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Downward Departures in the Post-Booker Era

How Is Diminished Capacity Defined?

In *U.S. v. Valdez*, 426 F.3d 178 (2nd Cir. 2005), the United States Court of Appeals for the Second Circuit reviewed the sentencing of Felix Valdez by the District (trial) Court for the Southern District of New York to determine if the court had incorrectly applied the insanity defense legal standard rather than the diminished-capacity downward-departure legal standard when denying the defendant's request for a downward departure.

Facts of the Case

Valdez confessed to obtaining and selling telephone calling cards in other people's names. He was recorded on a public pay phone while opening calling card accounts by offering various false explanations such as posing as a building owner attempting to obtain numbers on behalf of his tenants. The government estimated that Valdez had obtained over 1,176 calling card numbers and suggested that he was even able to obtain phone access to countries that had fraud protection mechanisms in place.

Upon his guilty plea, Valdez was convicted of wire fraud by the U. S. District Court for the Southern District of New York. At sentencing he requested a downward departure from the recommended sentence secondary to his diminished capacity. He based his petition for a diminished-capacity departure on his IQ of 55, documented learning difficulties, history of special education classes provided as a result of brain injury and severe emotional disturbance, history of dependency on others, and family psychiatric history. The defense's psychiatric expert opined that as a result of Valdez's generalized anxiety disorder, "marked dependency needs . . . overly compliant" behavior, low IQ, and essential illiteracy, he was easily manipulated by his coconspirator (Guillermo) into performing the fraud with the belief that he, the defendant, would then have access to calling cards to

call his son. The defense asserted that without Guillermo, Valdez would have been incapable of developing the fraud that led to his indictment; therefore, Valdez's diminished capacity was causally linked to the commission of the offense as a result of his vulnerability to Guillermo's manipulation. However, on cross-examination the defense's expert psychiatrist testified that Valdez knew that what he was doing was wrong and that he could have written the hundreds of names and calling card numbers himself. The expert's report also documented that Valdez had refused to pay his co-conspirator, Guillermo.

The district court denied Valdez's petition for a downward departure and sentenced the defendant according to the Federal Sentencing Guidelines. The court concluded that the defendant did not meet the definition of "significantly reduced mental capacity" (one prong necessary in defining diminished capacity) as evidenced by information that contradicted the defendant's contention that he had trouble understanding the wrongfulness of his actions. The court also dismissed the validity of the nexus between any psychiatric or cognitive impairment that Valdez had and his fraudulent behavior.

Valdez appealed this decision to the U. S. Court of Appeals for the Second Circuit. He contended that the district court had incorrectly applied the criteria for the insanity defense rather than the criteria for the diminished capacity departure when considering him for a downward departure from the Federal Sentencing Guidelines. Valdez asserted that the court, in doing so, had thereby failed to make use of the availability of this departure when a defendant understands the stark difference between right and wrong but has significantly impaired ability to understand the wrongfulness of his conduct.

Valdez also appealed on the grounds that the court's holding was based on clearly erroneous fact finding, asserting that the court based its holding on its own lay opinion of Valdez's mental capacity, which was contrary to evidence submitted by medical professionals.

Ruling

The U. S. Court of Appeals for the Second Circuit affirmed the district court's calculation of the defendant's sentence and found that the district court did not apply an incorrect legal standard in denying a downward departure and had not erred in fact finding. The court remanded the case to the district court

to consider whether the defendant's sentencing would have been different if the district court had understood the Federal Sentencing Guidelines to be advisory rather than mandatory.

Reasoning

The appeals court agreed with the defendant's assertion that the insanity defense standard, in which the defendant does not recognize the difference between right and wrong, is not the appropriate standard when considering a downward departure based on diminished capacity. The appeals court agreed that the standard for granting a downward departure on the basis of diminished mental capacity requires significant impairment in a defendant's judgment or ability to understand the wrongfulness of his actions. Therefore, the standard for diminished capacity does not require that a defendant lack criminal intent.

However, the appeals court held that the district court did not confuse the insanity defense standard with the diminished-capacity downward-departure standard in denying a downward departure for Valdez. The court found that the district court had considered his understanding of right and wrong only to assess at which point along the continuum his understanding fell. Furthermore, the appeals court noted that the lower court had rejected the diminished-capacity departure based on both Valdez's ability to carry out a complex crime and its perception of a lack of evidence supporting Valdez's having a psychiatric diagnosis.

The appeals court remanded the case to the district court as a result of the possibility that the district court had made a procedural error in imposing a sentence on the assumption that the Federal Sentencing Guidelines (FSG) were mandatory rather than advisory. The appeals court opined that a court properly sentences even if it decides to depart from the FSG, providing it first considers them. However, to avoid procedural error (e.g., failing to attend to the various factors contained in 18 U.S.C. § 3553 (a) of the guidelines that sentencing courts must take account of in deciding on an appropriate sentence), the court must be aware of its authority to depart from the guidelines. Therefore, the appeals court remanded the case for the district court judge to consider if the sentence rendered would be different if the guidelines were recognized as advisory.

