UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S.C.A. No. 04-30508
	)	
Plaintiff-Appellant,	)	U.S.D.C.No. CR-04-2074-EFS
	)	
v.	)	
	)	
PETER SANTOS MURILLO,	)	
	)	
Defendant-Appellee.	)	
________________________	)	

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The facts relevant to this appeal began in 1998 when Peter Santos Murillo pled guilty in the superior court of Chelan County, Washington to one count of second degree unlawful possession of a firearm in violation of R.C.W. § 9.41.040(2)(b)[1] and one count of harassment in violation of R.C.W. § 9A.46.020(2)(b). [E.R. 6-12].[2] After entering

[1]The judgment lists the statute of conviction as R.C.W. § 9.41.040(1)(b). [E.R. 13]. This appears to be a clerical error, as § 9.41.040(1)(b) is the citation for first degree unlawful possession of a firearm, which requires different elements are carries different penalties. The citation for second degree unlawful possession of a firearm is 9.41.040(2)(b).

[2]"E.R." refers to the Excerpts of Record filed along with the government's opening brief.

his pleas, Mr. Murillo was sentenced to 10 months incarceration on each count, to run concurrently. E.R. 17, 27]. The judgments filed in the two cases indicate that each of Mr. Murillo's convictions fell under "Seriousness Level III" of the state guideline scheme and was punishable by a range of 9-12 months. [E.R. 14, 24].

In 2004, a federal indictment was returned against Mr. Murillo, charging him with being a prohibited person in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). [S.E.R. 1-2].[3] Specifically, the indictment charged that Mr. Murillo possessed a firearm on March 22, 2004 subsequent to his Chelan County convictions. According to the indictment, the Chelan County offenses constituted crimes punishable by terms of imprisonment exceeding one year, thus causing Mr. Murillo to be prohibited from possessing firearms under federal law.

During the pretrial proceedings of the case, the district court dismissed the indictment on the basis that

[3]"S.E.R." refers to the Supplemental Excerpts of Record filed along with Mr. Murillo's response brief.

Mr. Murillo's Chelan County convictions did not constitute crimes punishable by terms of imprisonment exceeding one year as required by 18 U.S.C. § 922(g)(1).

SUMMARY OF ARGUMENT

The district court correctly determined that Mr. Murillo's Chelan County convictions do not fall under the scope of 18 U.S.C. § 922(g)(1) because, as made clear by the Supreme Court in Blakely v. Washington, 124 S.Ct. 2531 (2004), neither conviction was punishable by a term of imprisonment exceeding one year.

Looking at the predicate convictions as they applied individually to Mr. Murillo, Blakely makes clear that Mr. Murillo could not have received more than one year for either offense. The high end of the mandatory guideline range for each conviction was only 12 months. Accordingly, under Blakely, Mr. Murillo's maximum penalty was only 12 months. Blakely, 124 S.Ct. at 2538.

Even looking at Mr. Murillo's prior convictions generically, the offenses still also do not qualify as

crimes punishable by more than one year. Taking a categorical approach to the offenses, as outlined by the Supreme Court in Taylor v. United States, 495 U.S. 575 (1990), the criminal offenses at issue in this case are over-broad in that they are not always punishable by more than one year. Using a modified categorical approach, Mr. Murillo's convictions still fall outside the scope of the federal law because, as noted above, the maximum penalty applicable in Mr. Murillo's case was only 12 months.

Although proof of aggravating factors can cause an individual convicted of the offenses at issue in this case to receive a sentence of more than one year, this possibility does not change the core nature of Mr. Murilo's offenses. This court has made clear that the possibility of a recidivism enhancement must be ignored in determining whether or not an offense, at its core, qualifies as a crime punishable by more than one year. See United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002)(en banc). Alternatively, any aggravating fact

unrelated to recidivism would have to be treated as the functional equivalent of an element. Blakely, 124 S.Ct. at 2538. Thus, an enhancement for reasons other than recidivism would alter the generic nature of the offense. Cf. United States v. Moreno-Hernandez, 397 F.3d 1248 (9th Cir. 2005).

Regardless of whether one looks at the predicate convictions in this case individually or generically, the offenses do not constitute crimes punishable by more than one year. Accordingly, the district court's order of dismissal was appropriate.

