

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 93-4114  
Summary Calendar

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CLARENCE ROEDER,

Petitioner-Appellant,

VERSUS

UNITED STATES PAROL COMMISSION,

Respondent-Appellee.

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Appeal from the United States Parole Commission  
(18 U.S.C. §4106A)

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(September 10, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:<sup>1</sup>

Petitioner, Clarence Roeder, is a federal prisoner transferred to the United States under a prisoner exchange treaty<sup>2</sup> to serve a 15-year Mexican sentence imposed for importing 26 tons of marijuana. The United States Parole Commission (USPC), determined that Petitioner would serve 157 months of confinement followed by 23 months of supervised release. Petitioner now appeals the sentence imposed by the USPC. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

<sup>2</sup> Treaty on the Execution of Penal Sentences, Nov. 26 1976, United States--Mexico, 28 U.S.T. 7399 [hereinafter "Treaty"].

I.

After a prisoner is transferred to the United States under the Treaty, the USPC must analogize the foreign offense to a comparable violation of United States law. 18 U.S.C. § 4106A(b)(1)(A). Here, the USPC determined that Petitioner's Mexican charge was most akin to the offense of possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1). A post-sentence investigative report was prepared using the applicable sentencing guideline provisions. See 18 U.S.C. § 4106A(b)(1)(A) (USPC evaluates transferee prisoners as if they were convicted in U.S. district court). This report recommended a guideline range, based upon the quantity of marijuana involved and Petitioner's criminal history, of 188 to 235 months. Because his Mexican sentence was less than the minimum guideline range, the USPC concluded that Petitioner's 180 month foreign sentence was the applicable "guideline sentence." See id. at § 4106A(b)(1)(C); Lara v. United States Parole Comm'n, 990 F.2d 839, 840 (5th Cir. 1993).

Petitioner requested a departure from the guideline sentence on two grounds: First, that the abuse he suffered at the hands of Mexican authorities warranted a departure; alternatively, he argued that his participation in the offense was "aberrational behavior" on his part. After factoring in "good-time credits," the USPC examiners concluded that Petitioner would serve 157 months in custody. The panel declined to depart below this term, observing that Petitioner's Mexican sentence (180 months) was already below the guideline range:

In essence, the quantity of marijuana would normally indicate a release decision well within that guideline range [of 188-235 months], ... the panel would not normally have departed downward from the bottom of the guidelines. However, on this 15-year sentence, the projected satisfaction date is at approximately 157 months, with is 31 months under the bottom of the guidelines.

Summary of Transfer Hearing, at 3.

On appeal, Petitioner argues that the USPC committed two errors of law. First, Roeder contends that the USPC misinterpreted the guidelines in concluding that the 180 month Mexican sentence was below the guidelines, i.e. that this was in itself a "departure." Next, he urges that the USPC failed to make necessary findings under Federal Rule of Criminal Procedure 32(c)(3)(D). This Rule requires that a sentencing tribunal make specific findings when the defendant "allege[s] any factual inaccuracy in the presentence investigation report...." Fed. R. Crim. P. 32(c)(3)(D).<sup>3</sup> Because the examiners did not make specific reference to his "aberrant behavior" argument, Petitioner argues that a remand is necessary so the USPC can provide detailed reasons for failing to depart on this ground.

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<sup>3</sup> The USPC points out that 28 C.F.R. § 2.62(h)(5) requires USPC examiners to resolve disputed issues of fact, and provide written findings on their decision. Petitioner implicitly argues that Federal Rule of Criminal Procedure 32(c)(3)(D) is the governing standard. It would appear that both provisions mandate the same result -- written findings when facts are disputed. In the instant case, we will evaluate Petitioner's claim under Rule 32(c)(3)(D), in light of 18 U.S.C. § 4106A(b)(1)(A)'s command that the USPC must evaluate transferee prisoners as if they were convicted in a district court. However, as noted above, both avenues lead to the same conclusion.

## II.

The USPC is entitled to the same degree of deference to its factual findings as is a district court in its sentencing decisions. 18 U.S.C. § 4106A(b)(2)(B); Hansen v. United States Parole Comm'n, 904 F.2d 306, 309 (5th Cir. 1990), cert. denied, 498 U.S. 1052 (1991). We will upset factual findings only upon a showing of clear error. 18 U.S.C. § 3742(e); United States v. Badger, 925 F.2d 101, 104 (5th Cir. 1991).

We review sentences imposed under the guidelines to see if they are the result of a misapplication of the guidelines, or are imposed in violation of law. 18 U.S.C. § 3742(a)(1), (2). A refusal to depart from the guideline range will be upheld unless the refusal is in violation of law, United States v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989), or as a result of clearly erroneous factual error. See 18 U.S.C. § 3742(e).

