IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8465

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERONIMO ANTONIO PONCE-SANTOYO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
EP 92 CR 165

June 21, 1993

Before KING, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

This is a direct appeal from a plea of guilty in which the defendant contends he was harmed by a failure of the district court to advise him that the court must consider any applicable guideline in imposing sentence. On the facts of this case we reject the government's argument that the conceded error was harmless, vacate the conviction and remand to allow defendant to plead again.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Defendant Geronimo Antonio Ponce-Santoyo is a citizen of Mexico. Before his 1987 conviction on drug charges in Texas state court, he had lived in the United States since 1977 as a permanent resident alien. This felony conviction led the INS to deport him on January 29, 1988. Ponce reentered the United States the next day, however, and remained in the country undetected until December 11, 1991, when he was arrested for heroin possession and placed in the El Paso Detention Center. A Border Patrol agent located Ponce in jail on January 4, 1992.

On April 15, 1992, Ponce was charged under 8 U.S.C. § 1326 (a), which prohibits previously deported aliens from willfully and unlawfully reentering the United States without the consent of the Attorney General. Notice of Penalty Enhancement was attached to the indictment, alleging that Ponce's May 29, 1988 deportation followed a felony conviction for the delivery of heroin. This enhancement increased the possible maximum punishment from two to fifteen years imprisonment. § 1326 (b) (2).

On July 13, 1992, Ponce moved to dismiss the enhancement on grounds that this provision had been enacted after his deportation and subjected him to substantially more prison time than he had been advised at the time of his deportation. The district court denied this motion, stating:

> Well, I'm not unsympathetic with you, you understand. I don't agree with the sentencing framework that's now applicable to some of these cases. Whether it will be applicable to your client's case or not, I really don't know because we haven't gone far enough to know that. But basically I've ruled on this before. And of course

> your remedy would be to make a record, which you're doing, and prefect your appeal, which I assume you will do.

The court then explained to him that he could be sentenced to a maximum of fifteen years under the statute, but failed to give the advice regarding the sentencing guidelines as required by Rule 11. Ponce then entered a plea of guilty.

Ponce appeared for sentencing on August 26, 1992. According to the presentence report, Ponce's base offense level § 1326 was 8. Because he had been previously been convicted of an aggravated felony, however, the report recommended a 16 level increase under § 2L1.2 (b) (2). A two-level decrease for acceptance of responsibility yielded a offense level of 22. Since Ponce had a criminal history category of VI, his guideline range was 84-105 months imprisonment.

Ponce filed no objections to the PSR calculations, but requested a downward departure on grounds that the nature of the past aggravated felony was not serious enough to warrant the 16-level increase. The district court, while voicing his frustration with the guidelines, declined to depart and sentenced Ponce to 84 months imprisonment and three years supervised release. Ponce appealed.[1]

II.

Rule 11 provides in relevant part that "the court must address the defendant personally in open court and inform the defendant of,

[1]Ponce has not appealed the enhancement under 8 U.S.C. § 1326 on the merits.

and determine that he understands . . . the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances." Fed. R. Crim. P. 11 (c) (1). The government concedes that "the record is painfully clear: no participant in the guilty plea proceeding expressly mentioned the Sentencing Guidelines." It nonetheless maintains that the district court's omission should be regarded as harmless error.

We have held that trial courts are under no obligation to inform a defendant of his likely guideline range or the possible adjustments before accepting his plea. See United States v. De Fusco, 930 F.2d 413, 415 (5th Cir.), cert. denied, 112 S.Ct. 239 (1991); United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990), cert. denied, 111 S.Ct. 977 (1991); see also United States v. Horne, 1993 U.S. App. Lexis 5012 (D.C.Cir. 1993); United States v. DeFusco, 949 F.2d 114, 119 (4th Cir. 1991); United States v. Fernandez, 877 F.2d 1138, 1143 (2d Cir. 1989).[2] Rather, as the

[2] These holdings find direct support in the advisory committee's note to the 1989 amendment:

> Since it will be impracticable, if not impossible, to know which guidelines will be relevant prior to the formulation of a presentence report and resolution of disputed facts, the amendment does not require the court to specify which guidelines will be important or which grounds for departure might prove to be significant . . . . By giving the advice, the court places the defendant and defense counsel on notice of the importance that guidelines may play in sentencing and of the possibility of departure from those guidelines.

text of Rule 11 suggests, the court need only advise the defendant that it must "consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances." It is well established that a district court's failure to explain that it must consider the guidelines is subject to harmless error review. See, e.g., United States v. Hekiman, 975 F.2d 1098, 1104 (5th Cir. 1992); United States v. McLeod, No. 91-5729 (5th Cir. 1992); United States v. Perdomo-Serrano, No. 90-8670 (5th Cir. 1992).

We have then a failure to mention the guidelines coupled with the district court's statement that he did not agree with the sentencing framework that is now applicable to "some" of these cases. In combination, the omission and the statement leaves a confused advice to the defendant. The guidelines in fact carried a sharp sting--a guideline range of 84-105 months. Betraying his lack of sympathy, earlier expressed when the plea was taken, the district court rejected Ponce's request to deport made at the time of sentencing and sentenced him to seven years imprisonment and three years supervised probation. In sum, the guidelines were never mentioned and the district court's sympathetic statement was not qualified by the limits upon the judge's discretion imposed by the guidelines. We decline to rely on the actions of counsel or on what counsel "must have told him" to infer that Ponce understood the applicability of the guidelines. Such inferences, however, form the basis of the government's argument that "although the district court did not expressly refer to the Guidelines it is

clear that the court and the parties were fully aware of the effect of the Sentencing Guidelines."

In sum, we find that given the unique facts of this case the error was not harmless. We vacate the conviction and remand to allow defendant to plead again to the indictment.

VACATED and REMANDED.