ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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June 23, 2005

The Honorable Joel M. Flaum, Chief Judge
United States Court of Appeals for the Seventh Circuit
Dirksen Federal Building, Room 2702
219 South Dearborn Street
Chicago, Illinois 60604

Dear Chief Judge Flaum:

As Chairman of the House Committee with oversight of the Federal Judiciary, the Department of Justice, and the criminal laws of the United States, I write with respect to recent action by a panel of the Court of Appeals for the Seventh Circuit in *United States v. Lissett Rivera*, No. 02-3238, an appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 98 CR 923 - Blanche M. Manning, Judge.

On June 16, 2005, the panel, considering the above-referenced appeal, issued an unpublished opinion, a copy of which is enclosed, in which it affirmed the defendant's conviction for drug trafficking and the 97 month sentence which she received. This, despite the panel's repeated acknowledgment throughout the opinion that the 97 month sentence was contrary to the statutory requirement that the sentence be not less than 120 months.

Congress, in the exercise of its Constitutional responsibility with regard to oversight of the Judiciary, should proceed cautiously concerning inquiry into judicial action with which we merely disagree. However, with respect to judicial actions which are contrary to law, it is not only appropriate but essential that Congress act. I do so in this case, for the decision by a panel of the Court of Appeals to permit an admittedly illegal sentence to stand is inconsistent with the Seventh Circuit's previous laudable pronouncement to the contrary in *United States v. Gibson*, 356 F.3d 761, 767 (7th Cir. 2004) that "[t]o allow an illegal sentence to stand would impugn the fairness, integrity, and public reputation of the judicial proceedings. . ."

18 U.S.C. § 3742 (f) (1) provides that:

> If the court of appeals determines that –
>
> (1) the sentence was imposed in violation of law . . . , the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

Yet, the panel in *Rivera* declined to remand the case for the imposition of a lawful sentence and has permitted the sentence, which it acknowledges is illegal, to stand.

18 U.S.C. § 3742 (f) (1) does not condition the statutory requirement of remand for the imposition of a lawful sentence upon whether or not that question was presented to the court of appeals by either direct or cross appeal or whether or not it was raised by either party. Rather, the statute mandates a remand *upon a determination by the court that "the sentence was imposed in violation of law."*

In its June 16, 2005 opinion affirming the illegal sentence, the panel clearly did determine that the sentence was "imposed in violation of law." Specifically, the panel determined that the district judge imposed a sentence of 97 months, twenty three months less than mandated by the applicable statutory mandatory minimum 120 month sentence. The panel repeatedly noted that the 97 month sentence circumvented the factual finding by the jury that the defendant was guilty of conspiracy to distribute more than five kilograms of cocaine,[1] which required a sentence of 120 months.

Specifically, the panel determined that:

- "a first offender who conspires to distribute more than five kilograms of cocaine 'shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life.' 21 U.S.C. § 841 (b) (1) (A) (ii)." Opinion at 1.

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[1] The opinion in one instance reflects a jury determination that the defendant was guilty of conspiracy to distribute five kilograms or more of "crack" cocaine. Opinion at 1. All other references in the opinion, including the court's citation to the applicable statute, reflect conviction involving cocaine.

- "given the jury's conclusion that she conspired to distribute more than five kilograms of cocaine the statute calls for a minimum sentence of 10 years imprisonment. Yet the district judge sentenced her to 97 months. . . ." *Id.* at 2.

- "The jury verdict by itself establishes that Rivera is accountable for five kilograms and thus must serve the statutory minimum sentence." *Id.*

- "the minimum [sentence] has been taken out of the judge's hands." *Id.*

- "Once the jury has spoken, its verdict controls unless the evidence is insufficient or some procedural error occurred; it is both unnecessary and inappropriate for the judge to reexamine, and resolve in the defendant's favor, a factual issue that the jury has resolved in the prosecutor's favor beyond a reasonable doubt." *Id.* at 3.

- "The jury found that Rivera conspired to distribute more than five kilograms of cocaine, and she does not maintain that the evidence is insufficient to support that verdict." *Id.*

- "What *did* happen at trial fixes Rivera's minimum penalty at 120 months' imprisonment." *Id.* at 4.

Despite the panel's unambiguous determination that the 97 month sentence was illegal, it appears to seek to justify the sanctioning of both the illegal sentence and its own failure to comply with the remand statute by stating, "[b]y deciding not to take a cross-appeal, the United States has ensured that Rivera's sentence cannot be increased." Opinion at 4. The panel cites no authority for this bizarre proposition and I am aware of none.

