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WHITE-COLLAR CRIME

BY ROBERT G. MORVILLO AND ROBERT J. ANELLO

Sentencing Guidelines in 2003: Too Easily Abused?

THE U.S. SENTENCING Commission Guidelines continue to eradicate challenges to prosecutorial determinations. The most recent statistics from the commission bear out Judge Jack B. Weinstein's recent observation in *United States v. Speed Joyeros, S.A., et al.*,[1] that the guidelines have "virtual[ly] eliminat[ed] federal criminal trials, substituting administrative decisions not to prosecute or pleas of guilty."

Nationwide, the percentage of convictions obtained through guilty pleas has risen steadily since the inception of the guidelines. In 1998, 93.6 percent of convictions resulted from guilty pleas; 94.6 percent in 1999; 95.5 percent in 2000; and 96.6 percent in 2001. The statistics for the U.S. Court of Appeals for the Second Circuit show that even fewer defendants opted to go to trial, with more than 97 percent of convictions obtained through guilty pleas in 2001.[2]

This attorney continues to believe that the trend of empowering young, ambitious and sometimes immature prosecutors to be investigators, accusers, prosecutors and sentencers is dangerous and will ultimately lead to abuse.

Departures

The only light at the end of the ever-darkening tunnel embodied in the defense function in federal criminal cases is that of departure. Here again, the prosecution holds most, although not all the cards, with approximately half of all downward departures resulting from the prosecution's submission of a 5K1.1 letter based upon its assessment of the defendant's substantial assistance to the prosecution.[3] One wonders about the societal utility of having a nation of informers. Recent cases confirm that the government exercises almost complete discretion in assessing the sufficiency of a defendant's cooperation, with little opportunity for judicial intervention in these decisions.[4]

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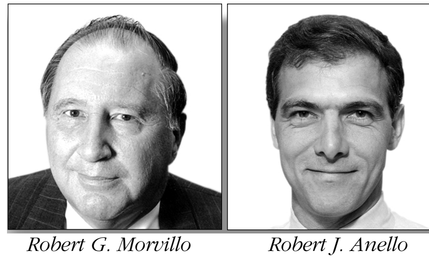

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Nationwide, just over 18 percent of defendants received a downward departure based on factors other than their assistance to the prosecution. That figure was slightly higher in the Second Circuit, with more than 20 percent of defendants obtaining departures for reasons other than cooperation, although Southern District judges were less inclined than their counterparts to award departures — doing so in only 12 percent of cases.

Family Circumstances and Physical Impairment. Defendants met with mixed success in efforts to obtain departures based on family circumstances or physical impairment, with judges consistently looking for some series of factors rendering the impact of a defendant's incarceration truly extraordinary before granting a departure. Thus where the defendant in *United States v. Khmelnitsky*,[5] was able to show that she was responsible for the care of her ailing parents and grandmother (who collectively suffered from a litany of health problems ranging from diabetes and heart disease to ulcers and a neurological disorder) and her brain-damaged daughter, and was a major source of financial support for them as well as for her brother and husband, the court departed downwards, sentencing her to six months in prison instead of the 12-18 months she faced under the guidelines.

Southern District Judge Gerald E. Lynch declined to grant a downward departure based on family circumstances in *United States v. Jimenez*,[6] despite the fact that the defendant was a single mother with three children, one of whom was severely disabled, observing that her repeated criminal activities had set a terrible example for her children. He did grant her a departure, however, based on her extraordinary physical impairment, caused by a brain aneurism that "literally [left] her a different person than the one who committed those past offenses." He rejected the government's somewhat insensitive argument that such a departure is warranted only where the Bureau of Prisons is unable to provide adequate care for a condition, finding the departure warranted in this case because the defendant was "seriously infirm" and because her condition eroded her capacity to threaten society, making her incarceration wasteful and unnecessary.[7]

Aberrant Behavior

First-time offenders continue to seek departures for aberrant behavior, initially recognized as a grounds for departure in *Zecevic v. United States Parole Comm'n*,[8] and more recently codified in guidelines §5K2.20, which became effective at the end of 2000. The application notes to 5K2.20 instruct that aberrant behavior means a single criminal occurrence or transaction that was (a) committed without significant planning; (b) was of limited duration; and (c) represents a marked deviation by the defendant from an otherwise law-abiding life. The recent decisions considering a departure under this provision have tended to focus on the first two of these factors. In *Gonzalez v. United States*,[9] the Second Circuit vacated a sentence denying an aberrant behavior departure, holding that the district judge had erred in requiring that the defendant's criminal activity be

