FOR THE DEFENSE

Volume 2, Issue 2 May 2017

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An Answer to the "Seemingly Mindless Acceleration" of Penalties for Economic Crimes Under the Federal Sentencing Guidelines

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Over the past few decades, there has been a steep and steady increase in the sentences handed down by federal courts for certain financial crimes. As one District Court recently put it: there has been a "seemingly mindless acceleration of penalties for economic crimes incorporated in the current United States Sentencing Guidelines regime."[1] In an effort to curb this trend, the American Bar Association commissioned a Task Force on the Reform of Federal Sentencing for Economic Crimes. The Task Force investigated the escalating economic crime sentences and issued a report.[2] This report, which was published on November 10, 2014, has come to be called the ABA's "Shadow Guidelines."[3]

A significant problem that the Task Force sought to address with the Shadow Guidelines is the exponential increase in Federal Guideline sentences for economic crimes involving a high-dollar loss. Currently, the Federal Sentencing Guidelines are somewhat Draconian in this regard. By way of background, the Federal Sentencing Guidelines, which were promulgated by the U.S. Sentencing Commission, are a set of guidelines that aid federal judges in crafting sentences for defendants convicted of federal crimes. The Sentencing Guidelines set forth "Base Offense Levels" for every federal crime, which are based on a number of factors.[4] The Guidelines also contemplate "Adjustments" to the Base Offense Level based on a litany of aggravating factors (Upward Adjustments, for a longer sentence) and mitigating factors (Downward Adjustments, for a shorter sentence); the result of those Adjustments is the "Offense Level."[5] There are forty-three (43) Offense Levels, with one (1) being the lowest and forty-three (43) being the highest.[6] The Guidelines contemplate longer sentences for repeat offenders by the addition of "Criminal History Points" to the Offense Level."[7] The Guidelines also provide guidance on whether probation or incarceration is appropriate in any given circumstance.[8] The Guidelines are supposed to be but one factor for the District Court to consider when fashioning a sentence.[9]

There remains an ongoing debate about whether the Federal Sentencing Guidelines are still perceived to bind sentencing courts, despite the fact that these guidelines were deemed to be merely advisory in nature by the United States Supreme Court.[10] In its most-recent (March 2017) pronouncement on this issue, the Supreme Court, in an opinion written by Justice Thomas, held that the Guidelines "are not amenable" to a vagueness challenge because they "merely guide the district courts' discretion"; they do not mandate any particular sentence.[11] But in her opinion concurring in the judgment, Justice Sotomayor noted that,

> [t]he importance of the Guidelines in this process, as we explained last Term, makes them not only the starting point for most federal sentencing proceedings but also the lodestar. In most cases, it is the range set by the Guidelines, not the minimum or maximum term of imprisonment set by statute, that specifies the number of years a defendant will spend in prison. District courts impose a sentence within the Guidelines (or below the Guidelines based on a Government motion) over 80% of the time. And when Guidelines ranges change – because the Guidelines themselves change, or because the court is informed of an error it made in applying them – sentences change, too. **It is therefore no exaggeration to say that the Guidelines are, in a real sense, the basis for the sentence imposed by the district court.**[12]

Many white-collar defense practitioners would surely agree with Justice Sotomayor, though it is true that sometimes sentencing courts choose to vary or depart from the Sentencing Guidelines and issue sentences outside the advisory Guideline range.

With respect to economic crimes, there are fifteen different monetary tiers tied to an increase

in Offense Level, with the highest (loss in excess of $550 million) requiring an astounding increase of thirty (30) Levels.[13] By comparison, under the Federal Sentencing Guidelines, a defendant's Offense Level for kidnapping, where a defendant is found to have sexually exploited the victim, is only increased by six (6) Levels.[14] Even taking into account the different Base Levels for those two crimes (32 for kidnapping versus 6-7 for fraud), the total sentencing level for kidnaping/sexual exploitation could only be one level higher than for a $550 million fraud (38 versus 37), assuming all other factors being equal. This makes little sense, as there is clearly very little equivalency between the nature of these crimes.

A principal goal of the Shadow Guidelines is to shift the focus away from the amount of loss associated with the fraud to where it belongs: the culpability of the defendant. Under the Shadow Guidelines, there are only six (6) tiers of sentence enhancement tied to the amount of the loss. $50 million is the cap, and that amount is tied to an enhancement of fourteen (14) levels, which is less than half of the highest level set forth by the Federal Sentencing Guidelines.[15] In addition to reducing the impact of the loss amount, the Shadow Guidelines have a further six tiers tied to culpability, which are as follows:

(2) Culpability

(A) Lowest culpability	subtract [6-10]
(B) Low culpability	subtract [3-5]
(C) Moderate culpability	no change
(D) High culpability	add [3-5]
(E) Highest culpability	add [6-10]

The ABA suggested that the factors that the Court ought to weigh in making a culpability determination would include, but would not be limited to, the following:

- the defendant's motive (including the general nature of the offense);
- the correlation between the amount of loss and the amount of the defendant's gain;
- the degree to which the offense and the defendant's contribution to it was sophisticated or organized;
- the duration of the offense and the defendant's participation in it;
- extenuating circumstances in connection with the offense;
- whether the defendant initiated the offense or merely joined in criminal conduct initiated by others; and
- whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense.[17]

Additionally, the Shadow Guidelines purposefully do not assign a numerical value to any of these factors therefore allowing a sentencing court greater ability to tailor a sentence to an individual defendant's crime.[18] The result is a greater consideration of culpability and corresponding adjustment of offense level, upward or downward, based upon that factor.[19]