Rather, regardless of the position of the parties, the Court of Appeals is bound to ensure that the sentence imposed is consistent with the statute. The Seventh Circuit has previously done just that. In *United States v. Belanger*, 936 F. 2d 916 (7th Cir. 1991) the Seventh Circuit remanded for correction of an illegal sentencing despite the failure of either party to ask for it. In doing so, the Court noted:

> Both the prosecution's proposal of a sentence outside the bounds of the law, and the defense counsel's failure to object to such a proposal were negligent.

Id. at 920 (noting that the sentence imposed by the district court was *ultra vires* as contrary to the statute, and *sua sponte* remanding with directions to impose a sentence consistent with the statute). *See also, United States v. Ekblad*, 90 Fed App 171, 2004 U.S. App. LEXIS 4382 (7th Cir. 2004) (unpublished) ("We now turn sua sponte to address an error we discovered in the imposition of Ekblad's sentence"); *United States v. Schnell*, 982 F. 2d 216, 219 (7th Cir. 1992) (stating that the court may remand sua sponte if it finds an error in sentencing even if neither party objected).

Moreover, in *United States v. Schnell*, 982 F.2d 216, 219 (7th Cir. 1992) the Seventh Circuit favorably cited the Fifth Circuit case of *United States v Schmeltzer*, 960 F.2d 405, 408-09 (5th Cir. 1992). In *Schmeltzer*, the Fifth Circuit vacated a sentence illegally imposed below the statutory mandatory minimum and remanded for the imposition of the required higher sentence. In doing so, the Fifth Circuit not only recognized its own responsibility to ensure compliance with the statute, but strongly criticized both the district court and the government for agreeing to impose an illegal sentence below the mandatory minimum by stating:

> The court should not have approved a plea bargain that ignored the mandatory minimum sentence applicable to the offense of conviction.
>
> * * *
>
> we cannot give our imprimatur to the government's attempted end run around the minimum mandatory sentence. That the government actually urged the court to sentence below the statutory mandatory minimum is, in our view, a serious breach of its duty to enforce the law Congress wrote.

Id. at 406; 408 - 409.

As the mandate has not yet issued in this case, I ask that all necessary and appropriate measures be taken, whether by the members of the panel and/or by the other judges of the Court [2] to ensure

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[2] "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's decision, or (2) the proceeding involves a question of exceptional importance. Fed. R. App. P. 35 (a)" XXVIII. EN BANC PROCEDURE, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (2003 EDITION) at 104.

that the precedent of the Seventh Circuit is followed and that the statutory commands of 21 U.S.C. § 841 (b) (1) (A) (ii) and 18 U.S.C. § 3742 (f) (1) are complied with by the the imposition of a lawful sentence in this case.

I have written separately to the Attorney General concerning this matter as well, urging him to take all necessary steps to ensure the same and to further determine the facts relevant to what appears to have been a failure by the government to adhere to Department of Justice guidelines with respect to the appeal of an illegal sentence.

I would appreciate a prompt response with respect to what steps the Court of Appeals intends to take to rectify the panel's actions. The American People and their elected representatives have a right to expect that the judiciary will adhere to the laws enacted by Congress so as not to (in the court's own words) "impugn the fairness, integrity, and public reputation of the judicial proceedings. . ."

Should you have any questions with respect to this matter please contact Jay Apperson, Chief Counsel, Subcommittee on Crime, Terrorism, and Homeland Security, at 202-225-3926.

Sincerely,

F. JAMES SENSENBRENNER, JR.
CHAIRMAN

Enclosure

c: The Hon. Frank H. Easterbrook
The Hon. Ilana Diamond Rovner
The Hon. Diane P. Wood
The Hon. Alberto Gonzales
The Hon. John Conyers

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June 23, 2005

The Honorable Alberto Gonzales
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

As Chairman of the House Committee with oversight of the Federal Judiciary, the Department of Justice, and the criminal laws of the United States, I write with respect to (1) recent action by a panel of the Court of Appeals for the Seventh Circuit in *United States v. Lissett Rivera*, No. 02-3238, an appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 98 CR 923 - Blanche M. Manning, Judge, and (2) the failure of the Department of Justice to appeal, and thereafter the failure to cross-appeal, an illegal sentence below the statutory mandatory minimum.

