Legal Times
WEEK OF APRIL 9, 2007 • VOL. XXX, NO. 15
ALM

Hard Hits

Upward departures from the Sentencing Guidelines seem immune from scrutiny when national security is invoked.

BY A. JEFF IFRAH

Despite new freedom in sentencing criminals, federal district courts are mostly staying within the U.S. Sentencing Guidelines—with one significant exception.

That exception is national security. For defendants in these cases, the news is grim: Upward departures based on national-security concerns have not only been upheld in every case but have also resulted in sentences that exceed the guidelines by as much as 333 percent.

And these extremely high sentences often have been imposed and affirmed without compelling reasons for such strong punishments. This trend is troubling, and it deserves closer scrutiny.

Since the Supreme Court ruled in *United States v. Booker* (2005) that the Sentencing Guidelines are no longer mandatory but only advisory, trial courts have, at least theoretically, had the freedom to exercise discretion in sentencing. Their decisions are subject to appellate review nominally, for "reasonableness" only.

Under the circumstances, one would think that trial courts could assume that their broad exercise of discretion would rarely be disturbed on appeal. Yet despite the trial courts' official freedom, statistics from the U.S. Sentencing Commission more than two years after *Booker* show that compliance with the "advisory" guidelines is at an all-time high in virtually every district.

For those courts entertaining the imposition of sentences outside of the guideline range, the federal courts of appeals have announced this general message: Sentences that depart below the recommended guideline range are extremely vulnerable to reversal as "unreasonable," but sentences that exceed the recommended guideline range have significant leeway.

This trend among the appellate courts is especially acute with national-security convictions. Although above-guideline sentences in general are occasionally (though rarely) reversed, the case law in this one area shows that sentences exceeding the guideline range in national-security cases are seemingly immune from scrutiny. And that is unfortunate.

This issue began with the interaction between Congress and the courts. Congress enacted the Sentencing Reform Act of 1984 partly to respond to perceived widespread sentencing disparities in the federal courts. Under the act, the Sentencing Commission was created to promulgate mandatory sentencing guidelines.

On Jan. 12, 2005, a 5-4 majority of the Supreme Court determined in *Booker* that mandatory application of the Sentencing Guidelines violates the Sixth Amendment right to a jury trial. A separate 5-4 majority (Justice Ruth Bader Ginsburg was in both majorities) held that the Sixth Amendment problem could be remedied by striking the portions of the Sentencing Reform Act that made the guidelines mandatory.

The Court ruled that the guidelines should be considered along with many other factors codified at 18 U.S.C. §3553(a). These included the requirement that a sentence be "sufficient, but not greater than necessary" to meet specified goals, the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence to reflect the seriousness of the offense, and the need to avoid unwarranted disparities. The remedial majority further held that sentences would be reviewed on appeal for reasonableness.

COURTS RESPONDING

After *Booker*, some predicted a new era of sentencing, where the focus would be not on a rigid system of guidelines that rivals the tax code in complexity but on the seriousness of the offense and the characteristics of the defendant.

Unfortunately, more than two years later, very little appears to have changed. According to the *Final Report on the Impact of*

United States v. Booker *on Federal Sentencing,* the Sentencing Commission's analysis of sentences from the post-*Booker* era reveals few distinctions from the pre-*Booker* era.

Trial courts continue to rely foremost on the sentence recommended by the Sentencing Guidelines—even though the guidelines exclude or minimize consideration of relevant factors such as employment history, family circumstances, education, and disadvantaged upbringing. (All of these things may be taken fully into account after *Booker*.)

Most federal appeals courts have helped shape post-*Booker* adherence to the guidelines by concluding that sentences within the advisory guideline range are presumptively reasonable. That sends an unambiguous message to district judges: Stay within the guidelines, and you'll be safe.

As for sentences outside the guideline range? The expectation that *Booker* would herald a new era of judicial discretion was short-lived. The appellate courts have made it eminently clear that, whatever degree of deference may be implicit in the *Booker* standard of reasonableness, reasonableness is not a code word for rubber stamp.

Decisions from various appellate courts (not involving national security) appear to reflect a relative tolerance for upward departures and a corresponding intolerance for downward departures. Compare the case of *United States v. Jordan* (2006), in which the U.S. Court of Appeals for the 7th Circuit affirmed an upward variance reflecting a 175 percent increase from the top of the advisory range, with *United States v. Curry* (2006), in which the 4th Circuit held that a downward variance of 70 percent was unreasonable. And the 8th Circuit in 2006 found downward variances of 54 percent and 58 percent unreasonable, although the 2nd Circuit in 2007 concluded that when the advisory range was 41 to 51 months, a sentence of seven months was unreasonable.