ARGUMENT

I. The relevant statutory schemes.

The federal statute at issue in this case specifies that a person who has been convicted in any court of a crime punishable by a term of imprisonment exceeding one year cannot possess a firearm that has been transported in interstate commerce. 18 U.S.C. § 922(g)(1). By definition, the federal prohibition does not depend upon

how an offense is labeled by the applicable court of conviction, unless the conviction is a state offense classified as a misdemeanor and punishable by a term of imprisonment of two years or less.[4] 18 U.S.C. § 921(a)(20)(B). The federal prohibition also does not depend upon how much time the defendant actually received. See United States v. Horodner, 993 F.2d 191, 194 (9th Cir. 1993). Instead, whether a prior conviction falls under the scope of the federal law depends upon whether the "sentencing court had discretion to impose a term of incarceration of more than one year." See United States v. Minnick, 949 F.2d 8, 9 (1st Cir. 1991).

In Mr. Murillo's case, the two statutes of conviction indicate that they are Class C felonies. R.C.W. §§ 9.41.040(2)(b) and 9A.46.020(2)(b). Pursuant to R.C.W.

[4]Even if the definition were to depend on how a predicate offense is labeled, this court's jurisprudence indicates that the relevant inquiry would still be whether or not the offense is punishable by more than one year imprisonment. United States v. Ballesteros-Ruiz, 319 F.3d 1101, 1103 (9th Cir. 2003); United States v. Robles-Rodriguez, 281 F.3d 900, 904 (9th Cir. 2002).

§ 9A.20.021(1)(c), a Class C felony cannot result in a term of imprisonment greater than five years. However, this statute does not operate alone in setting the maximum possible sentence.

Under Washington's Sentencing Reform Act, not all Class C felonies are eligible for five year sentences. The Sentencing Reform Act divides all criminal offenses into seriousness levels. As reflected in his judgments [E.R. 14, 24], both Mr. Murillo's offenses fell into Seriousness Level III. See R.C.W. § 9.94A.515.[5] The possible sentences for offenses within Seriousness Level III are listed by a sentencing grid located at R.C.W. § 9.94A.510.[6] The sentencing grid reflects that some offenses within Seriousness Level III -- those with an offender score of zero -- can only be sentenced up to

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[5]At the time of Mr. Murillo's offense conduct, the statute designating seriousness levels for offenses was codified at R.C.W. § 9.94A.320. Subsequent changes to the statute have no bearing on this case.

[6]At the time of Mr. Murillo's offense, the sentencing grid was codified at R.C.W. § 9.94A.310.

three months. However, under the grid, other offenders within Seriousness Level III -- those with offender scores of nine or more -- can be sentenced up to 68 months. The offender score is determined by calculating a defendant's criminal history. See R.C.W. § 9.94A.525.

II. The Supreme Court's decision in *Blakely v. Washington* makes clear that in the context of a mandatory guideline system, the maximum statutory penalty is the maximum of the applicable guideline range.

Until recently, it was generally believed that, in Washington state, the statutory maximum penalty for a criminal offense was determined by the statute of conviction, without regard to the corresponding sentencing guideline range. However, the Supreme Court's decision in Blakely v. Washington, 124 S.Ct. 2531 (2004) turned this general understanding on its head. The Court in Blakely explained that, under the Sixth Amendment to the United States Constitution, the statutory maximum sentence that a court may impose for a crime is the

maximum term that may be imposed based solely upon the facts established by the guilty verdict. Id. at 2537. Because Washington has a determinate sentencing guideline system, Washington trial courts do not have unlimited discretion to impose any sentence up to the maximum set forth in the statute of conviction. R.C.W. § 9.94A.585(4).[7] Under Washington's system, were a court to impose a greater sentence than contemplated by the standard range, based solely on the facts established by a guilty verdict, it would be reversed. Id., Blakely, 124 S.Ct. at 2538. Because the Sixth Amendment demands that juries, not judges, find any facts necessary to enhance a defendant's sentence, the maximum of the range set by Washington's sentencing grid must be considered the statutory maximum term of incarceration, unless aggravating factors are pled and proven to a jury beyond

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[7]At the time of Mr. Murillo's offense conduct, this provision was codified at R.C.W. § 9.94A.210. It should be noted that the citations to Washington's Sentencing Reform Act contained in Supreme Court's decision in Blakely pertain to this former numbering system.

a reasonable doubt. Blakely, 124 S.Ct. at 2538.

In the instant case, the sentencing grid reflects that the maximum term of incarceration Mr. Murillo faced as a result of his guilty pleas was 12 months. [E.R. 14, 24]. Given this circumstance, the "maximum sentence" was no more five years in Mr. Murillo's case than it was 10 years in Blakely, 20 years in Apprendi v. New Jersey, 530 U.S. 466 (2000) or death in Ring v. Arizona, 536 U.S. 584 (2002). Blakely, 124 S.Ct. at 2538. Accordingly, Mr. Murillo's conviction does not meet the plain terms of a predicate conviction under 18 U.S.C. § 922(g)(1).

