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United States Court of Appeals,
Ninth Circuit.

United States of America, Plaintiff–Appellee,
v.
Jesse D. Kaplan; Daniel James Strycharske,
Defendants–Appellants.

Nos. 15-30213
|
15-30225
|
Argued and Submitted August 29, 2016, Seattle, Washington
|
Filed October 7, 2016

Synopsis
Background: Two defendants entered negotiated guilty pleas, in the United States District Court for the Western District of Washington, James L. Robart, J., to endangering human life while manufacturing controlled substances, maintaining drug involved premises, and manufacturing hash oil and marijuana, and were sentenced to 36 months' imprisonment and were ordered to pay $2,771,929 in restitution, relating to death, personal injuries, and property destruction arising from explosion in apartment building. Defendants appealed.

Holdings: The Court of Appeals, Ezra, Senior District Judge, held that:

[1] as a matter of first impression, replacement value can be an appropriate measure of value for destroyed property, for purposes of restitution under Mandatory Victims Restitution Act (MVRA), and

[2] using replacement value for destroyed personal belongings was not an abuse of discretion.

Affirmed.

West Headnotes (20)

[1] **Criminal Law**
Review De Novo
Criminal Law
Sentencing

The Court of Appeals reviews de novo the legality of a restitution order and reviews for clear error the factual findings that support the order.

Cases that cite this headnote

[2] **Sentencing and Punishment**
Measure of valuation

"Fair market value" of property, for purposes of restitution, refers to the price that a seller is willing to accept and a buyer is willing to pay on the open market.

Cases that cite this headnote

[3] **Sentencing and Punishment**
Measure of valuation

"Replacement value" of property, for purposes of restitution, refers to the amount of money necessary to replace the property.

Cases that cite this headnote

[4] **Sentencing and Punishment**
Purpose

The purpose of the Mandatory Victims Restitution Act (MVRA) is to fully compensate

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victims for their losses, and to restore victims to their original state prior to the criminal act. 18 U.S.C.A. § 3663A.

Cases that cite this headnote

[5] **Sentencing and Punishment**
Nature and purpose

The ordinary meaning of "restitution" is restoring someone to a position he occupied before a particular event.

Cases that cite this headnote

[6] **Sentencing and Punishment**
Measure of valuation

While fair market value generally provides the best measure to ensure restitution under the Mandatory Victims Restitution Act (MVRA) in the full amount of the victim's loss, replacement value is an appropriate measure of destroyed property where the fair market value is either difficult to determine or would otherwise be an inadequate or inferior measure of the value. 18 U.S.C.A. § 3663A(b)(1)(B).

Cases that cite this headnote

[7] **Sentencing and Punishment**
Measure of valuation

When determining restitution under the Mandatory Victims Restitution Act (MVRA), fair market value will almost always be an accurate measure of the value of a fungible commodity with a viable market, like precious metals, coffee, lumber, currency, wheat, or even marijuana. 18 U.S.C.A. § 3663A(b)(1)(B).

Cases that cite this headnote

[8] **Sentencing and Punishment**
Measure of valuation

While it is within the District Court's discretion to determine the proper method of calculating the value of property when ordering restitution under the Mandatory Victims Restitution Act (MVRA), the method chosen must comport with the congressional intent to make the victim whole, and accordingly, it would be an abuse of discretion for a District Court to issue a restitution award that makes a victim more than whole, such as by awarding a windfall. 18 U.S.C.A. § 3663A(b)(1)(B).

Cases that cite this headnote

[9] **Criminal Law**
Sentencing

The district court's determination of the actual value of property, when ordering restitution under the Mandatory Victims Restitution Act (MVRA), is a question of fact and should be reviewed for clear error. 18 U.S.C.A. § 3663A.

Cases that cite this headnote

[10] **Sentencing and Punishment**
Measure of valuation

The sentencing judge is in the unique position to assess the evidence and determine the nature and value of the property for which restitution will be paid under the Mandatory Victims Restitution Act (MVRA), and where property is personal or unique, or neither fungible nor easily sold on a viable market, District Courts should be permitted the discretion to make victims

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whole by determining an appropriate measure of value under the circumstances of the case before them. 18 U.S.C.A. § 3663A(b)(1)(B).

