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EXPERT ANALYSIS

Restoring Sentencing Sanity in White-Collar Criminal Cases

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In August, the U.S. Sentencing Commission announced as a top priority a "continuation of its work on economic crimes."[1] While the commission is prioritizing its continuing review of Section 2B1.1, the section of the sentencing guidelines governing economic crimes, a lot of damage has already been done.

The purpose of the guidelines is to employ fact-based sentencing so that similarly situated offenders are sentenced fairly and consistently. In economic crime cases, these goals are not being met. The low end of the applicable guidelines has tripled since 2003, causing already lengthy sentences to increase dramatically.

District courts are varying from the guidelines in fully half of economic crime cases. The result has been unnecessarily harsh, yet wildly inconsistent, sentences. The commission needs to act promptly to develop a more rational scheme for sentencing white-collar offenders.

THE GUIDELINES

In passing the Sentencing Reform Act in 1984 to establish the Sentencing Commission with a mandate to create federal sentencing guidelines, Congress sought to eliminate unwarranted disparity in sentencing, increase fairness and ensure proportionate punishment. Although the commission was generally supposed to base the guidelines on the average sentences imposed prior to the guidelines, the commission wrote the guidelines to reduce the availability of probation and ensure some period of confinement for economic crimes.

Section 2B1.1 of the guidelines sets forth a complex and formulaic exercise for assessing the severity of an economic offense. The most important variable is "loss," meaning the actual or intended pecuniary loss to the victims of the offense. Other characteristics, often highly correlated with loss (such as the sophisticated nature of the scheme and the number of victims), also increase the offense severity, creating a compounding effect.

The problem, simply put, is that over time the sentencing ranges under Section 2B1.1 have escalated to the point where they result in the imposition of prison terms that are wholly unreasonable. One cause is that on top of the commission's own increases to white-collar sentences, Congress has also legislated harsher penalties for economic crimes in reaction to high-profile cases, such as the savings and loan scandals in the late 1980s, and the Enron and WorldCom cases in the early 2000s.

The original goal of addressing the relatively lenient sentences received by white-collar offenders compared with other offenders may have been a reasonable one. However, the pendulum has now swung so far that sentences for first-time nonviolent white-collar offenders are often substantially higher than for the most heinous violent criminal offenses, even murder. This undermines the fairness and integrity of our judicial system, a system that already produces the highest rates of incarceration of any democracy in the world.

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THE ERA OF SELF-HELP

Prior to 2005, federal sentencing courts were required to follow the guidelines and thus were stuck with the sentences dictated by the guidelines in economic crime cases. In 2005 the U.S. Supreme Court held that the guidelines are advisory, not mandatory.[2]

Over the past decade, many judges have declined to employ the guidelines in economic crimes cases. The guidelines in these cases are so high that, now that they are not mandatory, they have effectively priced themselves out of the market. In economic crime cases, many sentencing judges are no longer buying what the guidelines are selling.

In a high-profile insider-trading case, U.S. District Judge Jed S. Rakoff of the Southern District of New York noted, "[T]he numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim or abstract number-crunching than any rigorous methodology — thus maximizing the risk of injustice."[3] In another case, faced with a guideline sentence of 85 years, Judge Rakoff remarked on "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guidelines calculations can visit on human beings if not cabined by common sense."[4] In both cases, Judge Rakoff imposed a sentence substantially below the guidelines range.

As Judge Frederic Block of the Eastern District of New York put it in one securities fraud case, "[I]f not for the wisdom of the Supreme Court in recognizing the need to free district courts from the shackles of the mandatory guidelines regime, I would have been confronted with the prospect of having to impose what I believe any rational jurist would consider to be a draconian sentence."[5]

Section 2B1.1 of the sentencing guidelines sets forth a complex and formulaic exercise for assessing the severity of an economic offense.

Yet, other courts still recognize the guidelines as setting the market, and, if no longer following them as religiously, still hand out sentences dictated by the guidelines, or sentences that while discounted from the guidelines, remain extraordinary for first-time nonviolent offenders.

Shalom Weiss was sentenced in the Middle District of Florida to 845 years in prison, Norman Schmidt in the District of Colorado to 330 years, Robert Thompson in the Middle of District of Louisiana to 309 years, and Richard Harkless in the Central District of California to 100 years. While these cases may be outliers, the number of such triple-figure sentences is growing.

More troubling, in more typical fraud cases, scores of other recent non-violent offenders have received sentences of decades in prison. Bernie Ebbers and Jeffrey Skilling, the lead defendants in the WorldCom and Enron scandals, received 25 and 24 years, respectively.[6]

The sentences in these cases, widely viewed as being the most egregious frauds in history, should represent ceilings, not floors on which even greater sentences are routinely built. It is apparent that the runaway guidelines are out of control and still have too great of an impact on sentences in too many cases. This leads to a tremendous disparity in the sentence received by a white-collar offender lucky enough to draw Judge Rakoff, Judge Block or a like-minded jurist and by one who is not.

REMEDYING THIS 'TRAVESTY OF JUSTICE'

In May, the American Bar Association submitted a draft proposal intended to be a substitution for the existing Section 2B1.1. The proposal has several laudable features. While "loss" remains a factor, it is defined more narrowly and is given far less weight in establishing sentencing ranges.

The proposal also relies on an assessment of the defendant's culpability and a consideration of the impact of the offense on the victim(s), features largely missing from the current guidelines.

We urge the Sentencing Commission to consider this proposal, as well as other amendments to the current guidelines that would reduce the over-reliance on "loss" and other factors highly correlated with loss, which routinely produce eye-popping sentences.

Only when the guidelines have been fixed will sentencing courts seeking to do justice follow them more consistently. And only when the guidelines are followed more consistently in the ordinary case will unwarranted disparities be eliminated, instilling a greater degree of fairness in the punishment of economic crimes.

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NOTES

[1] 79 Fed. Reg. 49,379 (Aug. 20, 2014)

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

[3] *United States v. Gupta*, 904 F. Supp. 2d 349, 350-51 (S.D.N.Y. 2012).

[4] *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006).

[5] *United States v. Parris*, 573 F. Supp. 2d 744, 750-51 (E.D.N.Y. 2008).

[6] Skilling's sentence was later reduced to 14 years.

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The sentencing ranges under Section 2B1.1 have escalated to the point where they result in the imposition of prison terms that are wholly unreasonable.

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