

2014 Seminar on the Federal Sentencing Guidelines

Defense Attorney Panel

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Notable Recent Supreme Court Decisions

- Alleyne v. United States, 133 S. Ct. 2151
(June 17, 2013)
- Peugh v. United States, 133 S. Ct. 2072
(June 10, 2013)

Alleyne v. United States (2013)

- Holding: *Apprendi* applies to facts that increase the applicable mandatory minimum sentence
 - Any fact that increases the applicable mandatory minimum is an “element” of the crime and must be found by the jury, not the judge, under *Apprendi*
 - For example, a finding that defendant was “brandishing” and not just “carrying” a weapon, increasing mandatory min. from 5-7 yrs
 - Overruled the Supreme Court’s earlier decision in *Harris v. United States* (2002), which had held that *Apprendi* only applied to facts that could enhance a statutory *maximum*, not *minimum*, sentence

Peugh v. United States (2013)

- Holding: Ex Post Facto Clause violated if defendant is sentenced under a Guidelines version, promulgated *after* the crime occurred, that provides for a higher sentencing range than the version in place at the time of the offense
 - § 1B.11 of the Guidelines (“Use of Guidelines Manual in Effect on Date of Sentencing”) directs courts to use the Guidelines Manual in effect on the date of sentencing *unless* doing so would violate the Ex Post Facto Clause
 - Based on *Peugh*, the Commentary to § 1B.11 has been amended, effective Nov. 2013, to note that Ex Post Facto Clause “applies to sentencing guideline amendments that subject the defendant to increased punishment” (citing *Peugh*).

Notable Recent Amendments to the Guidelines

- Proposed Amendment to Drug Quantity Table for Drug Trafficking (§2D1.1)
 - Proposed in April 2014, will be effective Nov. 1, 2014 if accepted
 - Sentencing Commission is proposing to reduce the Guidelines ranges for drug trafficking crimes, generally reducing the base offense levels for all drug types in § 2D1.1 by two levels
- Amendment to Section 3E1.1 (Acceptance of Responsibility), effective Nov. 1, 2013
 - Application Note 6 added to the Commentary, explaining that the government shouldn't withhold the acceptance of responsibility benefit for a defendant based on interests not identified in § 3E1.1, such as not agreeing to waive his or her right to appeal

Notable Recent Amendments to the Guidelines

- Amendment to Section 2B1.4 (Insider Trading), effective Nov. 1, 2012
 - § 2B1.4(b)(2) now requires that if the offense involved an “organized scheme,” the offense level must amount to at least level 14
 - Commentary to § 2B1.4 now notes that the two point enhancement under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies if the defendant is employed in the securities field and that employment was used to facilitate the commission or concealment of that offense – noting specifically that it would apply to a hedge fund professional who used his or her position to facilitate an insider trading offense

The Law: 3553(a)

- Shall impose a sentence that is sufficient but not greater than necessary to satisfy the *need* for just punishment, respect for law, deterrence, incapacitation, rehabilitation in the most effective manner
- In light of *all* offense and offender circumstances, *all* kinds of sentences available *by statute*, and avoiding *unwarranted* disparities

Kinds of Below-Range Sentences

1) Variances

a) Individualized Sentences

- mitigating facts about the offense or offender that are relevant to the purposes of sentencing and parsimony

b) Avoidance of unwarranted disparity/uniformity

b) Policy Disagreements

- guideline recommends punishment that is excessive to satisfy the purposes of sentencing *apart from* any case-specific facts that might otherwise justify a variance

2) Departures

– controlled by policy statements and “heartland” standard

Commission Departure list

- Back of Guideline manual
- 165 upward
- 34 downward and narrow
- 23 neutral
- Always look for variance too

Avoid Guideline-Centric Analysis, Refocus to § 3553(a)

- Describe all mitigating facts about offense and offender, 3553(a)(1)
- Explain why the sentence you seek, based on those facts, is SBNGN to satisfy sentencing purposes, 3553(a)(2)
- Explain why probation, home detention, or split sentence is appropriate, 3553(a)(3)
- Calculate guideline range, low as possible, 3553(a)(4)
- Attack “correct” guideline range
- Use avoidance of unwarranted disparity to your advantage, 3553(a)(6)

Departures or Variances: What To Do?

