND for resentencing in light of U.S.S.G. § 5G1.3(b).

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<sup>2</sup> **Gross; United States v. Miller**, 903 F.2d 341 (5th Cir.1990).