Cases that cite this headnote

[11] **Sentencing and Punishment**
Measure of valuation

Using replacement value, rather than fair market value, to calculate the value of destroyed personal belongings such as clothes, furniture, and home appliances, was not an abuse of discretion, when ordering defendants to pay restitution under Mandatory Victims Restitution Act (MVRA) for personal belongings of apartment tenants, which were destroyed in explosion arising from defendants' illegal manufacturing of hash oil in their apartment; fair market value would not have adequately captured destroyed items' intangible, and perhaps sentimental, value to victims. 18 U.S.C.A. § 3663A(b)(1)(B); Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401(a)(1), (b)(1)(D), 406, 416(a)(1), (b), 417, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(D), 846, 856(a)(1), (b), 858.

Cases that cite this headnote

[12] **Sentencing and Punishment**
Requisites and sufficiency

Presentence investigation reports (PSR) for two defendants expressly indicated that an aggravating circumstance might warrant upward departure under Sentencing Guidelines, and thus, no additional notice from District Court was required, for sentencing for crimes relating to defendants' illegal manufacturing of hash oil, which caused explosion at apartment building; PSR for each defendant stated that death, serious bodily injury, and property destruction were not contemplated in advisory Guideline range. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401(a)(1), (b)(1)(D), 406, 416(a)(1), (b), 417, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(D), 846, 856(a)(1), (b), 858; U.S.S.G. § 5K2.0(a)(1)(A); Fed. R. Crim. P. 32(h).

Cases that cite this headnote

[13] **Criminal Law**
Application of guidelines
Sentencing and Punishment
Operation and effect of guidelines in general

Post-*Booker* departures under Sentencing Guidelines may not form the basis of a procedural error, and instead, to extent that District Court has framed its analysis in terms of a departure, the Court of Appeals will treat such so-called departures as an exercise of post-*Booker* discretion to sentence a defendant outside of applicable Guidelines range, and that sentence is subject to unitary review for reasonableness. U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[14] **Criminal Law**
Sentencing

The substantive reasonableness of a criminal sentence is reviewed for abuse of discretion.

Cases that cite this headnote

[15] **Controlled Substances**
Extent of punishment
Sentencing and Punishment
Degree of harm caused by offense in general
Sentencing and Punishment
Harm, injury, and death

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Sentence of 36 months' imprisonment for crimes relating to manufacturing hash oil in apartment building, which sentence was above Sentencing Guidelines range of 24 to 30 months, was substantively reasonable; explosion at apartment building caused several million dollars in property damage, a fatality, permanent and disabling and significant injuries, and interruption in lives of a number of people, and while one of defendant's crimes had as an element the creation of substantial risk of harm to human life, creation of risk was not the same as actual harm. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401(a)(1), (b)(1)(D), 406, 416(a)(1), (b), 417, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(D), 846, 856(a)(1), (b), 858.

Cases that cite this headnote

[16] **Criminal Law**
Sentencing

A sentencing court's findings of fact are reviewed for clear error.

Cases that cite this headnote

[17] **Criminal Law**
Sentencing

The reasonableness of a sentence is reviewed for abuse of discretion.

Cases that cite this headnote

[18] **Sentencing and Punishment**
Objections and disposition thereof

Defendant's sentence for crimes relating to manufacturing hash oil in apartment building was not based on clearly erroneous factual finding that defendant's apartment contained 64 cans of butane before explosion; District Court made a statement in the form of a question, which defendant ultimately answered and corrected, and District Court did not make a factual finding that apartment contained 64 cans of butane, nor did it rely on quantity of butane containers when imposing sentence. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401(a)(1), (b)(1)(D), 406, 416(a)(1), (b), 417, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(D), 846, 856(a)(1), (b), 858.

Cases that cite this headnote

[19] **Sentencing and Punishment**
Endangering public or bystanders

District court's factual finding, that defendant acted with wanton recklessness by having butane canisters actively involved around open flames, was not clearly erroneous, at sentencing for crimes relating to manufacturing hash oil in apartment building, at which building an explosion occurred; while factual basis for defendant's plea agreement did not describe the existence of an open flame, the fact that butane gas was "ignited" strongly implied that a spark or a flame caused the explosion. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401(a)(1), (b)(1)(D), 406, 416(a)(1), (b), 417, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(D), 846, 856(a)(1), (b), 858.

