The End of the US Sentencing Guidelines Loss Tables

By David Deitch

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Looking back at the history of how a particular legal framework or doctrine emerged, flourished and then disappeared, one can often identify key moments that signaled the demise of that framework or doctrine. In the case of the application of the United States Sentencing Guidelines, the Supreme Court's 2005 decision in *United States v. Booker* – in which the Court ruled that the Guidelines were no longer mandatory but merely advisory – was clearly one such moment.[1] Only time will permit the perspective necessary to tell, but U.S. District Judge Jed Rakoff's October 2012 sentencing decision in the case of *United States v. Gupta* may very well be another such moment, particularly with regard to the loss tables that drive Guideline calculations in many white collar criminal cases.[2]

On October 24, 2012, Judge Rakoff sentenced Rajat Gupta to serve 24 months in prison after he was found guilty by a jury of one count of conspiracy and three counts of substantive securities fraud, in connection with providing material non-public information to Raj Rajratnam. This 2-year prison sentence was substantially below the applicable advisory range under the United States Sentencing Guidelines and, in the week following that ruling, there was voluminous media commentary about whether or

not this sentence was appropriate. But the most remarkable part of Judge Rakoff's sentencing ruling was his unflinching analysis of the way in which the application of the United States Sentencing Guidelines to white collar fraud case no longer reflects empirical analysis about those offenses or those who commit them – an argument that defense counsel have been making for some time with mixed success.

Judge Rakoff began his analysis with an eloquent and incisive observation about his role as a sentencing judge and the inadequacy of the sentencing guidelines as a comprehensive tool to determine a defendant's sentence:

> Imposing a sentence on a fellow human being is a formidable responsibility. It requires a court to consider, with great care and sensitivity, a large complex of facts and factors. The notion that this complicated analysis, and moral responsibility, can be reduced to the mechanical adding-up of a small set of numbers artificially assigned to a few arbitrarily-selected variables wars with common sense. Whereas apples and oranges may have but a few salient qualities, human beings in their interactions with society are too complicated to be treated like commodities, and the attempt to do so can only lead to bizarre results.[3]

Judge Rakoff noted that the Sentencing Guidelines were "originally designed to moderate unwarranted disparities in federal sentencing" on the theory that the Sentencing Guidelines "would cause federal judges to impose for any given crime a sentence approximately equal to what empirical data showed was the average sentence previously imposed by federal judges for that crime."[4] Of course, as the Supreme Court has already observed, the Guidelines deviated from this goal almost from the start.

For example, based on "limited and faulty data," the Sentencing Commission determined that an ounce of crack cocaine should be treated as the equivalent of 100 ounces of powder cocaine for sentencing purpose, even though the two substances

were chemically almost identical and, as later studies showed, very similar in their effects. The result of this empirically unsupportable conclusion was an indefensible racial disparity in narcotics sentencing.[5] Judge Rakoff noted that, even when the Sentencing Commission changed the ratio from 100-to-1 to 18-to-1 in 2010, that ratio was likewise not based on empirical evidence but was merely “plucked from thin air.”

Judge Rakoff went on to observe that the Guidelines applicable to white collar fraud likewise “appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology,” and that this “maximize[s] the risk of injustice.” Noting the huge increases in the recommended Guidelines for fraud cases, Judge Rakoff concluded that the resulting advisory ranges “are no longer tied to the mean of what federal judges had previously imposed for such crimes.” Rather, these sentences “instead reflect an ever more draconian approach to white collar crime, unsupported by any empirical data.” In short, Congressional mandates to get tougher on fraud have resulted in a singular focus on one factor – the amount of loss – that “effectively ignored the statutory requirement that federal sentencing take many factors into account, *see* 18 U.S.C. § 3553(a), and by contrast, effectively guaranteed that many such sentences would be irrational on their face.” The result, Judge Rakoff observed, was “to create, in the name of promoting uniformity, a sentencing disparity of the most unreasonable kind.”[6]

Regardless of whether or not one agrees with the particular sentence ordered in the *Gupta* case, Judge Rakoff’s analysis of the way in which the United States Sentencing Guidelines fail to promote justice in white collar cases is sure to have significant weight

in other cases going forward. As structured, federal sentencing begins with a calculation of the advisory Guidelines range, and then defendants seek a variance from that range under Section 3553(a) – a process that creates a *de facto* presumption that a defendant will be sentenced within the Guidelines range.[7] Recognition that the Guidelines ranges applicable to fraud crimes are not fair is a good first step towards reforming sentencing in such cases in the interest of true justice.

And it may very well be that we look back years from now and recognize that Judge Rakoff's unequivocal accusation that the Guidelines have abandoned the underpinnings that may once of have given them legitimacy was a turning point in the demise of the "Guidelines era" in federal sentencing.

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[1] *United States v. Booker*, 543 U.S. 220 (2005).

[2] *United States v. Gupta*, F.Supp.2d 349 (S.D.N.Y. 2012).

[3] *Gupta*, 904 F.Supp.2d at 350.

[4] *Id.*

[5] *Kimbrough v. United States*, 552 U.S. 85, 96-98 (2007).

[6] *Gupta*, 904 F.Supp.2d at 351.

[7] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2004).