

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1360
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MORRIS LYNN ROGERS,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Texas
(3:92-CR-474-D (01))

(February 3, 1994)

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:*

On April 7, 1993 Rogers was sentenced to 72 months imprisonment for conspiracy to distribute heroin. Two days later, another court imposed a consecutive sentence of 51 months imprisonment plus 3 years of supervised release for Rogers' fraud conspiracy. On appeal, Rogers argues that his second sentence should not run consecutively to his first. We reverse and remand.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Generally, the court should sentence the defendant according to the Federal Sentencing Guidelines effective at time of sentencing. *United States v. Gross*, 979 F.2d 1048, 1050 (5th Cir. 1992); 18 U.S.C. § 3553(a)(4). But if the guidelines in effect at the time the defendant committed the crime are more favorable to the defendant than the amended guidelines effective at his sentencing, the ex post facto clause of the Constitution requires the court to apply the preamended guidelines. *United States v. Suarez*, 911 F.2d 1016, 1021 (5th Cir. 1991).

In this case, the November 1, 1991 version of § 5G1.3(b) is applicable because it is more favorable than the amended version effective November 1, 1992. The November 1, 1991 version of § 5G1.3(b) states:

If subsection (a) does not apply, and 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, *or if the prior undischarged term of imprisonment resulted from a federal offense and was imposed pursuant to the Sentencing Reform Act*, 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 § 5G1.2 (Sentencing on Multiple Counts of Conviction) had all the sentences been imposed at the same time. (emphasis added).¹

Because Rogers' sentencing for his heroin conviction was imposed "pursuant to the Sentencing Reform Act," the court should

¹ The amended version of § 5G1.3(b) omits the phrase "or if the prior undischarged term of imprisonment resulted from a federal offense and was imposed pursuant to the Sentencing Reform Act."

impose the sentence for Rogers' fraud conviction according to the formula set forth in § 5G1.2.²

REVERSE and REMAND.

² The court does, however, have the discretion to deviate from this formula if the court decides to depart from the Federal Sentencing Guidelines. *Gross*, 979 F.2d at 1051-52.