

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Argued May 16, 2006 Decided October 11, 2007)

Docket Nos. 05-4591-cr(L), 05-5210-cr(CON)

United States of America,

Appellee,

v.

Gerard Cavera, aka Gerry Lake and Peter Abbadessa,

Defendants-Appellants.

Before:

CARDAMONE, CALABRESI, and POOLER,
Circuit Judges.

Defendant Gerard Cavera appeals from the judgment entered August 23, 2005 in the United States District Court for the Eastern District of New York (Sifton, J.), convicting him, upon his guilty plea, of conspiring to deal in and transport firearms in violation of 18 U.S.C. § 371. Cavera was sentenced to 24 months imprisonment, 3 years supervised release, a \$60,000 fine, and a \$100 special assessment. Defendant challenges his sentence, alleging the district court erred by imposing a sentence above the advisory U.S. Sentencing Guidelines range of 12 to 18 months and in refusing to grant him a downward departure on the basis of his wife's illness. He also requests that the case be remanded to a different sentencing judge.

Affirmed in part, vacated in part, and remanded.

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Daniel A. Hochheiser, Hochheiser & Hochheiser, LLP, New York, New York, filed a brief Amicus Curiae for the United States District Court for the Eastern District of New York.

1 CARDAMONE, Circuit Judge:

2 This appeal prompts us to write further on the subject of
3 federal criminal sentencing in the aftermath of United States v.
4 Booker, 543 U.S. 220 (2005).¹ All agree that Booker removed the
5 mandatory teeth of the United States Sentencing Guidelines
6 (Guidelines) by rendering them advisory, and that Justice
7 Breyer's remedy opinion put some bite back into the Guidelines by
8 requiring courts when sentencing defendants to "consider" them.
9 See id. at 259-60. We, like our sister circuits, are still
10 putting flesh on the skeleton issue of what it means to consider
11 the Guidelines, and -- as we address specifically in this case --
12 when and under what circumstances a district court may impose a
13 non-Guidelines sentence.

14 Defendant Gerard Cavera (defendant) appeals the August 23,
15 2005 judgment of the United States District Court for the Eastern
16 District of New York (Sifton, J.) following his conviction on a
17 guilty plea to one count of conspiring to deal in and transport
18 firearms in violation of 18 U.S.C. § 371. Although the
19 recommended Guidelines range for Cavera's offense was 12 to 18
20 months imprisonment and a fine of \$3,000 to \$30,000, the district
21 court imposed a non-Guidelines sentence of 24 months

¹ Our initial opinion in this case, issued on June 6, 2007, prompted comments from several members of the Court. In an effort to address the concerns they expressed, the panel decided to withdraw the earlier filed majority opinion along with the concurring opinion and issue this new opinion in their place.

1 imprisonment, three years supervised release, a \$60,000 fine, and
2 a special assessment of \$100.

3 On appeal Cavera maintains, and the government agrees, that
4 the district court committed legal error by considering the
5 population density of New York City in imposing a non-Guidelines
6 sentence. We appointed amicus curiae counsel to brief the
7 position taken by the district court because both parties agreed
8 that the district court sentence was imposed in error. Amicus
9 counsel's exposition of the issues was helpful to us, and we note
10 his commendable candor in advising the Court that his extensive
11 research unearthed scant judicial authority supporting the
12 district court's sentence. Cavera also contends on this appeal
13 that the district court erred by refusing him a downward
14 departure based on his wife's medical condition and urges the
15 case be remanded to a different district court judge for
16 resentencing.

17 Under the circumstances of this case, the district court's
18 reliance on the simple fact of population density to impose a
19 non-Guidelines sentence constituted legal error and rendered
20 defendant's sentence unreasonable. We must therefore vacate and
21 remand the case for resentencing, although we see no reason to
22 remand it to a different sentencing judge. Finally, the district
23 court's refusal to grant Cavera a downward departure for family
24 circumstances is not appealable.

1 to one count of conspiring to deal in and transport firearms in
2 violation of 18 U.S.C. § 371.

