FEDERAL SENTENCING AND POST-CONVICTION News

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FAVORABLE NEW CASES

By James H. Feldman, Jr.[1]

● When a defendant has raised a *Booker* objection at sentencing, resentencing is required—unless, on direct appeal, the government can demonstrate that the error was harmless. *See* Fed.R.Crim.P. 52(a). The Fifth Circuit recently demonstrated how difficult that can be for the government. In *United States v. Woods,* 440 F.3d 255 (5th Cir. 2006), the Court held that the fact that the district court imposed sentence at the top of the correctly-calculated guideline range and then imposed that sentence to run consecutively to the sentence in an unrelated offense did not prove that the preserved *Booker* error was harmless. See also *United States v. Cain,* 433 F.3d 1345 (11th Cir. 2005) (same).

● The Supreme Court held in *Booker* that federal sentences would now be reviewed on appeal for "reasonableness." Courts are beginning to give meaning to that standard of review. In its initial foray into the issue, the Sixth Circuit held that a sentence within the guideline range is presumptively "reasonable." *United States v. Williams,* 436 F.3d 706 (6th Cir. 2006). The Sixth Circuit has now held that *Williams* does not mean either that a sentence outside the guideline range will be presumed unreasonable, or that a sentence within the range will be presumed reasonable in the absence of evidence in the record that the sentencing court both a) considered all of the factors listed in 18 U.S.C. § 3553(a), and b) followed the statutory mandate to impose a sentence "sufficient, but not greater than necessary" to meet the goals of sentencing as stated in § 3553(a)(2). See *United States v. Foreman,* 436 F.3d 638 (2006). Other circuits reject the idea of any presumption of reasonableness. *See, e.g., United States v. Jimenez-Beltre,* 440 F.3d 514 (1st Cir. 2006) (en banc); *United States v. Zavala,* 443 F.3d 1165 (9th Cir. 2006); *United States v. Fernandez,* 443 F.3d 19 (2d Cir. 2006).

● Prior to *Booker*'s dismantling of the mandatory guideline system, the Courts of Appeals held they had no authority to review a district court's refusal to depart downward. Although the Sixth Circuit held in *United States v. Puckett,* 422 F.3d 340 (6th Cir. 2005), that even after *Booker* it still had no authority to review refusals to "depart," that holding does not preclude appeals of sentences within a correctly-calculated guideline range. In *United States v. McBride,* 434 F.3d 470 (6th Cir. 2006), the Court held that while it could not review a district court's refusal to "depart," it did have jurisdiction to determine whether the sentence within the guideline range was "reasonable." No circuit has yet bought the government's argument to the contrary. At least one circuit holds that a sentence below the guideline range can now be reviewed for reasonableness on a defendant's appeal. See *United States v. Giaquinto,* 441 F.3d 195 (3d Cir. 2006). See also *United States v. Menyweather,* 431 F.3d 692 (9th Cir. 2006), which affirmed downward departures for diminished mental capacity and extraordinary family circumstance, but noted that even if factors did not justify a "departure," the sentence below the guideline range was nevertheless "reasonable" based on the district court's explanation of why these aspects of the defendant's "history and characteristics," 18 U.S.C. § 3553(a)(1), made the sentence it imposed "sufficient, but not greater than necessary" to achieve the goals of sentencing enunciated in *id.* § 3553(a)(2).

● Prior to *Booker,* plea agreements sometimes provided that the defendant agreed to be sentenced under the guidelines. The Sixth Circuit recently held that such a provision did not amount to a waiver of a *Booker* issue on appeal. *United States v. Alford,* 436 F.3d 677 (6th Cir. 2006).

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● Rule 35(a) of the Federal Rules of Criminal Procedure provides that, within seven days after sentencing, a "court may correct a sentence that resulted from arithmetical, technical, or other clear error." This rule's extremely limited reach can sometimes protect defendants from overzealous prosecutors who are unhappy with a sentence. The Sixth Circuit recently provided an example. In *United States v. Arroyo,* 434 F.3d 835 (6th Cir. 2006), after the district court imposed a 41-month sentence after the government filed a departure motion based on the defendant's cooperation, the government filed a Rule 35(a) motion, which alleged that the sentence resulted from "clear error," because the district court departed from the guideline range that would have applied had there been no mandatory minimum sentence—rather than from the 10-year mandatory minimum that would have applied without the departure motion. The district court agreed and raised the defendant's sentence to 51 months. The Court of Appeals reversed. Once the government filed its departure motion, the extent of departure was committed to the district court's discretion. Since a 41-month sentence was within that discretion, no "clear error" supported the Rule 35(a) motion.

