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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

CR No. 04-371-MO

Plaintiff,

**MOTION FOR DETERMINATION OF
SUBJECT-MATTER JURISDICTION**

vs.

BRIAN DAVID BOHNSTEHN,

Defendant.

Defendant, Brian David Bohnstehn, by and through his attorney of record by appointment, Assistant Federal Public Defender Christopher J. Schatz, hereby moves the Court, pursuant to 18 USC § 3231, to determine whether it has subject-matter jurisdiction in the instant matter over an offense cognizable under federal law and applicable to the conduct admitted by Mr. Bohnstehn in his plea of guilty to the charge alleged against him in the indictment. Mr. Bohnstehn requests that the instant motion be heard at the time of his sentencing hearing, currently scheduled for March 31, 2005.

**POINTS AND AUTHORITIES
IN SUPPORT OF MOTION**

A. The Court Has An Independent Obligation To Determine Whether Appropriate Subject-Matter Jurisdiction Exists.

The bases for Mr. Bohnstehn’s motion are as follows:

1. 18 USC § 3231 provides that the “district courts shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.” In *Pettibone v. United States*, 148 U.S. 197 (1983), the Supreme Court declared that the “courts of the United States have no jurisdiction over offenses not made punishable by the constitution, laws, or treaties of the United States . . .”

2. Insofar as the federal courts are courts of “limited jurisdiction any party or the court sua sponte, at any stage of the proceedings, may raise the question of whether the court has subject matter jurisdiction; and, if it does not, dismissal is mandatory.” *Manway Construction Co., Inc. v. Housing Authority of the City of Hartford*, 711 F.2d 501, 503 (2d Cir. 1983); see also *United States v. Giraldo-Prado*, 150 F.3d 1328 (11th Cir. 1998)(“[A] party may raise jurisdiction at any time during the pendency of the proceedings.”). Indeed, the district court has an independent obligation to ensure that it has subject-matter jurisdiction over the matter at hand. *Sty-Lite Co. v. Eminent Sportswear, Inc.*, 115 F.Supp.2d 394, 398 (S.D.N.Y. 2000)(“The court is required to consider jurisdiction and is therefore obligated to raise the issue sua sponte.”); see also *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)(“The federal courts are under an independent obligation to examine their own jurisdiction . . .”), and *FDIC v. Four Star Holding Company*, 178 F.3d 97, 100 n.2 (2d Cir. 1999)(“[T]he Court may examine subject matter jurisdiction, sua sponte, at any stage of the proceeding.”). As the Ninth Circuit observed in *United States v. Ceja-Prado*, 333 F.3d 1046, 1047

(2003), “every federal court has a continuing obligation to ensure that it possesses subject-matter jurisdiction . . .”

3. The indictment in the instant matter alleges two grounds for the exercise of federal jurisdiction with respect to Mr. Bohnstehn’s violation of 18 USC § 922(g)(1): First, that the subject firearm possessed by Mr. Bohnstehn had previously traveled in interstate commerce; second, that Mr. Bohnstehn was previously convicted “of a crime punishable by imprisonment for a term exceeding one year.” The indictment further alleges that this conviction criterion is satisfied by the Burglary in the Second Degree conviction Mr. Bohnstehn sustained in Multnomah County Circuit Court Case No. C 97-04-32657 on October 30, 1997.

4. Section 922(g)(1)’s prohibition against possession of firearms extends only to those individuals who were previously convicted of an offense “punishable by imprisonment for a term exceeding one year.” Section 921(a)(20) provides that “what constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.”¹ With respect to his second-degree burglary conviction, Mr. Bohnstehn received a sentence of probation. More importantly, as is shown by the state court Judgment of Conviction and

¹ It is pertinent to note that, in enacting §§ 921(a)(20) and 922(g)(1) as contained in the Firearms Owners Protection Act (FOPA) of 1984, Congress rejected the stress on national uniformity in the application of federal gun control laws that had been invoked by the Supreme Court in support of its decision in *Dickerson v. New Banner Industries, Inc.*, 460 U.S. 103, 121-122 (1983). Cf. Abriel, *Presumed Ineligible: The Effect Of Criminal Convictions On Applications For Asylum And Withholding Of Deportation Under Section 515 Of The Immigration Act Of 1990*, 6 *Georg. Immig. L. J.* 27 (1992)(“ The legislative history of the Firearms Owners Protection Act also shows Congress' intent to overrule *Dickerson* . . .”); see also *United States v. Kolter*, 849 F.2d 541 (11th Cir., 1988)(“[I]n enacting § 921(a)(20), Congress did not repeal a statute—it changed the rule announced in *Dickerson v. New Banner Institute*, which had interpreted a statute.”). Thus, Oregon law controls with respect to determination whether Mr. Bohnstehn’s prior conviction was “punishable by imprisonment for a term exceeding one year.”