Cases that cite this headnote

[20] **Sentencing and Punishment**
Remarks and conduct of court

District Court's "Bering Sea" analogy, at sentencing for illegally manufacturing hash oil in apartment building, leading to an explosion, was not extraneous or inflammatory; after

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defendant argued that his sentence should reflect an imprisonment range analogous to a drunk driving conviction, District Court suggested that a closer analogy was sending a boat to the Bering Sea, welding the doors shut to increase the profitability of the voyage, and having people die because the boat sunk, and the analogy's reflection of an individual's prioritization of profit at expense of safety of others found support in the record. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401(a)(1), (b)(1)(D), 406, 416(a)(1), (b), 417, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(D), 846, 856(a)(1), (b), 858.

Cases that cite this headnote

Appellants Jesse Kaplan ("Kaplan") and Daniel Strycharske ("Strycharske") appeal their 36–month sentence of imprisonment and final judgment of restitution in the amount of $2,771,929 on the ground that the district court erred by calculating the restitution award using replacement value instead of fair market value. We have jurisdiction under 28 U.S.C. § 1291.

We hold that district courts have discretion in calculating restitution, and that while fair market value generally provides the best measure to ensure restitution in the full amount of the victim's loss, "replacement value" is an appropriate measure of destroyed property under 18 U.S.C. § 3663A(b)(1)(B) where the fair market value is either difficult to determine or would otherwise be an inadequate or inferior measure of the value. We affirm the sentences on all other grounds.

Appeal from the United States District Court for the Western District of Washington, James L. Robart, District Judge, Presiding, D.C. Nos. 2:14–cr–00232–JLR–3, 2:14–cr–00232–JLR–2

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Before: Michael Daly Hawkins and M. Margaret McKeown, Circuit Judges, and David A. Ezra,* District Judge.

OPINION

EZRA, Senior District Judge:

***1**

BACKGROUND

This case arises out of Appellants' quest to manufacture homemade hash oil and the tragic consequences of that quest. In the summer of 2013, Kaplan and Strycharske met David Shultz ("Shultz") at a marijuana festival where Shultz held himself out as knowledgeable about the hash oil manufacturing process. Appellants expressed interest in producing their own hash oil, so they invited Schultz to move into their apartment. Subsequently, Schultz and Appellants started making hash oil in the apartment. On November 5, 2013, butane fumes given off during the hash oil manufacturing process ignited and exploded. The blast blew out the apartment's exterior wall and engulfed significant portions of the building complex in flames. As a result of the explosion, six victims suffered severe injuries, and one victim later died due to complications arising out of her injuries.

***2** On July 30, 2014, a grand jury returned a three-count indictment against the Appellants. Count 1 charged Endangering Human Life While Manufacturing Controlled Substances, in violation of 21 U.S.C. § 858 and 18 U.S.C. § 2; Count 2 charged Maintaining a Drug Involved Premises, in violation of 21 U.S.C. § 856(a)(1) and (b), and 18 U.S.C. § 2; and Count 3 charged Manufacturing Hash Oil and Marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), 846, and 18 U.S.C. § 2. The Appellants pled guilty and signed materially identical plea agreements.

At Kaplan's sentencing, the district court calculated his total offense level to be 17 and his criminal history category to be I. The resulting Guidelines range called for a sentence between 24 to 30 months' imprisonment. After calculating Kaplan's Guidelines range, the district court considered the § 3553(a) factors, but found that "an upward departure ... is warranted under sentencing guideline ["USSG"] 5K2.0 [rather than a variance under the § 3553(a) factors], as the aggravating circumstances of the crime are not fully contemplated by the guidelines." Accordingly, the district court sentenced Kaplan to 36 months' imprisonment. Likewise, at Strycharske's sentencing the district court calculated his Guidelines range to be 24 to 30 months' imprisonment but sentenced him to 36 months' imprisonment by way of an upward departure pursuant to USSG § 5K2.0(a)(1)(A).