● The guidelines provide for a four-level upward adjustment in theft or fraud cases involving 50 or more victims. USSG § 2B1.1(b)(2)(B). Before that adjustment may be applied, however, the government must prove that there were at least 50 victims—even in cases in which it would be reasonable to assume there were that many victims. *United States v. Arnaout,* 431 F.3d 994 (7th Cir. 2005), illustrates the point. In that case, the defendant directed the operations of a charity that was secretly diverting funds to support armed conflict overseas. Out of the $17,000,000 the charity received in donations, the defendant illegally diverted $300,000. While more than 50 donors contributed the $17 million, the government provided no evidence that at least 50 people donated the illegally diverted $300,000.

● Plea agreements often have provisions that limit a defendant's right to appeal. Some bar any appeals; others permit appeals under certain circumstances. One common provision bars appeals unless the sentencing court departs upward. How a particular provision of a plea agreement is phrased can make all the difference. *United States v. Harris,* 434 F.3d 767 (5th Cir. 2005), involved a plea agreement in which the defendant waived his right to appeal, but "reserve[d] the right to appeal a sentence in excess of the guidelines." Although the government argued that the language barred any appeal absent an upward departure, the Court of Appeals disagreed. The Court noted that a plea agreement that waived appeals of sentences within the statutory maximum would not bar an appeal that challenged whether the sentence was in fact within the statutory maximum. The Court therefore reasoned that a plea agreement that waived appeals within the guideline range would permit an appeal that challenged whether the sentence was in fact within the properly calculated guideline range.

● Although USSG § 3C1.1 provides a two-level increase for obstructing justice, Application Note 5 excludes the following conduct which might otherwise be thought of as obstructive: (a) providing a false name at the time of arrest (unless "such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense"), (b) false unsworn statements to law enforcement officers (unless such statements significantly obstruct the investigation or prosecution of the instant offense), (c) providing misleading information not amounting to falsehoods, (d) avoiding or fleeing from arrest, and (e) lying to probation or pretrial services about drug use while on pretrial release. The Second Circuit held last year that these exceptions apply even when a defendant flees from arrest and manages to avoid capture for a year—even where he sometimes used a false name during that year, and also gained weight and grew facial hair. The Court held that the length of time between the initial flight and eventual capture does not justify application of the adjustment. Neither does the use of the false names or change in appearance, unless the government can show that they actually impeded authorities. In that case, the Court noted that there was no evidence that anything the defendant did threw authorities off track. *United States v. Bliss,*430 F.3d 640 (2d Cir. 2005).

● Although the selection of the offense guideline is governed by the offense of conviction, almost every other guideline decision is determined by "relevant conduct." USSG § 1B1.3. Even though the concept of "relevant conduct" is critical to an understanding of the guidelines, many prosecutors seem to think that anything logically related to the offense of conviction counts as "relevant conduct." Fortunately, not every bit of prejudicial evidence counts as relevant conduct. A case out of the Eleventh Circuit illustrates why it is important to subject evidence to analysis under the precise terms of § 1B1.3. *United States v. Williams,* 431 F.3d 767 (11th Cir. 2005), involved a charge of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The guideline for that offense, USSG § 2K2.1, contains a cross reference directing the court to apply other guidelines "[i]f the defendant used or possessed any firearm or ammunition in connection with … another offense." § 2K2.1(c). Four days before he was arrested on the federal charge, the defendant in Williams was arrested for assault using a firearm. Although the government never proved that the firearm the defendant pled guilty to possessing was the same one he used in the assault, the district court applied the cross reference to apply the guideline for aggravated assault. The Court of Appeals reversed. The only basis suggested by the government for finding the aggravated assault to be "relevant conduct" was that it "was part of the same course of conduct or common scheme or plan as the offense of conviction." § 1B1.3(a)(2). But this provision of the relevant conduct guideline applies "solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts." *Id.* As the Court noted, multiple counts of assault do not group under § 3D1.2(d). Since the assault was not relevant conduct with respect to the possession for this reason, the Court remanded for resentencing, at which the district was to determine whether the assault was relevant conduct under any other provision of § 1B1.3.