SECURITY DEPARTURES

Although upward departures are infrequently disturbed in general, one area in particular appears immune from appellate interference: national security. When a national-security connection is alleged at sentencing, an upward departure is almost certain to follow, and no appellate court has yet held that even an extreme upward departure was unreasonable.

To be sure, longer sentences in national-security cases are not utterly novel. In *United States v. Barresi* (2004), for example, the 2nd Circuit (before *Booker*) affirmed a 350 percent sentence increase because of national security. In *United States v. Leung* (2004), that circuit also affirmed a 160 percent sentence increase for national-security-related reasons.

No one can rationally dispute that national-security cases deserve very serious attention. But an analysis of the facts in cases where national security has been used to increase sentences indicates that extremely high sentences have been imposed—and affirmed—even in the absence of compelling circumstances.

Take the example of Zameer Nooralla Mohamed. On April 23, 2004, Mohamed telephoned the Department of Homeland Security from a hotel room in Calgary, Alberta, and made a phony bomb threat. Mohamed was charged with one violation of 18 U.S.C. §844(e), which prohibits the use of a telephone to "make any threat" or otherwise convey information known at the time to be false. Mohamed pleaded guilty.

The pre-sentence investigation report concluded that the proper advisory guideline sentence range for this offense was 12 to 18 months. At sentencing, the government argued that significant federal resources relating to national security had been expended in investigating Mohamed's hoax and that an upward departure was therefore required. The government urged the court to sentence Mohamed to 78 months (6.5 years)—450 percent of the maximum sentence recommended by the advisory guidelines.

Citing the terrorist attacks of Sept. 11, 2001, and national-security concerns generally, the trial court ruled that an enhanced sentence was required and sentenced Mohamed to 60 months (5 years)—more than 333 percent greater than the high end of the advisory guideline range. The 9th Circuit affirmed.

Another example is *United States v. Ahmed* (2006). Ahmed was charged with making false statements regarding the employment history he provided as part of his background investigation for a baggage-screener position with the Transportation Security Administration.

What did he lie about? The application asked whether he had ever been fired from a job or left employment under unfavorable circumstances. He answered "no." The government argued that his answer was false because he had left military service after receiving negative ratings on a performance evaluation.

Ahmed previously had made some extremely disgraceful comments after the events of Sept. 11. He was convicted for the false statement and faced an advisory guideline range of zero to six months. The trial court, citing national security, departed upward and imposed a sentence of 18 months—a 300 percent increase from the top of the advisory guideline range. The 6th Circuit affirmed.

Finally, in *United States v. Valnor* (11th Cir. 2006), Valnor was indicted for his role in a scheme to provide fraudulent driver's licenses to illegal immigrants in South Florida. He pleaded guilty and agreed to cooperate with the government. His cooperation led to the arrests of more than 50 others involved in the offense.

The pre-sentence investigation report recommended an advisory guideline sentence of 15 to 21 months before any government-sponsored departure. But the district judge, citing national-security concerns, departed upward to 42 months, after which the court reduced the sentence to 28 months to reflect Valnor's cooperation with the government.

Did the national security of the United States really warrant these abnormally long sentences? Possibly, but possibly not. That question is among those that courts should be asking when they evaluate why this category of cases is receiving such unusually strong penalties.

SUPREME COURT RELIEF?

The Supreme Court is expected to weigh in soon on the standard by which variances from the advisory guidelines should be measured. In *Claiborne v. United States,* a case on appeal from the 8th Circuit, the issue is whether such variances must be supported by "extraordinary circumstances."

Many predict that the Court will use this opportunity to prevent what clearly appears to be the inconsistent treatment of upward and downward variances. The Court also may take this opportunity to clarify what it envisioned from *Booker*. (It seems odd that a decision granting lower courts authority to depart upward or downward from the often-strict Sentencing Guidelines is being used to permit longer sentences while simultaneously being cited as the source for denying downward departures when judicial discretion is exercised.)

As for the national-security issue, however, it will not likely be affected by a migration to an "extraordinary circumstances" test or even a requirement that the variance be "truly compelling." National-security cases had long sentences before *Booker,* and the Court is unlikely to reverse this trend.

Nevertheless, both the Supreme Court and the justice system more broadly should pay attention to the aberrational sentencing in national-security cases. Even when national security is involved, the sentencing decision must never be free of meaningful judicial scrutiny.

A. Jeff Ifrah is a shareholder in the Washington, D.C., office of Greenberg Traurig, where he practices white-collar criminal defense. He is the co-author of Federal Sentencing for Business Crimes *(2006).*