On October 15, 2015, the district court awarded restitution in the amount of $2,771,929. On appeal, Kaplan and Strycharske argue that the proper restitution amount is $2,731,929. They argue that the $40,000 difference reflects the district court's improper use of replacement value in calculating the value of certain items including clothing, furniture, and household appliances.

DISCUSSION

A. *The Restitution Award*

How to measure the value of destroyed property when calculating a restitution award is a matter of first impression in this circuit.

[1]We review de novo the legality of a restitution order and review for clear error the factual findings that support the order. *United States v. Luis*, 765 F.3d 1061, 1065 (9th Cir. 2014). If the restitution order "is within the bounds of the statutory framework, a restitution order is reviewed for abuse of discretion." *Id.* (internal quotation marks and citation omitted). Whether the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, authorizes a district court to measure property "value" using its replacement value goes to the legality of the restitution order itself and is a question of law; thus the standard of review is de novo.

[2] [3]"Fair market value" refers to "the price that a seller is willing to accept and a buyer is willing to pay on the open market." *Fair Market Value*, Black's Law Dictionary (10th ed. 2014); *United States v. Simmonds*, 235 F.3d 826, 830 (3d Cir. 2000) (" 'Market value' refers to the actual price that the [property] in question would have commanded on the open market on the date of destruction."). " 'Replacement value,' in contrast, refers to the amount of money necessary to replace the [property]." *Simmonds*, 235 F.3d at 830. In most cases, the replacement value is greater than the fair market value due to depreciation in value over time of many types of property. *Id.* at 830–31.

[4] [5]The MVRA requires a district court to order a defendant to make restitution to the victim of certain offenses. 18 U.S.C. § 3663A(a)(1). In situations where the return of property is "impossible," a district court shall order a defendant to "pay an amount equal to the greater of the value of the property on the date of the damage, loss, or destruction[,] or the value of the property on the date of sentencing, less [any offsets]." 18 U.S.C. § 3663A(b)(1)(B)(i)(I)-(II). However, the statute is silent about *how* to value property. *United States v. Boccagna*, 450 F.3d 107, 114 (2d Cir. 2006). What is clear, however, is that legislative history and case law demonstrates that the purpose of the MVRA is to fully compensate victims for their losses, and to restore victims to their original state prior to the criminal act. S. Rep. No. 104–179, at 12–13 (1996) *reprinted in* 1996 U.S.C.C.A.N. 924; *United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004) ("[W]e are presented with a statute[,] the primary goal and overarching goal of which is to make victims of crime *whole*, to *fully* compensate these victims.") (internal quotation marks and citation omitted). Indeed, the Supreme Court has stated "that the ordinary meaning of 'restitution' is restoring someone to a position he occupied before a particular event." *Hughey v. United States*, 495 U.S. 411, 416, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990). Guided by the remedial purposes underlying the MVRA, other circuits which have addressed this question have granted district courts a degree of flexibility in calculating the value of property when constructing an appropriate restitution award.

***3** For example, the Third Circuit concluded that a district court did not abuse its discretion in calculating the value of the victims' furniture destroyed by a fire under § 3663A using "replacement value" rather than its "actual value." *Simmonds*, 235 F.3d at 832. The *Simmonds* court explained that "[w]hile there is no indication that the destroyed furniture in this case was 'unique,' furniture often has a personal value to its owners that cannot be captured or accurately estimated by simply determining

the market value of the furniture." *Id.* The Third Circuit held that "when evaluating personal items of furniture in one's residence, we find that replacement value may be an appropriate measure of 'value' under § 3663A(b)(1). In these circumstances, the market value or cash value is an inadequate or inferior measure of 'value.' " *Id.*

The Eleventh Circuit affirmed a district court's use of replacement value in determining the value of a burned-down church. *United States v. Shugart*, 176 F.3d 1373, 1376 (11th Cir. 1999). The *Shugart* court held that " 'value,' as § 3663A uses that term, contemplates a restitution order based on replacement cost where actual cash value is unavailable or unreliable. Whether actual cash value is unavailable or unreliable is an issue of fact, and a district court's decision to use replacement cost is a matter of discretion." *Id.* at 1375. The Eleventh Circuit explained that "[f]or fungible commodities, value is easy to determine: it's the actual cash value, or fair market value, of the item." *Id.* However, "[a]lthough fair market value will often be an accurate measure of the value of property, it will not always be so. Where actual cash value is difficult to ascertain—because an item is unique, or because there is not a broad and active market for it—replacement cost may be a better measure of value." *Id.*

