FEDERAL SENTENCING AND POST-CONVICTION News

ISSUE 21, FALL 2006

Booker Appellate Update: Reasonableness Review

By James H. Feldman, Jr.

It's now been over a year and a half since the Supreme Court ended mandatory guideline sentencing. By removing two sections from the Sentencing Reform Act, *United States v. Booker*[1] created a system in which the guideline range is but one of seven factors a court must "consider" before imposing sentence. The Sentencing Reform Act always required a judge to select a sentence which is "sufficient, but not greater than necessary" to achieve the goals of sentencing laid out in § 3553(a)(2). But before *Booker,* that consideration was generally limited to determining where in the guideline range to impose sentence. After *Booker,* a judge must impose the lowest sentence that is "minimally sufficient" to meet these goals – whether that sentence is one of probation, time served, the mandatory minimum sentence (should one apply), the statutory maximum, or somewhere in between. See *United States v. Ferguson,* 456F.3d 660, 665 (6th Cir. 2006) ("The district court's overall task remains that of imposing" a minimally sufficient sentence). *Booker* does not mean that judges are now free to impose any sentences they want. While *Booker* has increased a sentencing court's discretion, that discretion is not without limits. Sentences can still be appealed. But now they are reviewed on appeal for "reasonableness."

How does a Court of Appeals review a sentence for "reasonableness"? The first factor it looks at is whether the district court followed the sentencing procedure mandated by 18 U.S.C. § 3553(a). See, *e.g.*, *United States v. Crosby,* 397 F.3d 103, 114 (2d Cir. 2005).

Because a court must "consider" the guideline range before imposing sentence, it must first calculate it. All Courts of Appeals agree that if the district court makes a guideline calculation error, the resulting sentence is not "reasonable."[2] Courts of Appeals continue to review guideline issues *de novo*.[3] While courts must also "consider" the six other factors listed in § 3553(a) before imposing sentence, it has been rare for an appellate court to find a sentence within the guideline range to be unreasonable.[4] More disturbing is that few above-guideline sentences have been found to be unreasonable,[5] while many below-guideline sentences have been reversed.[6]

The guideline range may be only one of seven factors which a sentencing court must "consider" before imposing sentence, but most courts have treated it as the most important consideration. The Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits have held that a guideline sentence is "presumptively reasonable."[7] The Third has held that guideline sentences are "more likely" to be reasonable.[8] The Ninth and Eleventh Circuits, however, have made it clear that, while a sentencing court must "consider" the guideline range, it must not "presume" the appropriate sentence to be within that range.[9] The Eleventh Circuit has held "that a district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence." *United States v. Hunt,* 2006 WL 2285715 (11th Cir. Aug. 10, 2006).

Those remaining factors are: the "nature and circumstances of the offense and the history and

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FEDERAL SENTENCING AND POST-CONVICTION NEWS

Published Quarterly

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characteristics of the defendant," 18 U.S.C. § 3553(a)(1), the purposes of sentencing themselves, *id.* § 3553(a)(2), "the kinds of sentences available," *id.* § 3553(a)(3), the policy statements issued by the Sentencing Commission, such as those related to departures, *id.* § 3553(a)(5), "the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(6), and "the need to provide restitution to any victims of the offense." *Id.* § 3553(a)(7).

While *Booker* has not been the unalloyed blessing that defendants had hoped for, competent and well-prepared defense counsel can still make all the difference when there is a basis for a sentence lower than the guideline range – even in circuits that presume the reasonableness of a guideline sentence. *United States v. Vonner,* 452 F.3d 560 (6th Cir. 2006), illustrates the point. In that case, defense counsel made well-reasoned arguments for a lower non-guideline sentence based on the "nature and circumstances of the offense and the history and characteristics of the defendant." *Id.* § 3553(a)(1). Specifically, counsel submitted evidence of "(1)Vonner's traumatic childhood; (2) the impairment to Vonner as a result of his long history of alcohol and drug abuse; (3) circumstances surrounding Vonner's involvement in selling narcotics; (4) the conditions of pretrial confinement; (5) Vonner's cooperation and assistance to the government." *Id.* 562. Although Vonner provided the government with useful information, the prosecution did not file a departure motion. Rather than explain why these mitigating circumstances, either individually or in combination with each other, did not warrant a lower sentence, the sentencing judge ritualistically intoned that he had taken all the § 3553(a) factors into consideration, and then imposed a sentence in the middle of the guideline range. The Court of Appeals held that, despite the presumption of reasonableness, the district court's failure to explain why it had rejected the defendant's specific arguments itself made the sentence "unreasonable":