When contrasting this case to this court's pre-Blakely decision in United States v. Rios-Beltran, 361 F.3d 1204 (9th Cir. 2004), it is clear that the district court was correct in dismissing Mr. Murillo's indictment. In Rios-Beltran, the defendant argued that his prior Oregon conviction for possession of a controlled substance did not constitute a crime punishable by a term of imprisonment exceeding one year because his maximum sentence under Oregon's sentencing guideline scheme was

90 days. This court rejected the defendant's argument because the defendant's offense of conviction was labeled a Class C felony, punishable up to five years imprisonment. Id. at 1207-08. The court reasoned that a guideline maximum is not the same thing as a statutory maximum and that because the defendant's sentence could have been enhanced by an upward departure, the defendant's offense conceivably was punishable by a term greater than one year.

Blakely reveals Rios-Beltran is no longer good law. Blakely explains that the distinction between a "guideline" maximum and a "statutory" maximum is false. The maximum term of incarceration for an offense is not determined by a label, but by how the sentencing statute operates under the Sixth Amendment. Blakely, 124 S.Ct. at 2537. So long as a guideline system is mandatory,[8]

[8]Post-Blakely, Washington's sentencing guideline system remains mandatory. See State v. Harris, 123 Wash.App. 906 (2004). Consistent with Blakely, the Washington courts have not opted for the remedial approach taken by the Supreme Court in United States v. Booker, 125 S.Ct. 738 (2005).

Blakely makes clear that a guideline maximum is the statutory maximum. Id. at 2538.

III. The fact that some Class C felonies in Washington might result in punishments of more than one year does not cause Mr. Murillo's offenses to fall under the terms of the federal statute.

The government argues that the fact that some individuals can receive more than one year incarceration for violations of the predicate statutes at issue in this case means that the offenses in question are crimes punishable by terms of imprisonment exceeding one year even if Mr. Murillo, individually, could not have received more than one year. The government cites the Fourth Circuit's decision in United States v. Jones, 195 F.3d 205 (4th Cir. 1999) to support this position. The problem with this approach is that it is inconsistent with both Supreme Court precedent and precedent from this circuit.

The Supreme Court's decisions in Taylor v. United States, 495 U.S. 575 (1990) and United States v. Shepard,

No. 03-9168, 2005 WL 516494 (March 7, 2005) provide guidance for how to interpret the interplay between a state criminal statute and the federal firearms law. Taylor and Shepard instruct that in order for a state criminal offense to fall categorically under the terms of the federal statute, each and every application of the statute must meet the terms of the federal law.

Both Taylor and Shepard discussed the circumstances under which a state burglary offense can qualify as a "burglary" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The Supreme Court explained that in order for a state burglary statute to qualify categorically as a burglary under ACCA, all applications of the state statute must fall within the generic federal definition of burglary.[9] If only some applications of a

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[9]The generic definition of burglary is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor, 495 U.S. at 598. A state burglary statute that covers unlawful entrance into locations other than buildings, such as vehicles or boats, does not, categorically, meet the terms of the federal definition.

state burglary statute fall under the terms of the federal definition, then a modified categorical approach is permitted. Under the modified approach, a defendant's individual conviction will qualify as a burglary under ACCA so long as judicially noticeable facts establish that the defendant was actually convicted of an offense that meets the terms of the generic federal definition.

By taking a categorical approach to the analysis of predicate convictions, the Supreme Court's decisions in Taylor and Shepard, reveal that the Fourth Circuit's decision in United States v. Jones, 195 F.3d 205 (4th Cir. 1999) was in error. Under the approach taken by the Fourth Circuit in Jones, so long as some applications of a state statute fall under the terms of the federal law -- i.e., so long as a conviction can sometimes result in more than one year in custody -- the offense qualifies as a crime punishable by a term of imprisonment exceeding one year. This is simply inconsistent with the Supreme Court's categorical approach which demands that a predicate offense meet the terms of the federal statute

in every instance.