3 C. Cavera's Sentencing

4 At sentencing the district court calculated the Guidelines
5 range for Cavera's offense to be 12 to 18 months and a fine of
6 \$3,000 to \$30,000. However, the court decided to impose a non-
7 Guidelines sentence of 24 months imprisonment, 3 years supervised
8 release, a \$60,000 fine, and a \$100 special assessment. In a 21-
9 page opinion, the sentencing court explained its rationale for
10 imposing a greater non-Guidelines sentence. Looking at factor
11 (a) (2) of 18 U.S.C. § 3553, which directs the court to consider,
12 inter alia, the seriousness of the offense and the need for
13 deterrence, it reasoned that gun trafficking in an urban
14 environment like New York City requires heavier sentences.
15 United States v. Lucania, 379 F. Supp. 2d 288, 293-96 (E.D.N.Y.
16 2005). The district judge also denied a downward departure for
17 family circumstances noting that Cavera has ample financial
18 resources and five adult children to care for his ill wife. Id.
19 at 292-93. From the resulting judgment of conviction, Cavera
20 timely appealed.

21 DISCUSSION

22 I Standard of Review

23 We review both Guidelines and non-Guidelines sentences for
24 reasonableness. United States v. Rattoballi, 452 F.3d 127, 131
25 (2d Cir. 2006). The reasonableness standard entails two
26 elements: procedural reasonableness and substantive

1 reasonableness. Id. at 131-32. To determine procedural
2 reasonableness we examine three factors: whether the district
3 court properly (a) identified the Guidelines range supported by
4 the facts found by the sentencing court, (b) treated the
5 Guidelines as advisory, and (c) considered the Guidelines
6 together with the other factors outlined in 18 U.S.C. § 3553(a).
7 Id. Substantive reasonableness depends on whether the "length of
8 the sentence is reasonable in light of the factors outlined in 18
9 U.S.C. § 3553(a)." Id. at 132.

10 Even post-Booker, we continue to review a district court's
11 interpretation of the Guidelines de novo and its findings of fact
12 for clear error. See United States v. Mejia, 461 F.3d 158, 162
13 (2d Cir. 2006). We may review a refusal to downwardly depart
14 only if the sentencing court misapprehended its authority to
15 depart "or the sentence was otherwise illegal." United States v.
16 Stinson, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam). We
17 observe finally that although under our post-Booker
18 reasonableness regime we "have declined to adopt per se rules,
19 opting instead to fashion a mosaic of reasonableness through
20 case-by-case adjudication," on appeal we view "as inherently
21 suspect a non-Guidelines sentence that rests primarily upon
22 factors that are not unique or personal to a particular
23 defendant." Rattoballi, 452 F.3d at 133 (emphasis added).

1 II The Non-Guidelines Sentence Based on
2 Population Density Is Unreasonable in this Case
3

4 Both Cavera and the government assert the district court's
5 non-Guidelines sentence is unreasonable.

6 A. In General

7 The crux of the district court's argument for Cavera's
8 above-Guidelines sentence is its belief that trafficking firearms
9 in urban environments threatens greater harm than trafficking in
10 less densely populated places. In explaining Cavera's sentence,
11 the district court makes no reference to any characteristic
12 particular to the defendant or his crime, but relies entirely on
13 circumstances common to all defendants charged with gun
14 trafficking in New York and similar large cities. In so doing,
15 the court seems to devise and employ a formula requiring the
16 length of sentences for gun trafficking to rise or fall with the
17 population density of the locality where the weapons are expected
18 to end up.²

19 We emphasize our concern that the district court's
20 demographics-based approach to sentencing runs contrary to one of
21 the primary purposes of the Guidelines: to diminish unwarranted
22 sentencing disparity. Prior to the passage of the Guidelines,
23 Congress was troubled by studies showing disparate sentences
24 imposed on federal defendants who had committed similar crimes.

² This does not mean that a court may never consider characteristics of the locality in which the weapons are expected to end up in deciding the seriousness of a particular defendant's crime and especially in determining what is necessary properly to deter that defendant. See infra note 3.