"in some significant degree, spontaneous," for a departure under 5K2.20. It held that in drafting §5K2.20, the sentencing commission had "purposely excluded the requirement that an act be 'spontaneous and seemingly thoughtless' " as some circuits had previously required.[10] Following *Gonzalez,* the district court in *United States v. Barbato*,[11] declined to depart downward in sentencing a defendant convicted of using extortionate means to collect a debt. The judge rejected the defendant's contention that the threats he made were the result of anger and frustration arising from difficulty in collecting money the victim owed him, finding that the defendant had engaged in a pattern of conduct involving two separate loans and several threats extending over more than 18 months, which meant that his conduct was neither a single criminal occurrence nor limited in duration, as required by 5K2.20.[12]

Occasionally a district judge still bridles openly at the limitations imposed by the guidelines and seeks to show that the facts of a particular case present aggravating or mitigating factors of a kind or to a degree not adequately taken into consideration by the guidelines, as recognized in 5K2.0. In one such case last year, Judge Robert W. Sweet relied on this provision to soften the impact of what he referred to as the "heart-rending unfairness of the present sentencing system."[13] The unfairness he perceived resulted from the fact that the organizer and ring-leader of a large scale "boiler room" stock fraud operation had been permitted to plead guilty and been sentenced to a year and a day in prison pursuant to a 5K1.1 letter. Noting that he was hampered by Second Circuit precedent prohibiting a court from attempting to level-out sentences of similarly situated co-defendants,[14] Judge Sweet remarked that the case before him was a "classic demonstration of the disparities and inequalities that result in the individual case from mechanistic application of the Guidelines."

He went on to find that a departure was warranted under 5K2.2 because of the weight attached to the amount of loss for which defendants in a large-scale operation are held accountable, particularly where the loss is difficult, if not impossible to apportion fairly. He noted that there were between 150 and 250 brokers engaged in exactly the same practices as had the defendant being sentenced, but that only 21 defendants were being held accountable, and for differing levels of loss that at best "derive[d] from the vagaries of proof of how much loss could be attributed to each defendant." He concluded that in these circumstances it was appropriate to depart downward to the lowest level applicable to defendants in each tier of supervisory responsibility. He explained that this was not a case of rectifying apparent disparities in sentences between co-defendants because the court was addressing a specific offense characteristic (loss amount), which inadequately represented the true nature of the fault involved.[15]

The Court of Appeals decision in *United States v. Aleskerova*,[16] stands as a reminder that the Second Circuit will tolerate only so much creativity from a district judge in departing downwards before it finds an abuse of discretion. In that case, the defendant, an Azerbaijani citizen, claimed to fear political persecution because she had been a prosecutor under an earlier regime. Her eligibility for political asylum would have been curtailed by a conviction carrying a prison sentence of more than one year, and the district judge departed downward on that basis, reasoning that the effect of a lengthy sentence on her asylum prospects took her case out of the heartland of the guidelines. The Court of Appeals reversed, noting that Congress has made an explicit judgment to narrow the grounds for deportation for anyone convicted of an aggravated felony, and that the judge's disagreement with that policy could not provide a basis for departure.

Lost computation continues to generate substantial litigation despite the fact that district courts are given wide latitude in arriving at the loss figure.

Perhaps because the guidelines are so harsh, upward departures are only rarely imposed, and are subject to highly exacting review in this circuit.[17] In *United States v. Riera*,[18] the Second Circuit vacated a sentence containing an upward departure imposed pursuant to §5K2.2, because the court found that the defendant had exhibited a state of mind "utterly unaddressed" by the guidelines. Specifically, the district court found the sentence called for by the guidelines to be "astonishingly low," in light of the fact that the defendant had embezzled $1 million from his employer, committed that fraud while free on bail and committed many prior offenses for which he had only received a "slap on the wrist." The court expressed the view that a light sentence would lead the defendant to engage in criminal activity again once released from prison. Noting that a 5K2.0 departure can only be based on conduct related in some way to the offense of conviction, the Court of Appeals found that this departure was based on impermissible considerations of the defendant's criminal history and risk of recidivism. It further noted that the trial court's concern with the inadequacy of the punishment relative to the amount of money embezzled was not a proper basis for departure because that amount was taken into account in the guideline's calculation.