This court specifically recognized the applicability of Taylor's categorical approach in determining the maximum penalty applicable to a predicate state conviction in the en banc decision of United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002)(en banc). At issue in Corona-Sanchez was whether the defendant's conviction for petty theft with a prior in violation of California law was a theft offense "for which the term of imprisonment [is] at least one year" as required by the aggravated felony definition set forth at 8 U.S.C. § 1101(a)(43). Although the defendant in Corona-Sanchez had actually been sentenced to two years imprisonment for his offense, this court determined that the offense did not constitute an offense punished by one year imprisonment because the only way in which a sentence greater than six months was possible was through recidivism enhancements. 291 F.3d at 1208. The court explained that, under Apprendi v. New Jersey, 530 U.S. 466 (2000) and Almendarez-Torres v. United States, 523

U.S. 224 (1993), recidivism does not play a role in determining the generic nature of a criminal offense. Accordingly, the court explained the appropriate analysis as follows:

> Taylor requires us to examine the prior crimes by considering the statutory definition of the crimes categorically, without reference 'to the particular facts underlying those convictions.' ... Thus, under the categorical approach, we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.

Corona-Sanchez, 291 F.3d at 1208-09 (citation omitted).

By specifically excluding recidivism enhancements from the determination of what maximum penalty applies to a generic criminal offense, this court parted company with the Fourth Circuit in United States v. Jones, 195 F.3d 205 (4th Cir. 1999). As pointed out by the government in its opening brief [blue brief at 17], the Fourth Circuit in Jones ruled that a criminal offense is punishable by a term of imprisonment exceeding one year so long as recidivism-related factors allow for a sentence above one year. The government's claim that Jones is persuasive authority is mistaken. The Fourth

Circuit's view of the significance of recidivism enhancements is directly opposed to the view taken by this court in Corona-Sanchez.

Applying the categorical approach to this case, Mr. Murillo's offenses do not, generically, qualify as crimes punishable by more than one year. Looking at the applicable Washington statutes, not all violations of the offenses in question are punishable by more than one year. As explained in Section I, above, if an offender does not have any criminal history, the maximum possible penalty is three months. R.C.W. § 9.94A.510. However, if an offender is at the high end of the criminal history scale, the sentencing grid indicates a maximum term of 68 months. Id.[10] Given the range of maximum possible penalties, the statutes in question are, categorically, over-broad.

This court's decision in Corona-Sanchez dictates that

[10]Given that the offenses in question not only fall under Seriousness Level III, but are also classified as Class C felonies, the sentencing grid maximum of 68 months would be further capped by the Class C felony limit of five years.

recidivism-related factors cannot be used to alter the generic nature of Mr. Murillo's offenses. Accordingly, looking at the offenses generically, the maximum possible penalty is only three months.

Other than through a recidivism enhancement, the only way in which the statutory offenses at issue in this case can be punished by more than three months is through proof of an aggravating factor, justifying a sentence above the standard range. However, as this court recently recognized in United States v. Moreno-Hernandez, 397 F.3d 1248, 1254-55 (9th Cir. 2005) aggravating factors unrelated to recidivism change the substantive nature of an offense. Accordingly, the addition of a factual enhancement would change the fundamental nature of the underlying statutory offenses, such that they would no longer be the same as Mr. Murillo's predicate offenses. This conclusion is implicit in the reasoning of Blakely, which requires that any fact enhancing a defendant's maximum term of imprisonment be treated as the functional equivalent of an element. Blakely, 124 S.Ct. At 2543.

One way of thinking about the issues in this case is to compare the offenses at issue in this case with the sentencing scheme set up by the State of Washington for assault. See R.C.W. § 9A.36.011 et seq. Employing a pre-Blakely world view and ignoring Washington's sentencing guideline provisions, it is undisputable that assault in Washington is not the type of offense that is always punishable by more than one year as contemplated by 18 U.S.C. § 922(g)(1). A generic, un-aggravated assault in Washington is labeled a gross misdemeanor, punishable by no more than one year of imprisonment. R.C.W. §§ 9A.36.041(2), 9A.20.021(2). However, a recidivism-related factor -- the existence of a previously issued no-contact order[11] -- can cause an assault to be labeled a Class C felony, punishable up to five years. R.C.W. §§ 26.50.110(4), 9A.20.021(1)(c). In addition, substantive factors -- intent to cause great

[11]In United States v. Pimentel-Flores, 339 F.3d 959, 968-69 (9th Cir. 2003), this court explained that the existence of a prior no-contact order is a recidivism-related factor, which does not change the generic nature of misdemeanor assault.

bodily injury and use of a deadly weapon -- can cause assault to be labeled a Class A felony, punishable by up to life imprisonment. R.C.W. §§ 9A.36.011; 9A.20.021.