Two other circuit courts have explicitly adopted this approach. The Eighth Circuit held that

> in certain situations replacement value is the best measure of a victim's actual loss, particularly where the lost property is difficult to value. Conversely, in situations where the lost or damaged property is a fungible commodity with a viable market, we conclude replacement value is likely not appropriate because 'fair market value will ... provide[ ] the most reliable measure of ... the full loss.

United States v. Frazier, 651 F.3d 899, 908 (8th Cir. 2011) (remanding because district court did not make a factual finding as to whether the destroyed home was a unique asset with intangible value or whether it lacked a viable market (quoting *Boccagna*, 450 F.3d at 115) (alteration in original)). The Second Circuit has chosen to "decline to hold that, as a matter of law, district courts may only use fair market value in making the property calculations contemplated by 18 U.S.C. § 3663A(b)(1)(B)." *Boccagna*, 450 F.3d at 117. Two additional circuits have implicitly noted, but not directly held, that the MVRA permits multiple methods of calculating restitution. *United States v. Wilfong*, 551 F.3d 1182, 1184 n.2 (10th Cir. 2008) ("We do not hold that the cost to the victim is the only reasonable form of valuation. In some cases, replacement cost may be more appropriate."); *United States v. Gunselman*, 643 Fed.Appx. 348, 356 (5th Cir. 2016) (noting that "other circuits have sanctioned the use of replacement cost when that measure appears best suited to make victims whole"). No circuit court has held differently.

[6] [7] [8] [9]This Court now joins our sister circuits in concluding that fair market value generally provides the best measure to ensure restitution in the "full amount" of the victim's loss, but that "replacement value" is an appropriate measure of destroyed property under § 3663A(b)(1)(B) where the fair market value is either difficult to determine or would otherwise be an inadequate or inferior measure of the value necessary to make the victim whole. Fair market value will almost always be an accurate measure of the value of a fungible commodity with a viable market, like precious metals, coffee, lumber, currency, wheat, or even marijuana. *See Fungible Goods*, Black's Law Dictionary (10th ed. 2014) (using coffee and grain as examples); *Gonzales v. Raich*, 545 U.S. 1, 18, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (explaining that marijuana is "a fungible commodity for which there is an established, albeit illegal, interstate market"); *Fungible*, Webster's II New Riverside Univ. Dictionary (1984) (using money and grain as examples). It is within the district court's discretion to determine the proper method of calculating the value of such property when ordering restitution pursuant to 18 U.S.C. § 3663A. However, the method chosen must comport with the congressional intent to make the victim whole. Accordingly, it would be an abuse of discretion for a district court to issue a restitution award that makes a victim more than whole, such as by awarding a windfall. Finally, the district court's determination of the actual value is a question of fact and should be reviewed for clear error. *See Shugart*, 176 F.3d at 1375.

***4** [10]This holding comports with the position on an analogous legal question: how district courts are to measure "loss" for calculating total offense levels at sentencing. *United States v. Pemberton*, 904 F.2d 515, 516–17 (9th Cir. 1990). While "calculating loss under the guidelines is not necessarily identical to loss calculation for purposes of restitution," *United States v. Hunter*, 618 F.3d 1062, 1065 (9th Cir. 2010), the two calculations are often based on similar figures. The application notes to USSG § 2B1.1, which dictates offense level enhancements for financial loss, states "[t]he sentencing judge is in a unique position to assess the evidence and

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estimate the loss based upon that evidence." USSG § 2B1.1 cmt. n.3(C). The application note further explains that in estimating loss, the sentencing court should use "the fair market value of the property unlawfully taken, copied, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property." *Id.* § 2B1.1 cmt. n.3(C)(i). For example, in *Pemberton*, this court affirmed a district court's valuation of a drawing based on a "contract price" instead of its fair market value in calculating "loss" at sentencing. 904 F.2d at 517. The court explained,

> [t]he district court acted within its discretion by valuing the drawings as it did. Being unique, the drawings were not fungible items for which there was a broad and active market. In the absence of such a market, which would have supplied a readily ascertainable price, the court acted reasonably in relying upon the [contract].