> Even assuming … that the record indicates that the district court considered all of Vonner's arguments, there is nothing in the record that explains why the district court rejected those arguments. … The district court here merely provided a perfunctory explanation that it believed 117 months imprisonment was a reasonable sentence in light of the Section 3553(a) factors. But there is no explanation as to why the district court discredited Vonner's arguments for a lower sentence. Such a failure to provide adequate explanation is a violation of our decision in [*United States v.*] *Richardson*[, 437 F.3d 550 (6th Cir. 2006)]. Of additional concern, it leaves Vonner guessing as to why the district court rejected his claims and imposed the sentence that it chose. Moreover, it provides a record so woefully insufficient that it makes it nearly impossible for us to engage in meaningful appellate review. … Even if we were to suspect that Vonner's sentence was unduly harsh, we would have no intelligent means of reviewing the district court's sentencing decision because the record does not inform us why the district court reached the decision it did, what factors it relied upon, or its reasons for rejecting Vonner's claim. Based on the district court's lack of adequate explanation for its sentencing decision, we find that the sentence is unreasonable.

452 F.3d at 569 (footnotes and some citations omitted).

In short, present the court with detailed arguments which are tailored to the § 3553(a) factors. If the judge doesn't specifically explain why he is rejecting them, appeal.

[1] 543 U.S. 220 (2005).

[2] See, *e.g., United States v. Cantrell,* 433 F.3d 1269 (9th Cir. 2006); *United States v. Williams,* 435 F.3d 1350 (11th Cir. 2006); *United States v. Price,* 409 F.3d 436 (D.C. Cir. 2005).

[3] See, *e.g., United States v. Robinson,* 433 F.3d 1 (1st Cir. 2005); *United States v. Powell,* 404 F.3d 678 (2d Cir. 20005).

[4] As of March 2006, there was only one such case, according to the Sentencing Commission's *Booker Report*, which can be found at: **http://www.ussc.gov/booker_report/Booker_Report.pdf**

[5] As of March 2006, there were two such cases, according to the Sentencing Commission's *Booker Report*.

[6] As of March 2006, there were 15 such cases, according to the Sentencing Commission's *Booker Report*.

[7] *United States v. Green,* 436 F.3d 449 (4th Cir. 2006); *United States v. Alonzo,* 435 F.3d 551 (5th Cir. 2006); *United States v. Williams,* 436 F.3d 706 (6th Cir. 2006); *United States v. Mykytiuk,* 415 F.3d 606 (7th Cir. 2005); *United States v. Lincoln,* 413 F.3d 716 (8th Cir. 2005); *United States v. Kristl,* 437 F.3d 1050 (10th Cir. 2005).

[8] *United States v. Cooper,* 437 F.3d 324 (3d Cir. 2006).

[9] *United States v. Zavala,* 443 F.3d 1165 (9th Cir. 2006). *United States v. Hunt,* 2006 WL 2285715 (11th Cir. Aug. 10, 2006).

NEWS

FROM THE BUREAU OF PRISONS

The Bureau has recently released a new program statement (5100.08) on classification, designation, and redesignation procedures which is available by **clicking here**.

The Bureau has also recently issued a memorandum on its medical care level classification system under which inmates will be designated to institutions based, in part, on their health status and medical needs. **Click here** to view this memorandum.

Favorable New Cases

By James H. Feldman, Jr.

- *United States v. Staten,* 450 F.3d 384 (9th Cir. 2006) (clear and convincing evidence needed to support 15-level advisory guideline adjustment).