What Blakely teaches is that there is no functional distinction between a graduated sentencing system established by a mandatory guideline scheme and a graduated sentencing structure located within the definition of a substantive offense. Applying this lesson to the present case, Mr. Murillo's generic convictions for second degree unlawful possession of a firearm and harassment are no more crimes punishable by more than one year under Washington law than a generic conviction for assault. The fact that the legislature chose to locate the enhancement provisions for Mr. Murillo's offenses within the state's mandatory sentencing guideline scheme instead of within the statutory definitions of the substantive offenses is a distinction without a difference. The conclusion remains that, given the mandatory nature of Washington's sentencing scheme, Mr. Murillo's generic offenses are not

crimes punishable by more than one year.

IV. The cases relied upon by the government do not account for *Blakely* and are, therefore, unhelpful.

Although the government concedes that Mr. Murillo could not have received a sentence of more than 12 months custody for either of his convictions [blue brief at 17], it nevertheless argues that this court should simply defer to Washington's classification of the offenses as a "felonies" and reverse the district court's order of dismissal. Contrary to what the government would have this court believe, there is no precedent to support this approach.

The government appears to claim that this court's decision in United States v. Marks, 379 F.3d 1114 (9th Cir. 2004) supports its position. However, to the extent Marks is relevant at all, it supports Mr. Murillo. In Marks, the defendant argued that because Washington law does not permit the use of an unconstitutional conviction as a predicate offense in a prosecution under the state's firearms law, an unconstitutional conviction also cannot

be considered a "conviction" under the federal law. Id. at 1119. This court disagreed. Marks explains that the mere fact that a conviction cannot be used in state court to support a charge of unlawful possession of a firearm does not mean that the offense does not constitute a "conviction" for purposes of the federal law. Id. Under the federal firearms statute, a prior offense constitutes a "conviction" so long as it is final. Id. at 1118. No deference is owed to how the conviction can or cannot be used under state law. Id. at 1119.

Unlike the defendant in Marks, Mr. Murillo is not arguing that his prior offenses do not constitute convictions. His argument is that the convictions were not for offenses punishable by more than one year. Consistent with the reasoning in Marks, the fact that the State of Washington may consider Mr. Murillo's offenses "felonies," which can be used as predicate offenses under the state firearms law, is simply irrelevant to the issue of whether or not the offenses fall under the terms of the federal statute. Cf. Marks, 379 F.3d at 1119.

The government also claims that United States v. Horodoner, 993 F.2d 191, 192 (9th Cir. 1993) supports its position. The government correctly points out that, under Horodoner, the inquiry under 18 U.S.C. § 922(g)(1) is not how much time the defendant actually received, but how much time potentially could have been imposed. The problem with the government's reliance on Horodoner is that the rule established in that case has nothing to do with the argument made by Mr. Murillo.

In Horodoner, the defendant argued that because he only received 365 days in jail for his predicate California conviction and was not considered a prohibited person by the State of California, he did not fall under the terms of 18 U.S.C. § 922(g)(1). Not surprisingly, this court disagreed. The court cited Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 113 (1983) for the proposition that, under § 922(g)(1), how much time a defendant actually received for a prior conviction is irrelevant. 993 F.2d at 194. Because the defendant in Horodner could have received more than 365 days for his

offense, he fell under the terms of the statute.

The defendant in Horodner did not argue that a sentence greater than one year would have been illegal. Consequently, the court had no reason to consider the argument raised in the present case. Unlike the defendant in Horodner, Mr. Murillo has not claimed that he falls outside the scope of the federal statute because he only received sentences of 10 months for his prior convictions. Mr. Murillo's argument is that he could not have received more than 12 months for his convictions because 12 months was the statutory maximum sentence authorized by the facts established by his guilty pleas.

V. Policy concerns cannot over-ride the plain meaning of the statute.

Much of the government's opening brief deals with policy concerns. The government's brief refers to Lewis v. United States, 445 U.S. 55 (1980) for the proposition that the federal firearms statute must be read broadly in order to keep guns out of the hands of dangerous individuals. Citing Lewis, the government complains that

individuals such as Mr. Murillo should not be able fall out of the clutches of the federal government through some sort of legal loophole.