Further, the appeals court found that the district court had not made clearly erroneous fact findings. It

reasoned that the district court based its findings of the defendant's mental capacity on various pieces of proof, including Valdez's success in performing the complex fraudulent scheme. The appeals court also ruled that the rejection of the defense expert's opinion is not an error of law, because there is no rule that obliges a trial court to adopt expert testimony.

Discussion

According to the Federal Sentencing Guidelines Policy Statement that defines diminished capacity (18 U.S.C.S. Appx 5K2.13), a downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Significantly reduced mental capacity is defined as a "significantly impaired ability to understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason or control the behavior that the defendant knows is wrongful." As stated in *U.S. v. Leandre*, 132 F.3d 796 (D.C. Cir. 1998), and in reference to the definition of reduced mental capacity, "... little substantive guidance has been provided by the Sentencing Commission, either in the language of the guidelines themselves or in the commentary or application notes." In light of this history of the difficulty with the definition of reduced mental capacity, *U.S. v. Valdez* helped to clarify the distinction between the more narrowly defined insanity defense standard (the absolute lack of knowledge of wrongdoing) and the more broadly defined diminished capacity relevant to the downward-departure legal standard (the significantly impaired ability to understand the wrongfulness of the behavior).

In remanding this case to the district court, the appeals court underscored the court's relatively new ability (following the Supreme Court's decision in *U.S. v. Booker*, 543 U.S. 220 (2005)) to sentence a defendant outside the Federal Sentencing Guidelines and therefore to sentence a defendant without applying a mandated, rigid application of the sentencing committee's policy statements. Therefore, the courts may now be less constrained by the guidelines in their determinations of which defendants can qualify for a downward departure. Without having to rely on the language of a policy statement, courts may become more open to the testimony and recommendations of mental health expert witnesses. This case

may, therefore, represent a nascent trend toward an increase in influence of effective and credible psychiatric expert witnesses regarding a defendant's diminished capacity and an increase in the number of downward departures.

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Recommitment of NRRMDD Defendants

NRRMDD Defendants May Be Recommitted Using the Preponderance-of-the-Evidence Standard

In *Ernst J. v. Stone*, 452 F.3d 186 (2nd Cir. 2006), the U.S. Court of Appeals for the Second Circuit affirmed a U.S. district court's denial of a petition for a writ of *habeas corpus* in which the petitioner, who had been acquitted through a defense of not responsible by reason of mental disease or defect (NRRMDD), claimed that his recommitment by a preponderance-of-the-evidence standard violated either the due process clause or the equal protection clause of the Fourteenth Amendment.

Facts of the Case

Ernst J., who had chronic schizophrenia, had a history of violent behavior related to his disorder. On February 27, 1992, while in the midst of a psychotic episode, he believed that an elderly man was the devil and attacked him, inflicting bite wounds on his hand and genitals. On April 7, 1993, he pleaded not responsible by reason of mental disease or defect (NRRMDD) to assault in the second degree before a New York state supreme (trial) court. Subsequently, as prescribed by New York statute, he was examined by psychiatrists to determine which level of follow-up and monitoring he required as an NRRMDD defendant in New York. The psychiatrists determined that he did not have a "dangerous mental disorder" and was not "mentally ill," as defined by New York law; therefore, he was classified as a track-three defendant according to New York criminal procedure law. A track-three defendant is discharged

either unconditionally or with conditions that usually involve outpatient services. Mr. J. was subjected to an order of conditions for five years which included his compliance with an outpatient treatment program.

In 1996 and 1997, he was admitted for inpatient psychiatric care subsequent to arrests, first for criminal trespass and harassment and then for criminal trespass. Shortly before the expiration of his order of conditions, he showed a significant increase in symptoms, including violent behavior. On May 24, 1999, one week before his order of conditions was to expire, Mr. J. held a social worker hostage and threatened to sexually assault her at his residential treatment center. He was hospitalized involuntarily for 15 days on an emergency certificate. At the request of the state commissioner of mental health, his involuntary hospitalization was prolonged through an extension of the order of conditions as an NRRMDD defendant. He was transferred to the state inpatient facility at Kingsboro Psychiatric Hospital where he continued to show violent behavior. At the hospital's request, in July 1999, the New York supreme court, under the civil commitment statute, "ordered a three-month period of retention upon clear and convincing evidence" of mental illness and danger of physical harm to himself and others and also ordered under the NRRMDD statute that his order of conditions be extended for three years.

In October 1999, the hospital petitioned to have Mr. J. recommitted to a secure psychiatric facility under the NRRMDD statute because he had developed a dangerous mental disorder. The hospital simultaneously filed for an extension of commitment under the civil retention statute. Mr. J. filed to dismiss the application for recommitment, arguing that his rights under the Fourteenth Amendment would be violated were he to be recommitted pursuant to the lower standard of preponderance of the evidence under the NRRMDD statute rather than under the clear-and-convincing standard required by civil commitment.

The New York supreme court denied Mr. J.'s motion to dismiss and on July 12, 2000, found by a preponderance of the evidence that Mr. J. had a dangerous mental disorder and ordered him to be recommitted to a secure psychiatric facility.

Mr. J. appealed to the appellate division of the state supreme court, which reaffirmed the commitment order. It cited that recommitment provisions