On June 16, 2005, the panel, considering the above-referenced appeal, issued an unpublished opinion, a copy of which is enclosed, in which it affirmed the defendant's conviction for drug trafficking and the 97 month sentence which she received. This, despite the panel's repeated acknowledgment throughout the opinion that the 97 month sentence was contrary to the statutory requirement that the sentence be not less than 120 months.

Congress, in the exercise of its Constitutional responsibility with regard to oversight of the Judiciary, should proceed cautiously concerning inquiry into judicial action with which we merely disagree. However, with respect to judicial actions which are contrary to law, it is not only appropriate but essential that Congress act. I have done so in this case by separate letter to the Chief Judge of the Seventh Circuit. As I explained therein, the decision by a panel of the Court of Appeals to permit an admittedly illegal sentence to stand is inconsistent with the Seventh Circuit's previous laudable pronouncement to the contrary in *United States v. Gibson*, 356 F.3d 761, 767 (7th Cir. 2004) that "[t]o allow an illegal sentence to stand would impugn the fairness, integrity, and public reputation of the judicial proceedings. . ."

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In its June 16, 2005 opinion affirming the illegal sentence, the panel clearly did determine that the sentence was "imposed in violation of law." Specifically, the panel determined that the district judge imposed a sentence of 97 months, twenty-three months less than mandated by the applicable statutory mandatory minimum 120 month sentence. The panel repeatedly noted that the 97 month sentence circumvented the factual finding by the jury that the defendant was guilty of conspiracy to distribute more than five kilograms of cocaine,[1] which required a sentence of 120 months.

Specifically, the panel determined that:

- " a first offender who conspires to distribute more than five kilograms of cocaine 'shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life.' 21 U.S.C. § 841 (b) (1) (A) (ii)." Opinion at 1.

[1] The opinion in one instance reflects a jury determination that the defendant was guilty of conspiracy to distribute five kilograms or more of "crack" cocaine. Opinion at 1. All other references in the opinion, including the court's citation to the applicable statute, reflect conviction involving cocaine.

- "given the jury's conclusion that she conspired to distribute more than five kilograms of cocaine the statute calls for a minimum sentence of 10 years imprisonment. Yet the district judge sentenced her to 97 months. . . ." *Id.* at 2.

- "The jury verdict by itself establishes that Rivera is accountable for five kilograms and thus must serve the statutory minimum sentence." *Id.*

- "the minimum [sentence] has been taken out of the judge's hands." *Id.*

- "Once the jury has spoken, its verdict controls unless the evidence is insufficient or some procedural error occurred; it is both unnecessary and inappropriate for the judge to reexamine, and resolve in the defendant's favor, a factual issue that the jury has resolved in the prosecutor's favor beyond a reasonable doubt." *Id.* at 3.

- "The jury found that Rivera conspired to distribute more than five kilograms of cocaine, and she does not maintain that the evidence is insufficient to support that verdict." *Id.*

- "What *did* happen at trial fixes Rivera's minimum penalty at 120 months' imprisonment." *Id.* at 4.

Despite the panel's unambiguous determination that the 97 month sentence was illegal, it appears to seek to justify the sanctioning of both the illegal sentence and its own failure to comply with the remand statute by stating, "[b]y deciding not to take a cross-appeal, the United States has ensured that Rivera's sentence cannot be increased." Opinion at 4. The panel cites no authority for this bizarre proposition and I am aware of none.

In my letter to the Chief Judge, I stressed the Courts's independent responsibility to ensure the imposition of a lawful sentence without regard to the actions or inactions of the government or other parties, and I have asked the court to take appropriate action to correct the panel decision. Nevertheless, I am profoundly troubled that the government failed to appeal, and thereafter failed to cross-appeal, the illegal sentence in this case below the statutory mandatory minimum.

In a previous decision, the Seventh Circuit described the government's "proposal of a sentence outside the bounds of the law"as "negligent." *See, United States v. Belanger*, 936 F.2d 916 (7th Cir. 1991). That this case may be one in which the government acquiesced in, rather than proposed, a sentence outside the bounds of the law, is no less troubling.

