

MAY 08 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT F. JERNBERG,

Defendant - Appellant.

No. 06-30032

D.C. No. CR-05-00007-RFC

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Submission Deferred December 8, 2006
Resubmitted May 8, 2008**
Portland, Oregon

Before: FARRIS, CLIFTON, and BEA, Circuit Judges.

Robert F. Jernberg challenges his sentence on appeal. At the time the sentence was imposed, several relevant legal issues had not yet been resolved. In light of decisions rendered since that time, it appears that the Guidelines may have

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

been given excessive weight as a factor under 18 U.S.C. § 3553(a). We therefore vacate the sentence and remand for resentencing.

The district court's statements at both the change of plea hearing and the sentencing hearing make clear the district court understood that the Guidelines were advisory, even under 18 U.S.C. § 3553(b)(2), and that "sentencing proceedings are to begin by determining the applicable Guidelines range." *United States v. Carty*, No. 05-10200, slip op. at 2843-44, 2008 WL 763770 at *4 (9th Cir. Mar. 24, 2008) (en banc). Nonetheless, undue weight may have been given to the Guidelines in determining Jernberg's sentence. The district court expressly stated that it thought it was required by law to give "significant weight" to the Guidelines, and the sentence imposed was at the bottom end of the calculated range. It has now been established that the "Guidelines factor" should not "be given more or less weight than any other" factor in 18 U.S.C. § 3553(a). *Carty*, slip op. at 2844, 2850, 2008 WL 763770 at *4, *7 ("It would have been error had the judge actually . . . weighted the Guidelines range more heavily than other § 3553(a) factors."). Because we cannot be sure that the same sentence would have been imposed absent the extra weight given to the Guidelines, we vacate the sentence and remand for resentencing.

SENTENCE VACATED; REMANDED FOR RESENTENCING.