Commentary

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Renewed Opportunities for Sentencing Advocacy

I SPENT FOUR days in New Orleans, three of which were spent at the annual U.S. Sentencing Commission Conference. I came back not just five pounds heavier after eating the best food in America but also enlightened about some of the recent changes in this area of the law—changes that provide new opportunities for sentencing advocacy. Panelists at the conference—including two federal district judges from Massachusetts, Patti Saris and Nancy Gertner, along with other federal appellate and trial court judges, Sentencing Commission members, defense attorneys, federal public defenders, and others—discussed new developments in federal sentencing that should result in renewed opportunities for advocacy that have been unavailable to practitioners for many years.

The new tools derive from the following changes:

- the 2010 amendments to the guidelines, which allow trial courts more leeway in taking into account individual characteristics and case-specific circumstances in devising sentences appropriate to achieving the goals of sentencing in the first place; and
- the May 19, 2010, memorandum to federal prosecutors from Attorney General Eric Holder, which similarly allows prosecutors to take into account individual circumstances unique to a particular defendant when the prosecutors recommend a sentence.

The upshot for criminal defense attorneys practicing in federal court is that what had previously been practically unavailable during the mandatory sentencing guidelines regime in effect between 1987 and 2005—that is, opportunities to argue for and obtain a sentence that is not just based on a numerical calculation but may also take into account the unique circumstances of the crime and the defendant—is now encouraged.

The 2010 amendments to the sentencing guidelines took effect in November 2010 and, according to Section 1B1.1: Application Instructions, are in part in response to the Supreme Court's decision in *Booker v. United States,* 543 U.S. 220 (2005), and its progeny, making the guidelines advisory only rather than mandatory. Chapter 5, Part H: Specific Offender Characteristics, for example, has now been amended to specifically allow the sentencing court to consider four individual factors previously forbidden (as "not ordinarily relevant") from consideration under the guidelines: (1) age; (2) mental and emotional conditions; (3) physical condition, including drug or alcohol dependence or abuse and/or gambling addiction; and (4) military service. In an apparent attempt to make the guidelines more relevant in a post-*Booker* world, this amendment thus would allow the sentencing court to consider under the guidelines factors that courts have been directed to consider for the last five years under 18 U.S.C. § 3553(a).

In light of this amendment, defense counsel should employ a three-pronged attack at sentencing. First, and often forgotten, is a challenge to the calculation of the applicable sentencing range provided in the guidelines. Calculating the appropriate sentence according to the guidelines sentence is often fraught with mistakes and/or miscalculations. Several of the hypothetical cases on which probation officers, defense lawyers, and prosecutors attending the conference were asked to vote in an attempt to decide the correct range typified the errors that can be made. A guidelines consultant proves especially useful in this area.

Second, defense attorneys should move for departures from the applicable guidelines range where they are warranted and should not rely solely on arguments for variances under § 3553(a). The 2010 amendment directing courts to now consider departures based on age, mental and emotional conditions, physical condition, and military service provides defense attorneys with more to argue in the realm of departures before getting to arguments in favor of a variant sentence.

And finally, of course, defense counsel must argue for variances under § 3553(a) where appropriate—which is to say, in most cases. As the amended commentary to § 1B1.1 states, although a departure is still a "guidelines" sentence since it is a sentence "imposed under the framework set out in the Guidelines," a variant sentence is a sentence that is outside the guidelines framework. Although the concepts are separate, knowing the judge's preferences regarding departures versus variances is important, because some judges prefer to address one over the other—not both—at sentencing.

This trifurcated approach is confirmed in the newly amended Application Instructions to § 1B1.1, which state that the district court should first determine the correct guidelines range employing the usual combination of factors relating to the defendant's offense level (specific offense characteristics, role in the offense adjustments, and so forth) and criminal

history category. The guidelines then direct the sentencing court to consider Parts H and K of Chapter 5 to determine whether any departures are applicable. Only then should the court consider the applicable factors under § 3553(a) in determining whether a variant sentence is appropriate.

Although not new by any means, preparing the client for allocution at sentencing has taken on increasing importance when counsel is arguing that the individual circumstances of the client and the case call for a sentencing departure and/or a variant sentence. Judges at the conference agreed that allocution could be critical for these reasons, and panelists confirmed the importance of assisting clients in the preparation of their statements, having them rehearse their statements, and emphasizing the importance of sticking to the script, so to speak. In a related situation, letters from the defendant's family, employer, co-worker, Alcoholics Anonymous sponsor, and so forth—when prepared and offered appropriately—now have added potential to affect sentencing in ways that they did not prior to *Booker* and the 2010 amendments.

It is important to note that the guidelines were also amended this year to expand the availability of alternatives to incarceration (such as intermittent confinement, community confinement, or home confinement) in cases in which such sentences "may be appropriate to accomplish a specific treatment purpose." The amendments expand Zones B and C of the Sentencing Table presented in Chapter 5 to increase the pool of defendants eligible for these alternatives to imprisonment. This is an area where judges are particularly receptive to resourceful approaches at sentencing, because studies and experience have shown that offenders whose sentences fall within this range have shown a lower incidence of recidivism when they receive sentences that do not involve imprisonment and include provisions for drug and alcohol counseling, for example. Judge Saris also noted that judges are receptive to creative approaches to conditions of supervised release for similar reasons—that is, it is in the interest of the courts, the defendants, and the public to find specific conditions that will result in rehabilitation, reduced rates of recidivism, and increased public safety as a result.