● The guideline offense level in fraud cases is determined in large part by the extent of the "loss" suffered by victims. *See* USSG § 2B1.1. Frauds in which victims receive something of

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value for their money—although not as much as they may have been led to believe—provide particularly difficult loss calculation challenges to courts. A recent Fifth Circuit case illustrates the point in securities fraud cases. In *United States v. Olis,* 429 F.3d 540 (5th Cir. 2005), stock prices dropped after investors learned that the defendants had "cooked the books" of a publicly-traded corporation. The district court attributed the entire drop to the fraud; the Court of Appeals disagreed. The Fifth Circuit held that when securities fraud involves stock that would have had value in the absence of fraud, the district court's loss calculation must discount market forces that may have also contributed to the stock's decline in value.

[1] Mr. Feldman is a Senior Associate of The Law Offices of Alan Ellis in its Philadelphia office, and is Editor of *Federal Sentencing and Post-Conviction News*.

NEWS

FROM THE BUREAU OF PRISONS

By Alan Ellis and J. Michael Henderson [2]

Centralized BOP designations are being phased in this year. The responsibility for designation of offenders has now been officially transferred to the new centralized location in Grand Prairie, Texas. It is anticipated that all designations will be centralized by May 2006. The address, phone number, and fax number for the new centralized designation site is:

Centralized Designations
U.S. Armed Forces Reserve Complex
346 Marine Force Drive
Grand Prairie, TX 75051
Phone: 972-352-4200 (general)
972-352-4441 (designations)
Fax: 972-352-4395

The new designations center has six senior designators who share responsibility. They are not assigned by geographic location. Rather, their responsibilities are divided between initial designation, disciplinary transfers, and close supervision transfers. Designators will share responsibility for routine institutional transfers, Public Safety Factor reviews, and management variable reviews. In addition to the designators, sentence computation technicians will also be housed at this location. All of the regions have transferred designation responsibility to the centralized designation location with the exception of the Mid-Atlantic Region, which should take place by May.

Initial scoring for designation purposes previously handled by Community Corrections Management (CCM) offices throughout the country—each having responsibility for a particular judicial district—will be done at the new centralized designations complex as well. This is currently being phased in. Some delays are being experienced in initial designations, so counsel is advised to ask the court for a longer self-reporting date than would be ordinarily granted.

On a related subject, within the Third Circuit, the Bureau of Prisons—pursuant to *Wootall v. Federal Bureau of Prisons,* 432 F.3d 235 (3rd Cir. 2005)—is now considering accepting, and in some cases is following, judicial recommendations for service of sentence up to a year for direct commitment to a CCC (halfway house). This affects only sentences imposed and recommendations made in Pennsylvania, New Jersey, Delaware, and the Virgin Islands.

[2] Mr. Ellis is the firm's founder, a past president of NACDL, and a nationally-recognized expert in federal sentencing, BOP matters, and post-conviction remedies. Mr. Henderson is a consultant to the firm on BOP matters, co-author of the Federal Prison Guidebook, and a former BOP official.

PRACTICE TIPS

By Alan Ellis

Don't forget the two-level downward departure for "good lawyering." A judge's job is often tedious. I know. In my earlier days, I clerked for two federal judges. Most of the time was spent listening to mostly boring lawyers, so it was often a relief to retire into chambers and read the newspaper.

Be creative. If you are able to make your case both compelling and entertaining, your client may be rewarded. Even dull paperwork can be made more interesting. For instance, you might want to integrate some marketing language into documents, such as a sentencing memorandum. Remember that in many documents, particularly the sentencing memorandum, you are being a salesperson. You are selling your client to the judge.

If you can tell a compelling and compassionate story that explains why the defendant did what he or she did, a judge may be persuaded to be less severe in sentencing. I have often found it useful to have my sentencing memoranda edited by people who are not lawyers, but rather who are storytellers—marketing and advertising professionals, for instance. I sometimes use the services of screenwriters, who are masters of storytelling. We often get bogged down in legal language and fail to take advantage of language that persuades.

So when preparing your next sentencing memorandum, consider having someone—it doesn't have to be a Hollywood screenwriter—who is not a lawyer help you out.

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