- Use “departure” policy statements *only* if they clearly apply
- Argue as variance, ignore departures.
- If departure clearly applies, argue as variance, note that “even the Sentencing Commission says ...”

Individualized Sentence: Facts That Are Relevant to Purposes and Parsimony

- Pepper v. United States, 131 S. Ct. 1229 (2011): post-sentencing rehab was proper to consider at re-sentencing
- “No question” that Pepper’s
 - remaining drug-free for five years
 - attending college and achieving high grades
 - succeeding at work
 - re-establishing a relationship with his father
 - marrying and supporting a family

Are “highly relevant” to the need for deterrence, incapacitation, and treatment and training

And “bear directly on the District Court’s *overarching duty* to ‘impose a sentence sufficient, but not greater than necessary’ to serve the purposes of sentencing”

Pepper v. United States (cont.)

- Court found that Commission policy statement was not a reason to uphold 8th Circuit's judgment because "the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."
- Policy statements that conflict with § 3553(a) are not entitled to weight.
- Judge must instead give appropriate weight to relevant factors.

Gall v. United States, 552 U.S. 38 (2007)

- In imposing probation, judge appropriately gave significant “weight” to
 - Gall’s voluntary withdrawal from the conspiracy
 - abstained from drugs, completed his education, established own business
 - age and immaturity at the time of the offense
- All supported the conclusion that imprisonment was not necessary to deter Gall or to protect the public from further crimes committed by him.
- No mention of conflicting policy statements

Departures

- Standard based on Commn's re-write of 3553(b) to mean no departure if:
 - Case not outside the “heartland” – must be atypical, extraordinary, exceptional
 - Unjust crack disparity not permissible because “typical”
 - Commn prohibited the ground
 - E.g., unusual for D to possess father's legally owned unloaded handgun merely to pawn it to pay child support, but personal financial difficulties prohibited
 - Lack of guidance as a youth, disadvantaged upbringing, economic pressure on a trade or business, role in the offense, gambling addiction
 - Commn deemed the ground “not ordinarily relevant” and not “present to exceptional degree”
 - Family, employment, education, lack of employment, lack of education, good works, drug or alcohol dependence or abuse, civic, charitable, or public service, employment-related contributions
- Policy statements say particular factors are never relevant, not ordinarily relevant, or “may be” relevant

Potentially Relevant Offender Characteristics

Some offender characteristics now “may be” relevant:

- Age
- Mental and emotional conditions
- Physical condition including physique
- Military service

If “present to an unusual degree and distinguish the case from the typical cases covered by the guidelines”

- Same standard as “not ordinarily relevant” – “present to an exceptional degree”

Policy Disagreements

- Rita v. United States, 551 U.S. 338 (2007)
 - Judge may conclude policy statements “fail to treat the defendant’s characteristics in the proper way”
 - Judge may find the “Guidelines sentence itself fails properly to reflect § 3553(a) considerations,” or “reflects an unsound judgment”
- Kimbrough v. United States, 552 U.S. 85 (2007)
 - Variance based on disagreement with 100:1 crack-cocaine ratio in Guidelines was proper
 - “courts may vary [from Guideline ranges] based solely on policy considerations, including disagreements with the Guidelines.” (citing *Rita*)
- Spears v. United States, 555 U.S. 261 (2009)
 - Variance based on substituting a 20:1 ratio instead of 100:1 crack-cocaine ratio was proper

Procedural Error

- Appellate courts must ensure there was no “significant procedural error” (Gall, 552 U.S. at 51):
 - Fail to calculate the guidelines correctly
 - Treat the guidelines as mandatory
 - Fail to consider 3553(a) factors
 - Fail to address parties’ arguments
 - Fail to adequately explain
- Comes before review for substantive reasonableness.
- Ensures that district court *exercised discretion* based on relevant factors, without court of appeals substituting its judgment.