The other new tool available to defense attorneys and sentencing consultants comes courtesy of a memorandum from Attorney General Eric Holder to all federal prosecutors on May 19, 2010, which set forth a new department policy on charging and sentencing. Holder's memorandum, the result of a year-long internal review of sentencing and corrections policies, repeals two prior memos issued by former Deputy Attorney General James Comey as well as the charging and sentencing memo of 2003 issued by then Attorney General John Ashcroft. The 2010 memo is itself a long overdue response from the Justice Department to the sea change in federal sentencing brought about by the *Booker* decision—a change heretofore seemingly ignored by federal prosecutors who, based on the Comey and Ashcroft directives, routinely sought sentences within the calculated guidelines range, as if the case law following *Booker* explicating the now advisory nature of the guidelines did not exist.

In contrast to the prior lockstep approach to sentencing, Holder's memo uses the term "individualized assessment" four times in acknowledging that not all cases—and certainly not all criminal defendants committing similar crimes—are alike. The approach directed by the memo no longer encourages prosecutors to seek sentences within the calculated guidelines range "in all but extraordinary cases." Instead, prosecutors are now directed that, even though they "should generally continue to advocate for a sentence within [the calculated guidelines] range," the now advisory nature of the guidelines requires that "advocacy at sentencing—like charging decisions and plea agreements—must also follow from an individualized assessment of the facts and circumstances of each particular case." Attorney General Holder simply stated that equal justice depends on individualized justice, and smart law enforcement demands it.

For sentencing purposes at least, the real import of this change in direction from the Department of Justice may be that individual assistant U.S. attorneys are now empowered to take into account circumstances in a given case that may require "individualized justice" in order to achieve the stated goal of "equal justice." Time will tell, but the directive issued by Holder's memo to front-line prosecutors would seem to encourage defense counsel to call upon prosecutors to employ their newly found increased flexibility in approaching sentences. Persuading the prosecutor that a client's case is atypical enough that a sentence within the guidelines would actually result in an injustice should be easier with the Holder memo as a backdrop. The language in the memo itself states that unwarranted disparities "can also result, however, from a failure to analyze carefully and distinguish the specific facts and circumstances of each particular case." Prosecutors who hold to the previous approach risk losing credibility with district judges who are aware that the government is no longer required to seek a guidelines sentence "in all but extraordinary cases."

Finally, it is important to acknowledge that these developments do not portend a return to the "Wild West" of sentencing that existed before the guidelines were issued. The guidelines are today what they always should have been—guiding principles on which the prosecutors, defense counsel, and the sentencing court rely in arguing for, and fashioning, a sentence that accomplishes the purposes of providing a sentence "sufficient, but not greater than necessary," to punish the individual defendant appropriately and does so in a way that does not result in "unwarranted disparities" in the sentences received by similarly situated criminal defendants in the various federal districts.

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That said, as Judge Gertner stated during one panel at the Sentencing Commission Conference, the purpose of the sentencing guidelines, both before and after *Booker*, was not to avoid all disparities among the various district courts in sentences for defendants convicted of similar crimes and conduct but, rather, to avoid unwarranted disparities. The 2010 amendments to the sentencing guidelines and Attorney General Holder's memorandum both appear to recognize this aspect, and in so doing, provide defense attorneys and sentencing consultants with more room to argue than they have had in years. **TFL**

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U.S.C. § 1500 barred the Court of Federal Claims from hearing the case, because the same claim was already before the D.C. District Court. The Supreme Court's decision will determine the extent to which parallel claims must be related before 28 U.S.C. § 1500 bars jurisdiction in the Court of Federal Claims. Full text is available at topics.law.cornell.edu/supct/cert/09-846. **TFL**

Prepared by L. Sheldon Clark and Benjamin Rhode. Edited by Catherine Suh.

Williamson v. Mazda Motor of America (08-1314)

Appealed from the California Court of Appeals, Fourth Appellate District, Division Three (Oct. 22, 2008)
Oral argument: Nov. 3, 2010

Delbert Williamson sued Mazda Motor of America following the death of his wife in a car accident while she was riding in the couple's Mazda MPV minivan. Williamson claimed that Mazda was liable under state tort law for installing lap-only seatbelts—as opposed to lap-and-shoulder seatbelts—in the rear aisle seat, where his wife was seated during the crash. Mazda argues that Williamson's state law claim is pre-empted by a federal regulation granting manufacturers the choice between lap-only and lap-and-shoulder seatbelts in rear aisle seats. The Supreme Court's decision in this case will address the extent of pre-emption of state law claims by federal regulations. Full text is available at topics.law.cornell.edu/supct/cert/08-1314. **TFL**

Prepared by Kelly Halford and Eric Schulman. Edited by Chris Maier.