1 To deal with this problem, Congress enacted the Guidelines,
2 bringing nationwide uniformity to federal criminal sentences.
3 See Booker, 543 U.S. at 250 ("Congress' basic statutory goal [is]
4 a system that diminishes sentencing disparity");
5 Rattoballi, 452 F.3d at 133-34 ("Disparate sentences prompted the
6 passage of the Sentencing Reform Act and remain its principal
7 concern."); United States v. Florez, 447 F.3d 145, 157 (2d Cir.
8 2006). Put differently, the Guidelines aim to eliminate
9 disparities in sentences meted out by different district courts
10 to defendants who commit similar offenses. Thus, under the
11 Guidelines, a defendant who commits crime "x" in Chicago will be
12 punished, all other things being equal, similarly to a defendant
13 who commits crime "x" in Savannah. Indeed one of the § 3553(a)
14 factors -- factor (a)(6) -- provides that in determining the
15 particular sentence of a defendant, the court shall consider the
16 "need to avoid unwarranted sentence disparities among defendants
17 with similar records who have been found guilty of similar
18 conduct." 18 U.S.C. § 3553(a)(6).

19 With the above in mind, it seems plain that the district
20 court's formulaic approach threatens to undermine a primary
21 purpose of the Guidelines. The trial court's reasoning would
22 result in a return to disparate sentences across districts where
23 courts fashion sentences, not on facts unique to defendants'
24 conduct or circumstances, but solely on the urban or rural
25 character of each court's geographic jurisdiction. As the
26 government correctly points out, were we to take this reasoning

1 to its logical conclusion, manifold crimes that take place in
2 urban areas would be subject to a presumption of a higher non-
3 Guidelines sentence; and, conversely, crimes committed in rural
4 and less populated areas would be subject to a presumption of a
5 lower non-Guidelines sentence.

6 Hence, we proceed with caution to review the district
7 court's account for Cavera's sentence.

8 B. Critique of the Support Cited by the District Court
9 For Its Decision

10 1. Fast-Track Programs

11
12 The trial court believes the congressionally authorized
13 "fast-track" programs lend support to its approach. See Lucania,
14 379 F. Supp. 2d at 297. Fast-track programs, which offer a
15 defendant a reduced sentence in exchange for a waiver of certain
16 rights, started in districts along the southwest border of the
17 United States where a high incidence of illegal re-entry cases
18 severely strained local resources. The programs were authorized
19 by Congress in § 401(m) (B) of the Prosecutorial Remedies and
20 Other Tools to End the Exploitation of Children Today Act of
21 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003). See generally
22 Mejia, 461 F.3d at 160-61 (discussing history and regulation of
23 the various fast-track programs). The district court insists
24 that any disparity resulting from its consideration of New York
25 City characteristics is "at least as well justified as the
26 disparity created by these fast-track programs." Lucania, 379 F.
27 Supp. 2d at 297.

1 We do not think the existence or congressional sanction of
2 the fast-track programs is helpful to the district court's
3 position. Since the date of the decision below we have explained
4 that any disparity resulting from these programs is not
5 unwarranted. See Mejia, 461 F.3d at 163 ("Congress expressly
6 approved of fast-track programs without mandating them; Congress
7 thus necessarily decided that they do not create the unwarranted
8 sentencing disparities that it prohibited in Section
9 3553(a)(6)."). The participation of Congress in the
10 establishment and regulation of fast-track programs sharply
11 distinguishes such programs from the approach taken by the
12 district court. While fast-track programs forsake uniformity to
13 obtain other benefits, congressional participation ensures that
14 other goals of the Sentencing Reform Act, including transparency,
15 are preserved. See Michael M. O'Hear, Localization and
16 Transparency in Sentencing: Reflections on the New Early
17 Disposition Departure, 27 Hamline L. Rev. 357, 360-65, 373 (2004)
18 (noting benefits of localization, but emphasizing need for formal
19 localization mechanisms within the Guidelines to promote
20 transparency in the incorporation of local factors in
21 sentencing).

22 More fundamentally, Congress and, by proper delegation, the
23 Sentencing Commission act appropriately when they assess the
24 societal costs and benefits of punishing a category of crimes
25 prosecuted in different districts in a uniform fashion. A
26 federal court acting unilaterally is generally not in a position

1 similarly to assess societal costs and benefits. Moreover, as
2 the Supreme Court has made clear, "[i]n our system, so far at
3 least as concerns the federal powers, defining crimes and fixing
4 penalties are legislative, not judicial, functions." United
5 States v. Evans, 333 U.S. 483, 486 (1948); see United States v.
6 Castillo, 460 F.3d 337, 356 (2d Cir. 2006).