In *United States v. Barresi*,[19] the district court departed upward eight levels in sentencing a defendant who had pleaded guilty to falsely implicating a citizen of Pakistani descent in the attacks of Sept. 11, 2001, finding that the nonmonetary harms and the interference with government functions were not adequately taken into account by the guidelines. In determining the extent of the departure, the court took into consideration not just the harms caused by the defendant's conduct, but his prior criminal record, which it found demonstrated a lack of remorse. The Court of Appeals held that the district court acted properly in determining that an upward departure was warranted, but that it had erred in its consideration of the defendant's prior record and lack of remorse in calculating the degree of departure. Noting a split within the circuits, the court rejected the broad principle that the extent of a departure may be based on factors that do not support the initial decision to depart. Instead, it drew a distinction between what it referred to as metric factors (such as other statutes or guidelines) that can provide guidance for the degree of a departure even if they don't provide the basis for the departure itself, and factors, such as a defendant's prior record, which introduce entirely new "normative" considerations into the departure calculus.

The Second Circuit's decision to vacate the upward departure in *United States v. Guzman*,[20] was similarly based on the district court's method for calculating the extent of the departure rather than on the fact of the departure itself. In that case, the defendant had been convicted of possessing fraudulent identification documents. The trial court departed upward because the absence of monetary loss did not adequately reflect the seriousness of the crime, a circumstance expressly recognized by the guidelines as an appropriate basis for departure. It opted to compute the sentence based on the uncharged offense of bribery, which carries a base level of 10, rather than on fraud, the offense of conviction, which carries a base level of six. The trial court then added various adjustments pertinent to the bribery guideline, yielding an offense level of 15, which constituted a seven-level upward departure from the operative fraud guideline. The Court of Appeals held that the district court had erred by applying the bribery guideline "in toto." Rather, it found that the court should have first applied the base offense level and sen-

tencing characteristics for the offense of conviction. Only then was it permissible to consider analogous guidelines or any other rationale to determine if an upward adjustment was appropriate.

Enhancements

There were a number of decisions filed last year interpreting enhancements which boost sentences where a defendant has abused a position of trust or targeted vulnerable victims, or where a fraud affects a financial institution. Judge Sweet held in *United States v. Savin*,[21] that the investment entity that was victimized by the fraud in that case was not a "financial institution," for purposes of applying the four-level enhancement for offenses substantially jeopardizing the safety and soundness of a financial institution. He noted that the investment company was structured as a private corporation under Luxembourg law, permitting it to avoid a series of corporate taxes and regulation. He concluded that, "as a matter of equity," the company "should not be considered a financial institution for the purpose of assessing a weightier criminal punishment but not be considered as such — to its own benefit — for the purpose of domestic regulation."

United States v. Santoro,[22] instructs that a stockbroker who defrauds a customer may have his sentence enhanced for abusing a position of trust notwithstanding the fact that there is no general fiduciary duty inherent in the ordinary broker/customer relationship.[23] The Court of Appeals held that where a broker recommends stocks to his customers, rather than simply executing trades at their request, he has a duty to disclose all information pertinent to the quality of the recommended investment. In this case, the broker received a concededly excessive 15 percent commission on the trades he recommended, without disclosing that fact to his customers, warranting imposition of the enhancement.

In *United States v. Firment*,[24] the Second Circuit upheld the applicability of a vulnerable victim enhancement to a defendant convicted only of tax fraud, where the funds associated with the fraud were derived from a telemarketing scheme targeting victims many of whom were elderly and had already succumbed to previous scams. The court rejected the defendant's argument that the individuals in question were not the victims of the offense for which he was convicted. He reasoned that the only relevant victim was the United States, which could not be considered vulnerable. Relying on the commentary to §3A1.1(b)(1), which defines a vulnerable victim as any person "who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §§1B1.3," the court held that a vulnerable victim enhancement is appropriate when offense conduct victimizes a vulnerable person "even though the entity directly targeted by the offense of conviction was a different person."

As in years past, loss computation continues to generate substantial litigation despite the fact that district courts are given wide latitude in arriving at the loss figure based on which a defendant's sentence will be computed. Thus, the court reaffirmed that it is permissible to extrapolate based on an average amount of loss over a known period,[25] and upheld a district court's decision, after lengthy hearings, to accept the government's market theory of loss in a securities fraud and bribery case, rather than the intrinsic value theory advocated by the defendant.[26] The Court of Appeals upheld a loss calculation against government challenge in *United States v. Aleskerova*.[27] The defendant in that case was convicted for attempting to sell a number of stolen artworks. The drawings, including works by Durer and possibly Rembrandt, were originally stolen from a German art museum during World War II by the Soviet Army, and subsequently donated by the KGB to the Baku Museum in Azerbaijan, from which they disappeared nearly a decade ago. The district court rejected the government's argument that the drawings should be valued based on their worth to the German museum (more than $2.5 million), accepting expert testimony that their theft by the Soviet army placed a "cloud on their title," substantially reducing their value. The Second Circuit upheld the district court's valuation of $183,000, holding, in a case of first impression, that loss should be measured based on the value to the last possessor, rather than to some earlier possessor or based on the (mistaken) expectations of the defendant.