- *United States v. Gray,* 453 F.3d 1323 (11th Cir. 2006) (sentence of less than half the bottom of guideline range upheld as reasonable in child pornography case based on defendant age, prior minimal criminal record, and medical condition).

- *United States v. Medina-Argueta,* 454 F.3d 479 (5th Cir. 2006) (reversing vulnerable victim adjustment in alien smuggling case where adjustment was based on victim's status as alien (already taken into account by offense guideline) and conditions of confinement (not a characteristic of the victim)).

- *United States v. Krutsinger,* 449 F.3d 827 (8th Cir. 2006) (non-guideline sentence reasonable to avoid unwarranted disparity with similarly situated co-defendant who was given a low sentence prior to government's development of evidence which would have justified higher offense level).

- *United States v. Feingold*, 454 F.3d 1001(9th Cir. 2006) (two-level safety valve reduction applies in non-mandatory minimum cases).

- *United States v. Sanchez-Juarez,* 446 F.3d 1109 (10th Cir. 2006) (guideline sentence unreasonable where district court failed to address non-frivolous § 3553(a) argument for lower non-guideline sentence).

- *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006) (extent of higher non-guideline sentence unreasonable where government failed to provide evidence to support its assertion that defendant was part of nation-wide pick-pocketing ring).

- *United States v. Baker,* 445 F.3d 987 (8th Cir. 2006) (upholding lower non-guideline sentence in child pornography case based on defendant's youth, lack of criminal history, religious background, and history of employment and higher education).

- *United States v. Evan-Martinez,* 448 F.3d 1163 (9th Cir. 2006) (post-*Booker,* defendant still entitled to notice under Fed.R.Crim.P. 32(h) of potential for sentence above guideline range).

- *United States v. Chenowith*, 2006 WL 2256480 (5th Cir. August 08, 2006) (civil rights restoration precludes prior felony conviction from serving as predicate offense for felon-in-possession charge).

- *Levine v. Apker,* 455 F.3d 71 (2d Cir. 2006) (joining the Third and Eighth Circuits in holding that BOP overstepped authority in adopting rule limiting halfway house placement to lesser of last 10% of an inmate's sentence or six months; BOP to consider only factors listed in 18 U.S.C. § 3621(b) when transferring inmate to a CCC or any "available penal or correctional facility").

Practice Tips

By Alan Ellis

If the law is against you, argue the facts; if the facts are against you, argue the law; if both the facts and the law are against you, take the prosecutor and probation officer out to lunch.

On the day of sentencing, you want in your "fondest dreams" to stand up, have an alternative to imprisonment, and hear the prosecutor and probation officer tell the judge that they agree with your proposal because it is fair, reasonable, and an equitable administration of justice.

The way to achieve this is early preparation. If your client has a mental and/or substance abuse problem that contributed to the commission of the offense and from which he or she either (1) still suffers or (2) has experienced a miraculous recovery and you can document this with highly credible experts (such as the shrink the government typically uses), you are well on your way to getting both probation and the government to concur in what you have to say, which is your client should not be punished as severely as someone of sound mind who committed a crime out of greed and avarice.

On the other hand, if your client is not "fortunate" enough to have a significant mental disorder that contributed to the commission of the offense, try to get letters from family, friends, and community leaders that provide details about the good things the client has done for other people and the community. Such letters can often be just as helpful as a good psychiatric report – especially if they are good enough to quote from in your sentencing memorandum. I have a memo for clients to distribute to supporters which contains tips on how to write character letters. I get the letters in advance, throw out the bad ones, and quote liberally from a few of the really good ones. Sometimes I go so far as to ask a writer to expand on why my client is so terrific. I share these letters with probation and the prosecutor, and attach them to my sentencing memorandum. Occasionally, I will even ask a writer to address the court at sentencing.

Federal Sentencing and Post-Conviction News is published four times a year by The Law Offices of Alan Ellis. Subscriptions are provided free of charge to interested readers. To subscribe, you can write us at 495 Miller Ave., Mill Valley, CA 94941 or AELaw1@aol.com, or click here and type in the word "Subscribe" in the subject line.

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