7 2. Section 3553(a)(2)

8 We recognize that the district court rooted its non-
9 Guidelines sentence in a § 3553(a) factor, namely subsection
10 (a)(2), which provides that in crafting a sentence the court
11 should impose a sentence that reflects the seriousness of the
12 offense and the need for deterrence. 18 U.S.C. § 3553(a)(2). We
13 do not mean to suggest that the consideration of sentencing
14 disparity under factor (a)(6) trumps or should be given more
15 weight than considerations under factor (a)(2). See Florez, 447
16 F.3d at 158 (noting that the weight to be given any § 3553(a)
17 factor is committed to the discretion of the sentencing court and
18 beyond appellate review). Rather, we hold simply that the
19 district court erred in its analysis under factor (a)(2) by
20 sentencing Cavera on the basis of a policy judgment concerning
21 the gravity of firearms smuggling into a heavily populated area,
22 like New York City, rather than on circumstances particular to
23 the individual defendant and his crime, see Rattoballi, 452 F.3d
24 at 133. The district court's approach effectively defines a
25 separate crime -- gun trafficking in urban environments -- and
26 fixes an above-Guidelines penalty for that crime.

1 We have cautioned the district courts against misapplying
2 their sentencing authority to make policy decisions relating to
3 an entire class of offenses. See United States v. Trupin, 475
4 F.3d 71, 76 (2d Cir. 2007) ("Sentencing policy is for Congress
5 and the Sentencing Commission, not judges."); United States v.
6 Sung Soo Park, 461 F.3d 245, 249 (2d Cir. 2006) ("[P]olicy
7 determinations concerning the relative severity of punishments
8 for particular types of offenses continue to be left to
9 Congress."); cf. United States v. Mishoe, 241 F.3d 214, 218 (2d
10 Cir. 2001) (holding, before Booker, that departures must be based
11 on individual circumstances of defendant's case rather than on
12 general rules). Recently, we outlined the statutory basis for the
13 distinction drawn between sentences applicable to categories of
14 crimes and those properly tailored by a district judge

15 This distinction between policy decisions as
16 embedded in the Guidelines and judicial
17 decisions as imposed on a case-by-case basis
18 is at work in the language of
19 § 3553(a). . . . In § 3553(a)(2), the
20 district court is instructed to consider "the
21 need for the sentence imposed to reflect the
22 seriousness of the offense," while in
23 § 3553(a)(4), the district court is
24 instructed to consider the sentencing range
25 for "the applicable category of offenses"
26 (emphasis added) as set forth in the
27 Guidelines. The differing language between
28 § 3553(a)(2) and § 3553(a)(4) reflects the
29 difference between one particular defendant's
30 crime and the large genre of offenses into
31 which it falls. Indeed, [the difference]
32 clearly indicates the Sentencing Commission
33 and the district courts have two different
34 roles with respect to the Guidelines.

35
36 Castillo, 460 F.3d at 355-56.

1 We acknowledge the courts have not drawn a neat line
2 separating proper judicial consideration of a defendant and his
3 crime from impermissible policy judgment concerning a genre of
4 offenses, and examples may be found that blur the distinction.
5 But the logic underlying Cavera's sentence presents no such
6 challenge. The district court does not purport to establish that
7 Cavera's crime was itself more harmful, but only that his crime
8 falls within a category of offenses (gun crimes in densely
9 populated areas) that the district court viewed as more serious,
10 on average, than gun crimes in less urban communities. That the
11 district court improperly injected its policy views into Cavera's
12 sentence is clear to us, not because its rationale applies to
13 other offenses in the stated genre, but because its rationale
14 depends on characteristics of that genre to determine the gravity
15 of this defendant's crime.

16 In sum, the district court based Cavera's sentence on its
17 own public policy determination and, even though post-Booker
18 courts enjoy greater discretion in sentencing, "a district court
19 cannot import its own philosophy of sentencing if it is
20 inconsistent with the § 3553(a) factors." Rattoballi, 452 F.3d
21 at 132.

22 3. The District Court's Factual Argument

23 The district court's weak support for its assessment of the
24 harmfulness of Cavera's crime cements our view that it resorted
25 to policy preferences in imposing the sentence. Although the
26 court's central factual argument -- that injury to innocent

1 bystanders is more probable in crowded environments -- is sound
2 in theory, its application to New York City is unduly
3 speculative. The City's five boroughs contain many densely
4 populated areas where the district court's reasoning might apply,
5 but they are also home to quieter neighborhoods, like Rockaway
6 Point in Queens and suburban areas of Staten Island, where it
7 would not apply. New York City is simply too large and varied a
8 community to draw meaningful conclusions as to the potential
9 impact of stray bullets that may someday originate from a
10 trafficked firearm.