The primary problem with the government's position is that policy considerations cannot alter the plain meaning of the statute. As the Supreme Court itself made clear in Lewis, "in any case concerning the interpretation of a statute, the 'starting point' must be the language of the statute itself." 445 U.S. at 60. See also Leocal v. Ashcroft, 125 S.Ct. 377, 382 (2004). The fact that Congress may intend to outlaw certain behavior is of no consequence if the wording of the statute actually fails to do the trick. When the language of a statute is clear, neither legislative history nor policy considerations have any bearing on how the law must be read. See United States v. Gonzales, 520 U.S. 1, 6, 9-10 (1997). If nothing else, the rule of lenity prohibits legislative intent from altering the plain meaning of a criminal statute. See Taylor v. United States, 495 U.S. 575, 603 (1990)(Scalia, J., concurring).

Not only are the government's policy concerns unhelpful, it is not at all clear that all of the policy concerns at issue in this case favor the government. Given that Washington state has chosen to limit the maximum sentences faced by individuals convicted of the offenses at issue in this case, it is not inconceivable that such persons simply are not the type of dangerous individuals intended to fall under the reach of the federal firearms statute. Furthermore, Mr. Murillo is subject to prosecution under Washington State law. See R.C.W. § 9.41.040. Under our country's system of federalism, "the States possess primary authority for defining and enforcing the criminal law." United States v. Lopez, 514 U.S. 549, 561 n.3 (1995)(citations omitted). It is not a terrible result that an individual such as Mr. Murillo, who has never been to prison before, simply is not serious enough of an offender to fall under the ambit of the federal criminal law.

The government claims that the need for national uniformity in enforcement of the federal firearms statute

requires reversal of the district court's order of dismissal. However, this argument is foreclosed by United States v. Houston, 547 F.2d 104 (9th Cir. 1977). In Houston, the defendant brought an equal protection challenge to 18 U.S.C. § 1202, the predecessor to 18 U.S.C. § 922(g)(1), on the basis that the statute results in unequal treatment of similarly situated individuals in different states. This court quickly rejected this argument, explaining that "[i]t was entirely rational for Congress to conclude that its primary source of reference should be the maximum permissible punishment under the applicable state law." Id. at 107. Even though this would result in disparate treatment of people in different states, the law demands "no requirement of national uniformity." Id. (citation omitted).

It is evident from the structure of the federal statute that Congress intended application of the firearms law to vary from state to state. A particularly telling indicator of this intent is found in the changes wrought by the Firearms Owners' Protection Act of 1986

("FOPA"). FOPA was enacted after the Supreme Court's decision in Dickerson v. New Banner Institute, 460 U.S. 103 (1983), which held that expunged convictions could be used as predicate convictions under the federal firearms law. FOPA over-ruled Dickerson so as to grant a greater degree of deference to state procedures and policies. After FOPA, the federal law not only requires deference to the maximum sentence for a crime available under state law (as recognized in Houston), but state law must also be consulted in determining what constitutes a prior "conviction." See 18 U.S.C. § 921(a)(20). FOPA makes clear that Congress intended application of the federal firearms law to depend upon a complex web of state laws regarding expungement, restoration of civil rights, and maximum penalties.

VI. The rule of lenity demands upholding the district court's order of dismissal.

If nothing else, the phrase "crime punishable by a term of imprisonment exceeding one year" in 18 U.S.C. § 922(g)(1) is ambiguous. It has long been the law of this

country that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971). According to the Supreme Court, "when choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952). "[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." United States v. Bass, 404 U.S. 336, 348 (1971).

Given Blakley, applying § 922(g)(1) to offenses that cannot receive more than one year under a state's mandatory guideline system would necessitate a complicated and possibly inconsistent rendering of the words "crime" and "punishable." It is telling that the government's brief fails to suggest a plausible definition. The government has simply claimed that this court should defer to the state's designation of the

offenses as “felonies,” an approach not permitted by either the case law or the plain language of the statute. It is unclear how one could define the terms “crime” and “punishable” in a way that would both favor the government and still fall within the parameters set by the Supreme Court in Blakely and Taylor. Given the difficulty of this task, the rule of lenity, if nothing else, demands that the district court’s order of dismissal be upheld.

CONCLUSION

The district court correctly determined that, under Blakely v. Washington, 124 S.Ct. 2531 (2004), the predicate offenses at issue in this case do not qualify as crimes punishable by terms of imprisonment exceeding one year. Accordingly, the district court’s order of dismissal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF RELATED CASES

Counsel for Defendant-Appellee PETER SANTOS MURILLO is not aware of any related cases currently pending before this court.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Case No. 04-30508

I certify that this brief complies with the page limitation set by FRAP 32(a)(7)(A) and is proportionally spaced, has a typeface of 14 points or more, and contains 5261 words and 654 lines of text.
March 25, 2005.

____
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