Preserving Procedural Error Claims

- United States v. Flores-Mejia (3d Cir. July 16, 2014) (en banc)
 - Defendant had argued downward variance warranted due to cooperation with the government; only reference to argument made by sentencing judge was, “okay, thanks. Anything else?” After within-Guideline sentence was imposed, Defendant did not raise failure to “adequately address” the argument
 - Third Circuit imposed a new rule requiring that a party must object to a sentencing procedural error after the sentence has been imposed, in order to avoid plain error review on appeal
 - Overturned ruling in *United States v. Sevilla*, 541 F.3d 226 (3d Cir. 2008)
 - Dissenting Opinion (5 judges) argued that *Sevilla* should not have been overturned, as the new rule invokes an unwarranted, fundamental change to sentencing procedures, and does not square with Fed. R. Crim. P. 51 (allowing preservation of a claim of error when the ruling/order is made or sought).

Circuit Split

- As noted by the dissent in Flores-Mejia, not all Circuits require an objection to a procedural error be raised after the sentence is imposed
 - Some Circuits *always* require procedural objections to be raised after the sentence is imposed (3rd, 10th)
 - Some of these Circuits also require that the Judge ask after imposing the sentence whether any party has any objections
 - Some Circuits only require such objections in circumstances where the issue could only have arisen during the imposition of the sentence (1st, 5th, 6th, 9th)
 - For example, an objection that the Judge failed to adequately explain his reasoning for the sentence (*See United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc))
 - Some Circuits never require that objections be re-raised (4th, 7th, 8th)

Preserving Procedural Error Claims

- To avoid plain error standard of review on appeal, raise any potential procedural errors *after* the sentence is imposed in order to be sure to preserve
- Particularly, raise any claims that the Judge failed to adequately explain the sentence *after* the Judge imposes the sentence, as courts are more likely to require such an objection
- For any above-Guidelines sentences, worth objecting to the sentence as substantively unreasonable to be sure to preserve that objection as well

PRESENT EVIDENCE

- Facts about the defendant and the offense
 - and empirical evidence showing why those facts are relevant to purposes and parsimony
- Facts showing the guideline itself
 - recommends a sentence greater than necessary to achieve sentencing purposes
 - was not developed based on empirical data and national experience
 - Grober-child porn
 - McCarthy-ecstasy
 - Ortega- methamphetamine
- Tie the evidence to purposes and parsimony

Why Present Evidence?

- To convince the judge to grant a variance based on mitigating factors because they are *relevant* to sentencing purposes *as required by 3553(a)*
- To avoid reversal
- To make the record for reversal based on procedural error
- To make sure a policy disagreement is not based “solely on the judge’s view”
- To avoid “closer review” by establishing that the guideline was not based on “empirical data and national experience”

Frequent Reversals on D's Appeal for Procedural Error

- 75 within-guideline sentences, and 39 below- or above-guideline sentences reversed for failing to explain why sentence is SBNGTN in light of the arguments and evidence presented.
- Only 4 guideline sentences reversed as substantively unreasonable

When courts of appeals reverse for inadequate explanation or failure to adequately address a nonfrivolous argument, the sentence on remand is different

in the majority of cases.

Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* (Dec. 2011),
http://www.fd.org/pdf_lib/Procedure_Substance.pdf.

Just Punishment in Light of the
Seriousness of the Offense
3553(a)(2)(A)

Harm
and Culpability

Culpability

- Motive, Knowledge, Intent

- **Fraud** – varying from 210-262 months to 60 months because did not start as a fraud, started with best of intentions, D never drew a salary, provided his own money, cut back on costs, wasn't there for some key events, was fully forthcoming and truly remorseful. *United States v. Ovid*, 2010 WL 3940724 (E.D.N.Y. 2010)
- **Fake Stash House Robberies** – upholding variance from 235 to 132 months -- agents recruited D to rob a fake drug “stash house” with large non-existent drug quantities – “may risk overstating a defendant’s culpability.” *United States v. Briggs*, 397 Fed. App’x 329, 333 (9th Cir. 2010)
- **Stolen or Obliterated Serial Numbers, no *mens rea*** -- *United States v. Davy*, 2011 WL 2711045, *5 n.6 (6th Cir. July 12, 2011) (reversing for failure to consider lack of mens rea); *United States v. Montague*, No. 09-5542, 2011 WL 4950057 (6th Cir. Oct. 19, 2011) (same)