When presented as a basis for a downward variance, the Shadow Guidelines have found a receptive audience with sentencing courts that are increasingly confronted with outlandish Sentencing Guidelines-compliant sentences for large-dollar financial crimes, regardless of the culpability of the defendant. In *U.S. v. Faibish*, for example, the sentencing court (the Eastern District of New York) pointed to the Shadow Guidelines and noted that, "considering these alternate models, and applying common sense, the Court finds that a strict application of the existing guidelines derived from the existing loss table in this case would unfairly balloon Faibish's sentencing range beyond any reasonable proportion to his crimes."[20] The Court declined to issue Faibish the eighty-year sentence suggested by the Government (an appropriate sentence under the Federal Sentencing Guidelines) and instead issued him a sentence of about five years.[21] The Court suggested that this 75-year downward departure from the Sentencing Guidelines may have been due, at least in part, to its familiarity with the Shadow Guidelines.[22]

There have been some holdouts, however. In *U.S. v. Rivernider*, one of the defendants pleaded guilty to wire fraud, conspiracy and tax evasion for his role in a Ponzi scheme. He received a 90-month sentence.[23] The defendant appealed this sentence on the multiple grounds, one of which was that,

though the trial Court (the District of Connecticut) consulted a then-draft version of the Shadow Guidelines, it nevertheless sentenced him under the standard Sentencing Guidelines.[24] The Second Circuit sharply rejected that argument, exclaiming that the defendant's "argument lacks any basis in law."[25] As the Court pointed out:

> The district court was (to understate the case) no more bound by a hypothetical set of guidelines issued by proponents of changes in the law than it was by the actual Guidelines promulgated by the Sentencing Commission.[26]

Perhaps important to the Second Circuit's holding was the fact that the defendant's 90-month sentence was below the Sentencing Guidelines (just not within the Shadow Guidelines).[27]

In *U.S. v. Peppel*, it was the Government that appealed a sentence, which it believed was too short.[28] The sentencing court in *Peppel* imposed a 7-day sentence for fraud and money laundering related to a complicated, multi-million dollar stock scam because it regarded the defendant as a "remarkably good man."[29] The Sentencing Guidelines, however, suggested a sentence of 97-121 months, equating to a 99.9975% downward departure by the sentencing court.[30] In its analysis of the sentence – which it vacated – the Sixth Circuit held that the sentencing court abused its discretion by basing its week-long sentence on impermissible factors.[31]

In defense of the short sentence, the defendant argued that "there is consensus among judges, academics, the American Bar Association, and the Department of Justice that the guidelines for white-collar crimes are flawed and require amendment."[32] However, the Court rejected that argument, in part based on a letter written by Jonathan Wroblewski, the then-Director of the Office of Policy and Legislation of the U.S. Sentencing Commission.[33] In his letter, Mr. Wroblewski noted that, the Sentencing Commission regarded it as unfortunate that, in his words, "we have seen with increasing frequency district courts sentencing fraud offenders – especially high-loss fraud offenders – inconsistently and without regard to the federal sentencing guidelines."[34]

But Mr. Wroblewski also noted in his letter that "the current [June 28, 2010] sentencing outcomes in these [high-dollar fraud] cases are unacceptable, and the Commission should determine whether some reforms are needed."[35] Perhaps such change is on the horizon. In 2015, the Sentencing Commission revised the Guidelines to focus more on culpability, albeit only to a limited degree. The 2015 revisions include, as sentence enhancements, the extent to

which the "defendant intentionally engaged in or caused the conduct constituting sophisticated means" and the extent to which the "defendant purposely sought to inflict" pecuniary harm.[36] As the Commission itself explained, "basing the enhancement on the defendant's own intentional conduct better reflects the defendant's culpability and will appropriately minimize application of this enhancement to less culpable offenders."[37]

Despite this limited shift seen in the 2015 Amendments, the extreme sentencing enhancements, which are pinned to the dollar-value of a crime, persist.[38] As a result, there is a growing trend of white-collar defense practitioners using the Shadow Guidelines to argue in support of downward variances and shorter sentences. As of the publication of this article, the Shadow Guidelines have been cited in sentencing memoranda in more than 30 cases, nationwide, including at least

two in Pennsylvania within the past three years.[39] Though it is unclear what role, if any, the Shadow Guidelines had in the courts' determinations of the sentences in those cases, the fact that they were cited at all, and that the sentences were much lower than those suggested by the Sentencing Guidelines, is encouraging. Perhaps future sentencing courts might be amenable to applying the brakes to the "seemingly mindless acceleration of penalties for economic crimes."[40]

Notes

1. *U.S. v. Faibish*, No. 12-cr-00265, 2015 WL 4637013, *2 (E.D.N.Y., Aug. 3, 2015).
2. *See* Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes (hereinafter the "Shadow Guidelines"), available at **http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf?_sm_au_=iHVgqZwWJ0rVDP3g**.
3. *See* Shadow Guidelines, Economic Offences, § (b)(2).
4. *Federal Sentencing: The Basics*, U.S. Sentencing Commission, § IV, A, available at **http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf**.
5. *See id*.
6. *See id*. at Sentencing Table.
7. *See id*. at § IV, A.
8. *See id*.
9. *See* 18 U.S.C., § 3553 (a). Indeed, 18 U.S.C. § 3553 (a)(1) provides that, in addition to the Sentencing Guidelines, a sentencing court must also consider the following: (a) the nature and circumstances of the offense and the history and characteristics of the defendant; (b) the need for the sentence imposed; (c) the kinds of sentences available; (d) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (e) the need to provide restitution to any victims of the offense.

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