In another case, the Second Circuit affirmed a loss valuation based on the total amount of funds improperly transferred to an account in the victim's name, but to which defendant had access, including more than $200,000 that was never withdrawn from that account, finding that the defendant intended to defraud the victim of the entire amount.[28] Similarly, in *United States v. Abbey*,[29] the court upheld the district court's rejection of defendant's argument that the extent of the loss caused by his misrepresenting the amount of collateral available to secure a bank loan should be limited to the difference between the total amount of the loan and the amount the defendant would have received absent the fraud. Instead, the defendant was sentenced based on the total amount of the loan that was unpaid at the time that the fraud was discovered, reduced by the value of the collateral used to secure the loan.

Conclusion

Guideline negotiation and litigation proliferates. Prosecutors bask and defense attorneys whimper, while defense organizations continue to default by silence.

(1) 204 FSupp2d 412 (EDNY 2002).
(2) See generally, United States Sentencing Commission, Federal Sentencing Statistics, available at www.ussc.gov.
(3) Id., Fiscal Year 2001 Statistics, Table 8, Guidelines Departure Rate by Circuit and District.
(4) See, e.g., *United States v. Reeves*, 296 F3d 113 (2d Cir. 2002) (to meet its obligation of good faith in refusing to submit 5K1.1 letter, government need only demonstrate honest dissatisfaction with defendant's efforts to cooperate).
(5) No. 01 Cr. 890, 2002 WL 461590 (S.D.N.Y. March 25, 2002) (Sweet, J.).
(6) 212 FSupp2d 214 (S.D.N.Y. 2002).
(7) See also *United States v. Barbato*, 00 Cr. 1028, 2002 WL 31556376 (Nov. 15, 2002) (Kram, J) (granting downward departure based on combination of ailments including severe hypertension and spinal stenosis and disc disease, in combination with age, which would likely be exacerbated in prison and thus shorten life expectancy).
(8) 163 F3d 731 (2d Cir. 1998).
(9) 281 F3d 38 (2d Cir. 2002).
(10) But see *United States v. Harrell*, 207 FSupp2d 158 (S.D.N.Y. 2002) (Marrero, J.) (declining to depart downward under 5K2.20 for defendant convicted of making an online threat regarding the world series, following Sept. 11, 2001, on the basis that the defendant's use of an online name different from his usual name, as well as the fact that he was influenced by recordings released several years earlier cast[] doubt in the notion that [defendant's] threatening message arose from a purely spontaneous act during a friendly online sports debate with a Yankee fan.
(11) 2002 WL 31556376.
(12) See also *United States v. Arbelaez*, 00 Cr. 1260, 2002 WL 750845 (S.D.N.Y. April 26, 2002) (Sweet, J.).
(13) *United States v. MacCaull*, 00 Cr. 91-13, 2002 WL 31426006, (S.D.N.Y. Oct. 28, 2002).
(14) See *United States v. Tejeda*, 146 F.3d 84 (2d Cir. 1998).
(15) See also *Joyeros*, (departure based on fact that defendant's livelihood had been destroyed preventing her re-entry into criminal activity, and on coercive nature and harsh conditions of extensive of pre-trial detention).
(16) 300 F3d 286 (2d Cir. 2002).
(17) Nationally, in 2001, upward departures were imposed in only .6 percent of cases, with the rate being even lower in the Second Circuit, where upward departures were imposed in .4 percent of sentences for a total of only 15 cases
(18) 298 F3d 128 (2d Cir. 2002).
(19) No. 02-1039, 2002 WL 31819242, (Dec. 16, 2002).
(20) 282 F3d 177 (2d Cir. 2002).
(21) 00 Cr. 45, 2002 WL 31520472 (Oct. 22, 2002).
(22) 302 F3d 76 (2d Cir. 2002).
(23) See also *United States v. Szur*, 289 F3d 200 (2d Cir. 2002).
(24) 296 F3d 118 (2d Cir. 2002).
(25) See *United States v. Davis*, Nos. 00-1282, 00-1307, 00-1728 & 01-1171, 2002 WL 1369795 (June 25, 2002) (unpublished disposition).
(26) *United States v. Eyman*, No. 99-1173, 2002 WL 31831384 (2d Cir. Dec. 18, 2002).
(27) 300 F3d 286.
(28) *United States v. Coriaty*, 300 F3d 244 (2d Cir. 2002).
(29) 288 F3d 515 (2d Cir 2002).

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