Id. Similarly, the sentencing judge is in the unique position to assess the evidence and determine the nature and value of the property for which restitution will be paid. Where property is personal or unique, or neither fungible nor easily sold on a viable market, district courts should be permitted the discretion to make victims whole by determining an appropriate measure of value under the circumstances of the case before them.

[11]Applying the holding to this case, it is clear that the district court did not abuse its discretion in using replacement value to calculate the value of destroyed personal belongings like clothes, furniture, and home appliances. The district court correctly focused its attention at the restitution hearing on making the victims whole, in furtherance of the congressional purpose of the MVRA. The district court found that the various pieces of property at issue were "very personal types of items," and that awarding the fair market value to purchase someone else's used personal items would not make the victim whole. Accordingly, the district court entered restitution in the amount of $2,771,929, which reflected the use of replacement value.[1] The district court's decision reflects this court's view that replacement value is preferred where fair market value would provide an "inadequate or inferior measure of the value necessary to make the victim whole." Since the destroyed items were personal in nature, fair market value would not have adequately captured the destroyed items' intangible, and perhaps sentimental, value to the victims.[2] Accordingly, the district court did not abuse its discretion in using replacement value to calculate restitution.

B. *The Individual Sentences of Imprisonment*

Both Appellants contend the district court committed a procedural error by failing to comply with Federal Rule of Criminal Procedure 32(h). Because Kaplan and Strycharske failed to object at sentencing to the adequacy of notice, the standard of review is plain error. *See United States v. Evans–Martinez*, 530 F.3d 1164, 1167 (9th Cir. 2008).

***5** Federal Rule of Criminal Procedure 32(h) states:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Fed. R. Crim. P. 32(h). "Under the plain language of the Rule 32(h) ... [t]he district court itself is required to give notice of its intent to depart only when the PSR and the parties' prehearing submissions fail to identify the ground for departure." *United States v. Cruz–Perez*, 567 F.3d 1142, 1147 (9th Cir. 2009) (internal quotation marks and citation omitted).

[12]In this case, the PSRs filed for Kaplan and Strycharske expressly indicated that factors may warrant a departure pursuant to USSG § 5K2.0(a)(1)(A). Specifically, the PSRs state that "death, serious bodily injury, and property destruction was not contemplated in the advisory guideline range." Accordingly, the district court was not required to give additional notice because the PSR specifically put Kaplan and Strycharske on notice that the court may apply an upward departure. Their contention that the district court upwardly departed on alternative grounds is without merit. The record reflects that the district court articulated reasons to upward vary pursuant to the § 3553(a) factors, but these reasons did not form the

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basis for its upward departure. Accordingly, since the district court upwardly departed only on grounds stated in the PSR, the district court did not commit plain error.

[13] [14]Kaplan further argues that the district court erred by applying an upward departure pursuant to USSG § 5K2.0. In this circuit, post-*Booker* departures may not form the basis of a procedural error. *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006). Instead, "[t]o the extent that a district court has framed its analysis in terms of a ... departure, we will treat such so-called departures as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range [, and that sentence] is subject to a unitary review for reasonableness." *Id.* The substantive reasonableness of a criminal sentence is reviewed for abuse of discretion. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc).

[15]Here, Kaplan's sentence of 36 months imprisonment is substantively reasonable. The district court noted that the criminal conduct resulted "in several million dollars in property damage, a fatality, permanent and disabling and significant injuries, and interruption in the lives of a number of people who did nothing wrong other than to live in an apartment building that three individuals were misusing." As noted above, 21 U.S.C. § 858, the statute under which Kaplan pled guilty, includes as an element of the offense the "creat[ion of] a substantial risk of harm to human life." The creation of a risk is not the same thing as *actual harm*. Consequently, the sentence of 36 months is reasonable because Kaplan's criminal conduct resulted in significantly more than just the "creat[ion of] a substantial risk of harm to human life." 21 U.S.C. § 858. Instead, his conduct resulted in actual harm in the form of death and permanent injuries to a class of victims, and a sentence above the applicable range was necessary to account for behavior not considered by the statute or the Guidelines.

