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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 08-50194
	)	
Plaintiff – Appellee,	)	D.C. No. 2:02-CR-00157-GSP-6
	)	
v.	)	**MEMORANDUM***
	)	
TY FOWLES,	)	
	)	
Defendant – Appellant.	)	
	)	
	)	

Appeal from the United States District Court
for the Central District of California
George P. Schiavelli, District Judge, Presiding

Argued and Submitted April 14, 2009
Pasadena, California

Before: FERNANDEZ, SILVERMAN, and CALLAHAN, Circuit Judges.

Ty Fowles appeals his sentence after his guilty plea to Racketeer Influenced and Corrupt Organizations Act (RICO) charges. See 18 U.S.C. § 1962. We vacate and remand.

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

Fowles asserts that upon resentencing[1] the district court erred in calculating his sentence range under the Sentencing Guidelines[2] when it decided that the maximum sentence for the crime of attempted murder under the law of the State of California was life imprisonment.[3] We agree.

California law makes it clear that for the life sentence punishment to apply, the indictment must charge "premeditation" and that must be "admitted or found to be true by the trier of fact." Cal. Penal Code § 664(a); see also People v. Izaguirre, 42 Cal. 4th 126, 132, 164 P.3d 578, 581, 64 Cal. Rptr. 3d 148, 153 (2007); People v. Seel, 34 Cal. 4th 535, 548–49, 100 P.3d 870, 877–78, 21 Cal. Rptr. 3d 179, 188 (2004); cf. Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000). In this case, the indictment did not charge premeditation,[4] nor did Fowles admit that he had premeditated. That being so, the maximum possible sentence for a RICO violation was twenty years, rather than life imprisonment. See 18 U.S.C. § 1963(a).

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[1]See United States v. Fowles, 225 F. App'x 713, 714–15 (9th Cir. 2007) (unpublished).

[2]See USSG §§2E1.1, 4B1.1. All references to the Sentencing Guidelines are to the November 1, 1998, version.

[3]See Cal. Penal Code § 664(a).

[4]In fact, the indictment referred to California's general murder provision. See Cal. Penal Code § 187. It failed to refer to the provision regarding willful, deliberate, and premeditated murder. See Cal. Penal Code § 189.

The parties spill a good deal of ink on the questions of whether for career offender purposes[5] the attempted murder charge could be considered at all after the first remand from this court, and whether that charge could form both a predicate act for RICO purposes and a conviction for career offender purposes. But those questions are of no significance because, in light of the above, the RICO sentencing calculation yields a higher Guideline range than would the career offender calculation. The parties do not disagree about that. Therefore, the RICO calculation must be used. See USSG §4B1.1.

In short, the district court erred when it determined that the maximum possible sentence was incarceration for life and, in reliance upon that error, sentenced Fowles to concurrent terms of 275 months imprisonment, a period beyond the RICO Guideline range of 188–235 months.

We must, therefore, vacate the sentence and remand for resentencing upon an open record. See United States v. Matthews, 278 F.3d 880, 885 (9th Cir. 2002) (en banc).

VACATED and REMANDED.

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[5]USSG §§4B1.1, 4B1.2.