Unjust punishment

- Medical problems BOP will not treat
 - U.S. Dep't of Justice, Office of the Inspector General, Audit Division, *The Federal Bureau of Prisons' Efforts to Manage Health Care* (Feb. 2008), <http://www.justice.gov/oig/reports/BOP/a0808/final.pdf>
- Empirical research showing that defendants who are small, young, or old are subject to abuse, rape, violence in prison
- Aliens

Challenge Assumptions About Deterrence With Evidence

- No particular amount of imprisonment or any imprisonment is necessary for deterrence.
- No difference even between probation and imprisonment in deterrent effect.
- DOJ publication – increasing severity of punishment doesn't deter crime: “Five Things About Deterrence,” Nat'l Institute of Justice (July 2014):
<https://ncjrs.gov/pdffiles1/nij/247350.pdf>
- Add'l Resource: Sentencing Resource Counsel Project, **Fighting Fiction with Fact to Attain Lower Sentences:**
<http://www.fd.org/docs/select-topics---sentencing/Fighting-Fiction-with-Fact-Handout-Final.pdf>

Incapacitation: Recidivism factors

- Age
- Education
- Family
- Employment
- Drug treatment
- First time offenders

Recidivism Increased by Longer Sentences

- Lengthy imprisonment increases recidivism by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders.

Rehabilitation, 3553(a)(2)(D)

- Not prison, Tapia
- Drug treatment works
- Mental Health treatment works
- Beware dual diagnosis
- Extra conditions are counterproductive
- Job training

Kinds of Sentences Available *By Statute*

3553(a)(3)

- Must consider all “kinds of sentences available” by statute, § 3553(a)(3), even if the “kinds of sentence established [by] the guidelines” recommend only prison. *Gall*, 552 U.S. at 59 & n.11
- Probation authorized for any offense with a statutory maximum below 25 years unless probation expressly precluded. See 18 USC § 3561(a); 18 USC § 3559(a)
- As little as a day in jail + supervised release authorized for others
- Probation is a substantial restriction on liberty. *Gall*, 552 U.S. at 48 & n.4

28 U.S.C. § 994(j)

Guidelines shall “reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a *first offender who has not been convicted of a crime of violence or an otherwise serious offense*”

Prison generally appropriate if “convicted of a crime of violence that results in serious bodily injury.”

Unwarranted disparity and similarity

- Criminal history and minorities
- Career offender 65% variances
- Sentences of co-conspirators or in related cases
- 5K
- Sentencing manipulation and charge control

Data Shows Some Guidelines Are Too Severe/Would Create Unwarranted Disparity to Sentence Within Range

	Within	Judge Below	Govt Below	Above
Child Porn	33.7%	46.2%	18.4%	1.7%
Drug Trafficking	38.8%	20.8%	39.4%	1.1%
Fraud	47.4%	25.9%	24.4%	2.2%
Money Laundering	33.9%	26.9%	37.8%	1.3%
Tax	35.1%	44.6%	20.0%	0.3%
Immigration	56.8%	11.9%	29.8%	1.4%

USSC, 2013 Sourcebook, tbl. 27A

- By District and Circuit (USSC, 2013 Sourcebook, tbl. 26):
<http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table26.pdf>

Resources

- **David Debold, Practice Under the Federal Sentencing Guidelines** (2-volume treatise co-published by ABA Criminal Justice Section)
- **Federal Defender Sentencing Resource page**, www.fd.org
 - **Fraud Sentencing Memo**, James Client
 - Updated version as of 2011: <http://www.fd.org/docs/Select-Topics---sentencing/James-Client----Fraud-Sentencing-Memo----4-12-11.pdf>
 - **Baron-Evans, Sentencing by the Statute** (Dec. 2010), <http://www.fd.org//docs/select-topics/sentencing-resources/sentencing-by-the-statute>
 - **Hemingway & Hinton, Departures and Variances** (Sept. 2009), <http://www.fd.org/docs/select-topics/sentencing-resources/departures-and-variances.pdf?sfvrsn=6>
 - Outline of Caselaw on All Kinds of Variances and Departures
 - **Coffin, Gannet & Roth, FD Sentencing Resource Manual: Using Statistics and Studies to Redefine the Purposes of Sentencing** (Sept. 2008), http://www.fd.org/docs/select-topics---sentencing/Fed_Def_Resource_Manual.pdf