C. *Strycharske's Individual Issues*

***6** [16] [17]Strycharske argues that the district court made clearly erroneous findings of fact when it stated the apartment contained 64 cans of butane and that an open flame was involved. Strycharske also argues that the district court made a highly inflammatory analogy that prejudiced his sentencing. Finally, Strycharske argues that his sentence is substantively unreasonable. This Court reviews findings of fact for clear error and the reasonableness of a sentence for abuse of discretion. *United States v. Flores*, 802 F.3d 1028, 1047 (9th Cir. 2015); *United States v. Autery*, 555 F.3d 864, 871 (9th Cir. 2009).

[18] [19]It is undisputed that the apartment did not contain 64 cans of butane; yet, the district court did not make a factual finding to the contrary, nor rely on the quantity of butane containers when imposing the sentence. Instead, the district court made the statement in the phrase of a question, one that Strycharske ultimately answered and corrected. Nor did the district court commit clear error in finding that Strycharske acted with "wanton recklessness [by] having butane canisters actively involved around open flames." While the factual basis of the plea agreement does not describe the existence of an "open flame," the fact that the butane gas was "ignited" strongly implies that a spark or a flame caused the explosion. Therefore, the district court did not commit clear error because it was not illogical, implausible, or without support in inferences drawn from the record that an "open flame" existed near the butane canisters at the moment of explosion.

[20]Further, the district judge's "Bering Sea" analogy was neither extraneous nor inflammatory. At sentencing, Strycharske argued that his sentence should reflect an imprisonment range analogous to a drunk driving conviction. In response, the district court stated:

> I would suggest to you that closer analogy is when you've got a boat that you send up to the Bering Sea, and you weld the doors shut because it's going to increase the profitability of your voyage, and people die because it sinks. That's what I think this compares to.

The analogy's reflection of an individual's prioritization of profit at the expense of the safety of others finds support in the record; Strycharske admitted in his sentencing memorandum filed with the district court that he, Schultz, and Kaplan "discussed going into business together" to make hash oil. It was ultimately the pursuit of that business interest that led to the explosion. Finally, the "Bering Sea" analogy did not infect Strycharske's sentencing to the extent that it resulted in an unfair process or undermined the district court's application of the § 3553(a) factors. To the contrary, the district court's articulation of the § 3553(a) factors and ultimate upward departure pursuant to USSG § 5K2.0 demonstrates that

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the judge made "an individualized assessment," *Carty*, 520 F.3d at 994, that led the district court to impose a sentence of 36 months' imprisonment.

Finally, the district court did not abuse its discretion in sentencing Strycharske to an unreasonable imprisonment. The district court correctly calculated the applicable range, which called for imprisonment between 24 to 30 months. The district court fully articulated its reasons for an upward variance using the § 3553(a) factors. Specifically, the court noted that "what moves the court is the loss of life, the permanently-disabling and significant injuries that people received ... therefore, I take the nature and circumstances of the offense to be highly significant and serious." Despite giving detailed reasons to justify an above the guideline range sentence pursuant to the § 3553(a) factors, the district ultimately applied an upward departure "based upon the fact that the applicable sentencing guidelines did not consider the extreme harm done to the victims, including the total destruction of property, the permanent debilitating injuries, and the loss of life as a result of injuries received in the incident." Given these circumstances, the district court did not abuse its discretion in sentencing Strycharske to 36 months' imprisonment, six months above the applicable range.

***7** For these reasons, we affirm the district court's sentences of imprisonment and award of restitution.

AFFIRMED.

All Citations

--- F.3d ----, 2016 WL 5859856

Footnotes

* The Honorable David Alan Ezra, Senior United States District Judge for the District of Hawaii, sitting by designation.

1 Only a small portion, approximately $40,000, of the restitution award involved the personal property items at issue on appeal.

2 The Court notes that in addition to the difficulty in capturing the intangible and sentimental value of these types of possessions, that even if there is *some* type of Internet-based market for used property, the value varies widely depending on the seller, and it can be simply impracticable for the district court to ascertain which used piece of property most closely approximates the item lost by the victim.

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