Moreover, in *United States v. Schnell*, 982 F.2d 216, 219 (7th Cir. 1992) the Seventh Circuit favorably cited the Fifth Circuit case of *United States v Schmeltzer*, 960 F.2d 405, 408-09 (5th Cir.1992). In *Schmeltzer*, the Fifth Circuit vacated a sentence illegally imposed below the statutory mandatory minimum and remanded for the imposition of the required higher sentence. In doing so, the Fifth Circuit strongly criticized the government for agreeing to impose an illegal sentence below the mandatory minimum by stating:

> we cannot give our imprimatur to the government's attempted end run around the minimum mandatory sentence. That the government actually urged the court to sentence below the statutory mandatory minimum is, in our view, a serious breach of its duty to enforce the law Congress wrote.

Id. at 406; 408 - 409.

In light of these facts, and in as much as the mandate has yet to issue in *Rivera*, I ask that you see to it that all necessary and appropriate measures are taken by the Department of Justice to ensure that a lawful sentence is imposed in this case. Further, I am requesting that you determine the facts and report to me with respect to whether or not the United States Attorney's Office complied with the applicable statutes and Department of Justice policies with respect to both the initial sentencing and subsequent appeal decisions (including the decision not to appeal and not to cross-appeal the illegal sentence).

I am particularly anxious to determine whether the Attorney General's July 28, 2003 Memorandum regarding Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals was complied with in this case. As you are aware, that memorandum was promulgated in response to specific provisions enacted in the PROTECT Act (Pub. L. No. 108-21) and its issuance permitted the Department to avoid ongoing reporting requirements to Congress. *See*, PROTECT Act, § 401 (*l*) (1) (2) and (3). As Chairman of the Committee which oversaw passage of this important legislation, I am sure that you can appreciate my concern by evidence that such a policy may technically be "in place," but nevertheless not followed.

I would appreciate a prompt response with respect to what steps the Department intends to take to ensure that a lawful sentence is imposed in this case and that a full reporting is made of the facts concerning Department of Justice actions in the case as requested above. The American People and their elected representatives have a right to expect that the Department of Justice will adhere to the laws enacted by Congress so as not to (in the words of the Seventh Circuit) "impugn the fairness, integrity, and public reputation of the judicial proceedings. . . ."

Should you have any questions with respect to this matter, please contact Jay Apperson, Chief Counsel, Subcommittee on Crime, Terrorism, and Homeland Security, at 202-225-3926.

Sincerely,

F. JAMES SENSENBRENNER, JR.
CHAIRMAN

Enclosure

cc: The Hon. Joel M. Flaum
The Hon. Frank H. Easterbrook
The Hon. Ilana Diamond Rovner
The Hon. Diane P. Wood
The Hon. John Conyers

In the
United States Court of Appeals
For the Seventh Circuit

No. 02-3238

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LISSETT RIVERA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 98 CR 923—Blanche M. Manning, *Judge.*

ARGUED MAY 31, 2005—DECIDED JUNE 16, 2005

Before EASTERBROOK, ROVNER, and WOOD, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* In an unpublished order issued today, we affirm the convictions of Lissett Rivera and her co-defendants, who according to the jury's verdict conspired to distribute more than five kilograms of crack cocaine. 21 U.S.C. §846. This opinion addresses Rivera's objections to her sentence.

A first offender who conspires to distribute more than five kilograms of cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life". 21 U.S.C. §841(b)(1)(A)(ii). Rivera has no prior

convictions for drug offenses or violent felonies, and given the jury's conclusion that she conspired to distribute more than five kilograms of cocaine the statute calls for a minimum sentence of 10 years' imprisonment. Yet the district judge sentenced her to 97 months, and she contends that even this is too high because the judge should not have found that she is accountable for her confederates' use of weapons, and should have concluded that she is a minor participant. Adjustments for possessing weapons, or role in the offense, matter to the Guidelines' sentencing range but do not affect statutory minimum sentences. A sentence below the statutory minimum is proper if the accused substantially assists the prosecution, see 18 U.S.C. §3553(e), or qualifies for the "safety valve" in §3553(f), but neither exception applies.

Because the district judge treated the Guidelines range rather than the statutory minimum as the effective legal constraint, Rivera insists that the court violated her right under the sixth amendment to have the jury determine all factors that affect the minimum sentence to which she is exposed. See *United States v. Booker*, 125 S. Ct. 738 (2005). Accordingly she seeks a remand under *United States v. Paladino*, 401 F.3d 471, 481-85 (7th Cir. 2005)—though, her counsel informed us after oral argument, *not* a full remand, which, for reasons now to be explained, could lead to a higher sentence. See also *United States v. Goldberg*, 406 F.3d 891 (7th Cir. 2005).