Sentence,² his Oregon State Sentencing Guidelines grid coordinates were 2 and I, such that the presumptive sentence was 30 days jail, with an additional 60 days non-jail time that could have been used for treatment and other remedial purposes.

5. In *Blakely v. Washington*, 124 S.Ct. 2531, 2537 (2004), the Supreme Court held that the term “statutory maximum” does not denote the maximum duration of a sentence as such is set forth in the provisions of a penal statute, but rather the maximum sentence a judge may impose based on facts found by a jury, or by the court acting with the defendant’s consent to judicial fact-finding, or as admitted by the defendant:

[T]he relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” . . . and the judge exceeds his proper authority.

Following *Blakely*, and on remand from the United States Supreme Court, in *State v. Dilts* (*Dilts II*), 337 Or. 645, 652, 103 P.2d 95, 99 (2004), the Oregon Supreme Court interpreted the statutory provisions underlying Oregon’s sentencing grid system and held that the “presumptive sentence” generated by application of the state’s sentencing guidelines grid represents the “statutory maximum” sentence that can be imposed under state law:

[] Oregon law provides that “the sentencing judge *shall* impose the presumptive sentence * * * *unless* the judge finds substantial and compelling reasons to impose a departure.” OAR 213-008-0001 (emphasis added); *see also* ORS 137.669 (sentencing guidelines “shall control the sentences for all crimes committed after the effective date of such guidelines * * * ”); ORS 137.671(1) (“The court may impose a sentence outside the presumptive sentence or sentence range made presumptive by ORS 137.669 for a specific offense if it finds there are substantial and compelling reasons justifying a deviation from the presumptive sentence.”). If the trial court imposes a sentence that exceeds the presumptive sentence without making the required additional findings, then that sentence is erroneous. *See, e.g., State v. Woodin*, 131 Or.App. 171, 176, 883 P.2d 1332 (1994)(remanding case for

² A copy of the Judgment of Conviction and Sentence is attached hereto as Exhibit A.

resentencing because trial court imposed sentence in excess of presumptive sentence without making departure findings).

Here, the presumptive sentence that was based on the facts that were alleged in the indictment and admitted by the defendant in his guilty plea was 15 to 18 months' imprisonment, so the "statutory maximum" sentence that the trial court could have imposed without making additional factual findings was 18 months' imprisonment.

6. The *Dilts* opinion is an authoritative interpretation of Oregon state statutory sentencing law. As noted by the Supreme Court in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994), the "judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Thus, the instant case does not present any case-decision retroactivity issues. Rather, the question posed is how the prior conviction criterion of § 922(g)(1) is to be applied in this case given the construction of Oregon's sentencing grid system set forth in *Dilts*. Prior federal case law has read the § 922 prior conviction criterion ("a crime punishable by imprisonment for a term exceeding one year") as referring to the "maximum possible sentence" that could be imposed on a defendant under state law. *United States v. Arnold*, 113 F.3d 1146 (10th Cir. 1997). However, under *Blakely*, the term "maximum possible sentence" can only be read as referring to the range of punishment generated by application of the statutory sentencing scheme to facts properly determined in accordance with the strictures of the Sixth Amendment. Furthermore, according to *Dilts*, the maximum possible sentence that could have been imposed with respect to Mr. Bohnstehn's prior Burglary in the Second Degree conviction was, in accordance with the statutorily pertinent facts constituting that crime, 30 days' in jail. Consequently, under Oregon state law, Mr. Bohnstehn's second-degree burglary conviction is not a valid predicate conviction that can sustain this Court's exercise of federal jurisdiction with respect to the § 922(g)(1) offense alleged in the indictment.

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B. Conclusion.

If a federal court is without jurisdiction over an offense, any ensuing judgment and sentence is void and is subject to attack by motion to vacate at any time. *Bauman v. United States*, 156 F.2d 534, 537 (5th Cir. 1946). In light of the points and authorities set forth above, Mr. Bohnstehn submits that, before proceeding to sentencing in his case, a determination should be made by this Court as to whether subject-matter jurisdiction exists with respect to the charged offense.

Respectfully submitted this 25th day of March, 2005.

/s/ Christopher J. Schatz

Christopher J. Schatz

Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with Local Rule 100.13, I hereby certify that I served the foregoing **MOTION FOR DETERMINATION OF SUBJECT-MATTER JURISDICTION** on Assistant United States Attorney Thomas Edmonds on March 25, 2005, by electronic case filing.

/s/ Jill Lammé
Jill Lammé

CERTIFICATE OF SERVICE