## III.

Petitioner first contends that the USPC examiners misapplied the guidelines because they concluded the 180-month Mexican sentence was already below the guideline range. This conclusion, Petitioner maintains, resulted in the examiner's failure to give adequate consideration to his departure request. Additionally, Petitioner argues that it was error to factor in his good-time credits into the determination whether to depart.

If Roeder had been convicted in a United States court, his guideline range would be 188-235 months. The Mexican court, however, sentenced him to 15 years, or 180 months. We have held

that Guideline § 5G1.1(a) applies by analogy in these transfer cases: "This section indicates that where the application of the Guidelines results in a sentence above the maximum authorized by statute, the statutory maximum applies." Thorpe v. United States Parole Comm'n, 902 F.2d 291, 292 (5th Cir.), cert. denied, 498 U.S. 868 (1990).

Petitioner relies on Thorpe as support for his argument that the USPC examiners "erred in viewing [his] foreign sentence less good-time credit as establishing a release-date 'below' his guideline range." Petitioner's Original Brief at 12. This reliance is misplaced; indeed, Thorpe actually supports a conclusion that the USPC did not err in determining Roeder's release date:

The Commission correctly applied [U.S.S.G. § 5G1.1(a)] under the analogous circumstances of the instant case by interpreting the "statutory maximum" as the expiration of the [foreign] sentence less good time credits. The Commission did not err in the determination of Thorpe's release date.

Thorpe, 902 F.2d at 292 (emphasis added); see also Lara, 990 F.2d at 840 ("Because the guideline range exceeded the foreign sentence, the Parol Commission used the full foreign-sentence time less Lara's applicable credits as the appropriate 'guideline'...."). This is exactly what the USPC examiners did in the present case. There was no error in the application of the guidelines.

Petitioner next argues that the examiners failed to make the requisite written findings on his claim of "aberrant behavior." The USPC examiners were presented with evidence that Petitioner had no prior run-ins with the law. This was taken into account in

calculating Roeder's criminal history category. See U.S.S.G. Ch. 4, Pt. A, intro. comment. There was evidence presented that Petitioner had a steady work record, and had served in the armed forces. There was also evidence that Petitioner's failing eyesight caused him to lose his occupation as a truck driver and mechanic, and that he entered into the marijuana scheme in an attempt to earn money for his family. Additionally, there was ample documentation of the deplorable conditions of Mexican prisons, and of the abuse and torture that is inflicted by Mexican authorities on prisoners. Petitioner now argues that the USPC examiners erred in not issuing written reasons why such evidence did not merit a downward departure.

The USPC examiners obviously considered this evidence, and implicitly rejected it. See Summary of Transfer Hearing, at 2-3. Petitioner cites to no authority, and we have found none, that requires a sentencing tribunal to explain why it chose not to depart downward from a guideline sentence.<sup>4</sup> See 18 U.S.C. § 3553(c) (Court shall state "reasons for imposition of particular sentence..."); United States v. Georgiadis, 933 F.2d 1219, 1223 (3rd Cir. 1991) ("Nothing in § 3553(c) requires the judicial statements that [Appellant] wants. We consider the statute's silence on this point dispositive."); cf. United States v. Garcia,

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<sup>4</sup> Even looking to Federal Rule of Criminal Procedure 32(c)(3)(D), we find no support for this contention. This Rule only requires written findings when the defendant questions the factual accuracy of a presentence report. Petitioner does not argue with the accuracy of the conclusions in his report, rather he focuses on the failure of the USPC examiners to comment on their decision to not depart.

917 F.2d 1370, 1378 (5th Cir. 1990) (court's statement of its conclusion suffices as a factual finding).

Moreover, we conclude that Petitioner cannot argue that his participation amounted to aberrational behavior on his part. In United States v. Williams, 974 F.2d 25 (5th Cir. 1992), cert. denied, 113 S.Ct. 1320 (1993), we held that aberrant behavior generally involves acts that are "'spontaneous and seemingly thoughtless act[s] rather than one which was the result of substantial planning....'" Id. at 26 (quoting United States v. Carey, 895 F.2d 318, 325 (7th Cir. 1990)).

Petitioner cannot argue that round-the-world drug running did not require substantial forethought. It is uncontested that Petitioner allowed the transport vessel to be titled in his name, and that he served as the ship's mechanic on its illicit voyage. We review factual findings for clear error. Though the finding that departure was unwarranted based on Petitioner's aberrant behavior was an implicit finding in this case, it is not clearly erroneous. See id. at 26-27.

Accordingly, Petitioner's sentence is AFFIRMED.