11 III Rationale for Vacating Sentence in This Case

12 We do not decide that consideration by a sentencing court of
13 population density or similar community-based factors is
14 impermissible in all cases. See United States v. Anati, 457 F.3d
15 233, 238 (2d Cir. 2006) (suggesting that "the special impact of
16 the offense in a particular geographical community" could be
17 relevant to sentencing).³ Nonetheless, the preceding discussion

³ For example, § 3553(a)(2)(B) requires a sentencing court to consider what sentence is necessary "to afford adequate deterrence." If a community has very strict gun laws, and it was demonstrated that the prices of illegal guns were higher there than in communities with laxer gun laws and that, as a result of the higher prices, the profits from trafficking in such guns were also higher, then it might be that penalties might also have to be greater to achieve the same level of deterrence. The district court adverted to stringent gun laws in New York. But nothing in the record demonstrated that these gun laws made the business more profitable for gun-runners. And some commentators have suggested that high prices may exist in tight control cities for reasons that do not implicate higher profits. See Philip J. Cook & Anthony A. Braga, Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets, 43 Ariz. L. Rev. 277, 297 (2001). Under the circumstances, we do not

1 suggests the circumstances under which a district court can base
2 a sentence on such factors in a manner that is both compatible
3 with the § 3553(a) factors and in keeping with its judicial role
4 will arise infrequently.

5 A heavy measure of caution is suggested also by several pre-
6 Booker decisions of our sister circuits. See United States v.
7 Barbontin, 907 F.2d 1494, 1498-99 (5th Cir. 1990) (reversing
8 sentence where district court considered local standards as to
9 what constituted a "significant" amount of cocaine); United
10 States v. Thomas, 906 F.2d 323, 327-28 (7th Cir. 1990) (rejecting
11 sentence based on degree of violence in city and state where
12 offense was committed); United States v. Aguilar-Pena, 887 F.2d
13 347, 351-53 (1st Cir. 1989) (reversing upward departure based on
14 high incidence of crime and insufficient law enforcement in
15 specific location and community standards); see also United
16 States v. Hadaway, 998 F.2d 917, 920-21 (11th Cir. 1993)
17 (rejecting downward departure based on finding that many local
18 residents committed the crime in question and would perceive
19 sentence as too high, while allowing judges to consider community
20 factors in sentencing within Guidelines). Each of these cases
21 held that a sentencing court could not depart from the Guidelines
22 on the basis of community-specific considerations.

23 These courts expressed concern that allowing departures
24 based on such considerations would undermine the congressional

believe that an appropriate basis for a higher sentence was
established in the instant case.

1 goal of reducing sentencing disparity. See, e.g., Aguilar-Pena,
2 887 F.2d at 352-53 (stating that any regime where equally
3 blameworthy criminal received different sentences depending on
4 where crime occurred would foster the wide variations Congress
5 sought to eliminate). The decisions emphasized in addition that
6 departures should be based on case-specific considerations rather
7 than generalized disagreements with the Guidelines' treatment of
8 whole categories of offenses. See, e.g., Hadaway, 998 F.2d at
9 921 ("Downward departures based on community standards . . .
10 would apply generally to every violation of a specific federal
11 statute by any person in a particular community."); Barbontin,
12 907 F.2d at 1499 (noting that judicial dissatisfaction, "no
13 matter how steeped in real-world wisdom," is an untenable ground
14 for departures). We share each of these concerns and find them
15 pertinent today as before Booker.

16 Of course, we have recognized that, after Booker, "the
17 Guidelines limitations on the use of factors to permit departures
18 are no more binding on sentencing judges than the calculated
19 Guidelines ranges themselves." Jones v. United States, 460 F.3d
20 191, 194 (2d Cir. 2006). Accordingly, district judges are
21 afforded wide latitude to impose non-Guidelines sentences based
22 on case-specific applications of the § 3553(a) factors. For
23 example, in Jones, the district court had imposed a non-
24 Guidelines sentence that was 50 percent below the bottom of the
25 Guidelines range based on the judge's "gut feeling" about the
26 defendant and findings on his personal circumstances. Id. In

1 affirming the sentence we observed that a district judge may
2 consider the defendant's background together with the judge's
3 "own sense of what is a fair and just sentence under all the
4 circumstances," thereby fulfilling his or her "historic role."
5 Id. at 195-96.