An argument based on *Booker* is hard to maintain when the cornerstone of the defendant's position is that the jury's actual verdict counts for nothing. The jury's verdict by itself establishes that Rivera is accountable for five kilograms and thus must serve the statutory minimum sentence. Findings that may lead to a higher sentence remain the judge's responsibility, but the minimum has been taken out of the judge's hands.

When deciding to disregard the jury's finding, the district judge relied on *United States v. Young*, 997 F.2d 1204, 1209-10 (7th Cir. 1993), which holds that the drug quantity that is material to the minimum sentence in a conspiracy case is the amount for which the defendant is substantively accountable under *Pinkerton v. United States*, 328 U.S. 640 (1946)—which is to say, all criminal acts within the scope of the conspiracy and foreseeable to the accused. *Young*'s principle is unexceptionable and applies whenever the judge must make findings that set a statutory minimum sentence, something that judges may continue to do even after *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See *Harris v. United States*, 536 U.S. 545 (2002). But *Young* does not hold that judges may disregard the jury's own conclusion that some fact has been established. Once the jury has spoken, its verdict controls unless the evidence is insufficient or some procedural error occurred; it is both unnecessary and inappropriate for the judge to reexamine, and resolve in the defendant's favor, a factual issue that the jury has resolved in the prosecutor's favor beyond a reasonable doubt.

When *Young* was decided, this court thought that all disputes about drug type and quantity, to the extent they affected the sentence, were to be resolved by the judge rather than the jury. See *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997), affirmed, 523 U.S. 511 (1998). *Apprendi* and its successors, such as *Booker*, establish a new allocation of tasks between judge and jury. So although *Young*'s conclusions about the legal significance of particular facts remains sound, its assumption that judges necessarily resolve factual disputes about drug quantities has been superseded.

The jury found that Rivera conspired to distribute more than five kilograms of cocaine, and she does not maintain that the evidence is insufficient to support that verdict. She would have been free to argue at trial that, even if she joined with the other defendants in a drug-distribution

venture, the goal (as she understood it) was to distribute some lower amount; that might have led the prosecutor to request a lesser-included-offense instruction, so that the jury could determine whether Rivera's objectives were less ambitious, and her knowledge less extensive, than her confederates (who, the judge found, actually distributed more than 150 kilograms of cocaine). We need not speculate, however, on what could or might have happened. What *did* happen at trial fixes Rivera's minimum penalty at 120 months' imprisonment.

By deciding not to take a cross-appeal, the United States has ensured that Rivera's sentence cannot be increased. But the lack of a cross-appeal does not entitle Rivera to another shot at a sentence below 97 months, if the only lawful outcome on remand would be application of the statutory minimum. It is accordingly unnecessary for us to consider whether Rivera's sentencing range under the Guidelines was calculated correctly; she cannot benefit from resentencing. Nor is a remand under *Paladino* appropriate, for *Booker* does not confer on district judges any discretion to give sentences below statutory floors. Any error the district judge may have made in resolving factual disputes in order to apply the Guidelines was harmless. Cf. *United States v. Lee*, 399 F.3d 864 (7th Cir. 2005).

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 28, 2005

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Nos. 02-3238

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LISSETT RIVERA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 98 CR 923
Blanche M. Manning, *Judge.*

Order

The court's opinion of June 16, 2005, is amended on page 4. The last paragraph of the opinion shall be replaced with the following language:

> By deciding not to take a cross-appeal, the United States has ensured that Rivera's sentence cannot be increased. See *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-82 (1999). (Earlier decisions, such as *United States v. Schmeltzer*, 960 F.2d 405, 408-09 (5th Cir. 1992), holding that a court of appeals may increase a defendant's sentence whether or not the prosecutor filed a notice of appeal, do not survive *Neztsosie*.) But the lack of a cross-appeal does not entitle Rivera to another shot at a sentence below 97 months, if the only lawful outcome on remand would be application of the statutory minimum. It is accordingly unnecessary for us to consider whether Rivera's sentencing range under the Guidelines was calculated correctly; she cannot benefit from resentencing. Nor is a remand under *Paladino* appropriate, for *Booker* does not confer on district judges any discretion to give sentences below statutory floors. Any error the district judge may have made in resolving factual disputes in order to apply the Guidelines was harmless. Cf. *United States v. Lee*, 399 F.3d 864 (7th Cir. 2005).