

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States v. Jordan

895 F.2d 512 (9th Cir.) · Decided September 12, 1989

SUMMARY

The Ninth Circuit held that, under the pre-1985 version of Federal Rule of Criminal Procedure 35, a district court correcting an illegal sentence may correct only the illegal portion and may not change concurrent sentences to consecutive sentences to preserve the originally intended aggregate term. The court rejected the defendants’ claim that resentencing would violate double jeopardy because the challenged sentences were illegal and lacked an expectation of finality. The judgment was reversed and remanded for resentencing with concurrent terms of no more than five years each.

CASE DETAILS

|                       |                                                                                                                                                 |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States Court of Appeals for the Ninth Circuit                                                                                            |
| WRITING FOR THE COURT | David R. Thompson; Alarcon; Brunetti                                                                                                            |
| JURISDICTION          | Federal                                                                                                                                         |
| DECIDED               | September 12, 1989                                                                                                                              |
| DISPOSITION           | reversed_and_remanded                                                                                                                           |
| PROCEDURAL POSTURE    | Defendants appealed the district court's order correcting their original sentences under former Federal Rule of Criminal Procedure 35(a).       |
| STANDARD OF REVIEW    | The Ninth Circuit reviewed the district court's authority under former Federal Rule of Criminal Procedure 35(a) to correct an illegal sentence. |
| PRECEDENTIAL VALUE    | published and precedential                                                                                                                      |
| PARTIES               | Marcel Jordan, Mark Meng v. United States                                                                                                       |

TOPICS

- sentencing
- criminal procedure
- appellate procedure
- double jeopardy
- appellate jurisdiction

PRACTICE AREAS

- criminal law
- criminal sentencing
- appellate procedure

QUESTIONS PRESENTED

1. Whether a district court correcting an illegal sentence under former Federal Rule of Criminal Procedure 35(a) may alter a lawful concurrent-sentence provision to impose consecutive sentences.
2. Whether the defendants' Double Jeopardy Clause argument barred resentencing to terms longer than the two-year terms imposed in the district court's correction order.

## HOLDINGS

1. Under former Rule 35(a), a district court may correct only the illegal portion of an illegal sentence; it may not change lawful concurrent terms into consecutive terms in order to preserve the original aggregate sentence.
2. The Double Jeopardy Clause did not bar resentencing Jordan and Meng to concurrent terms of no more than five years each because they could not reasonably expect finality in illegal sentences that they had consistently challenged.
3. The case had to be remanded for resentencing with the new sentences restructured as concurrent terms of no more than five years each, rather than under a broad mandate allowing the district court to recreate the original aggregate term.

## KEY QUOTATIONS

*“Section 2106 plainly gives the court of appeals, not the district court, the authority to determine whether resentencing is appropriate.” (515)*

*“There can be no expectation of finality in sentences that are illegal and that were under challenge by the government from the moment the district court judges suggested the sentences they proposed to impose.” (516)*

## FACTUAL BACKGROUND

Jordan and Meng were convicted of multiple felonies, including nineteen mail-fraud counts. On May 21, 1987, the district court imposed twelve-year concurrent sentences on each mail-fraud count, although the statutory maximum for mail fraud was five years. On the defendants' Rule 35(a) motions, the district court reduced the terms to two years on six counts but ordered those terms to run consecutively, resulting in the same twelve-year aggregate imprisonment term.

## PROCEDURAL HISTORY

Jordan and Meng were convicted of multiple felonies, including nineteen counts of mail fraud, and received twelve-year concurrent sentences on each mail-fraud count. Because the statutory maximum for mail fraud was five years, the defendants moved under former Rule 35(a) to correct the illegal sentences by reducing each count to five years while preserving concurrency. The district court instead imposed two-year sentences on six counts to run consecutively, again producing an aggregate twelve-year term. The Ninth Circuit reversed and remanded.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

Resentence Jordan and Meng with concurrent terms of no more than five years each on the mail-fraud convictions; the district court may not use the remand to impose consecutive terms that recreate the original twelve-year aggregate sentence.

## CASES CITED

- Kennedy v. United States, 330 F.2d 26, 27 (9th Cir. 1964)
- United States v. Lewis, 862 F.2d 748, 750 (9th Cir. 1988)
- United States v. Minor, 846 F.2d 1184, 1187-89 (9th Cir. 1988)
- United States v. Clutterbuck, 445 F.2d 839, 840 (9th Cir.), cert. denied, 404 U.S. 858 (1971)
- United States v. Carter, 704 F.2d 1063, 1064 (9th Cir. 1983)
- United States v. DiFrancesco, 449 U.S. 117 (1980)
- United States v. Ford, 632 F.2d 1354, 1380 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981)
- United States v. Lopez, 706 F.2d 108, 109-10 (2d Cir. 1983) (per curiam)
- United States v. Jenkins, 884 F.2d 433, 440-41 (9th Cir. 1989)
- United States v. Edmonson, 792 F.2d 1492, 1496-97 (9th Cir. 1986), cert. denied, 479 U.S. 1037 (1987)
- United States v. Arrellano-Rios, 799 F.2d 520, 524 (9th Cir. 1986)

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