6 Read together, our cases addressing sentences outside the
7 Guidelines range make clear that Booker requires the district
8 courts to tailor sentences to reflect an application of the
9 § 3553(a) factors. See, e.g., id.; United States v. Crosby, 397
10 F.3d 103, 114 (2d Cir. 2005) (emphasizing our expectation that
11 post-Booker sentences will achieve more "individualized
12 justice"). But such individualized sentencing does not authorize
13 a district court to inject into sentencing decisions its policy
14 preferences with respect to the category of offense in question
15 or the kind of community in which it is perpetrated, see, e.g.,
16 Castillo, 460 F.3d at 357 ("[N]othing in Booker suggests that it
17 is the task of district court judges to pronounce broad policy
18 choices rather than specific sentences based on the specific
19 facts of a case.").

20 Cavera's sentence is procedurally and substantively
21 unreasonable. The district court committed procedural error by
22 relying on its own policy judgment concerning all gun trafficking
23 offenses in New York and comparable cities in fixing Cavera's
24 sentence. See Castillo, 460 F.3d at 354 ("[T]he question . . .
25 is whether the . . . imposition of a sentence that rejected the
26 100:1 ratio purely on generalized policy grounds . . . satisfies

1 [the] standard of procedural reasonableness."). As the resulting
2 non-Guidelines sentence has not been explained by reference to
3 any properly considered § 3553(a) factor, we also deem Cavera's
4 sentence substantively unreasonable. Cf. Rattoballi, 452 F.3d at
5 134 ("A non-Guidelines sentence that a district court imposes in
6 reliance on factors incompatible with the Commission's policy
7 statements may be deemed substantively unreasonable in the
8 absence of persuasive explanation as to why the sentence actually
9 comports with the § 3553(a) factors.").

10 Because we hold that the district court's reliance on
11 improper factors renders Cavera's sentence unreasonable, we do
12 not address his contention that the district court erred by
13 failing to afford him adequate notice of its intent to impose an
14 enhanced non-Guidelines sentence.

15 IV Cavera's Other Arguments Rejected

16 We turn now to the other two errors raised by defendant with
17 regard to his sentence, both of which are without merit.

18 A. Refusal to Grant Downward Departure

19 We may not review Cavera's challenge to the district court's
20 refusal to grant a downward departure because the record suggests
21 neither that the district court misapprehended its authority to
22 depart nor that it imposed an illegal sentence. See Stinson, 465
23 F.3d at 114.

24 B. Remand to Same Judge

25 Cavera next argues that should he prevail on appeal, the
26 case should be remanded to a different judge. We grant such

1 remands only in the rarest instances. Even when a judge has
2 erroneous views or made incorrect findings, resentencing before a
3 different judge is appropriate only when the judge's fairness is
4 seriously in doubt. United States v. Bradley, 812 F.2d 774, 782
5 n.9 (2d Cir. 1987). With the exception of personal bias, we
6 examine the following three principal factors to determine if a
7 case should be remanded to a different judge: whether (1) "the
8 original judge would reasonably be expected upon remand to have
9 substantial difficulty in putting out of his or her mind
10 previously-expressed views or findings determined to be erroneous
11 or based on evidence that must be rejected," (2) "reassignment is
12 advisable to preserve the appearance of justice," and (3)
13 "reassignment would entail waste and duplication out of
14 proportion to any gain in preserving the appearance of fairness."
15 United States v. Awadallah, 436 F.3d 125, 135 (2d Cir. 2006).
16 With these factors in mind, we decline to remand to a different
17 judge. There is no suggestion that the district judge is biased,
18 would ignore our instructions on remand, would have difficulty
19 putting out of his mind his previously expressed views or
20 findings determined to be erroneous, or would be otherwise unfair
21 in resentencing Cavera. We therefore remand this case to the
22 same district court judge.

23 CONCLUSION

24 For the foregoing reasons we vacate Cavera's non-Guidelines
25 sentence and remand to the district court for resentencing in

1 accordance with this opinion. We affirm the district court's
2 refusal to grant Cavera a downward departure.