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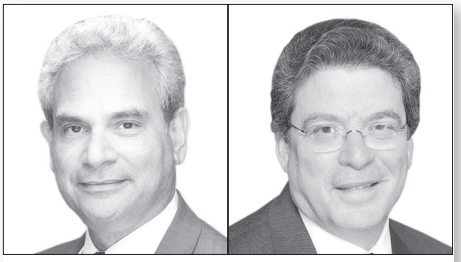
Reasonableness Review After 'Booker'

In 2005, the U.S. Supreme Court rendered the U.S. Sentencing Guidelines advisory, in theory granting district courts greater discretion in sentencing federal offenders.

The Court's decision in *United States v. Booker*[1] also instructed circuit courts of appeals to review sentences for "reasonableness." Two weeks ago, the Supreme Court heard oral argument in two cases dealing with this standard of appellate review of sentencing decisions in the post-*Booker* era. The cases, *United States v. Rita* and *United States v. Claiborne*,[2] examine whether the sentences upheld by the U.S. Court of Appeals for the Fourth Circuit and Eighth Circuit, respectively, were "reasonable." The Supreme Court's decisions in these cases will resolve a split among the circuits on whether a within-guidelines sentence is presumptively reasonable. On a more basic level, the decisions will define the nature and extent of the discretion left to district judges in the sentencing process.

'United States v. Rita'

In *Rita*, the defendant was found guilty by a jury of two counts of making false declarations in violation of 18 USC §1623(a), two counts of making false statements in violation of 18 USC §1001(a)(2), and one count of obstructing justice in violation of 18 USC §1503. The government's case was based on two statements made by Mr. Rita to a grand jury investigating



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InterOrdnance of America Inc., a licensed firearms retailer, which was accused of selling a vintage firearm that qualified as an illegal "machine gun" under federal law. Mr. Rita was called to testify before the grand jury about his conversations with InterOrdnance personnel when he purchased one such firearm. The government contended that Mr. Rita testified falsely when he denied that: i) he had spoken to InterOrdnance representatives after being contacted by the Bureau of Alcohol, Tobacco and Firearms (ATF) concerning the recall of the weapon and ii) the ATF had asked him to surrender the weapon.[3]

Despite Mr. Rita's assertions that his statements were true and sincere, a jury convicted him on all counts. The Presentence Report prepared in the case calculated that under the Sentencing Guidelines, the base offense level of 14 should be increased to 20 because Mr. Rita was an "accessory after the fact" to supposed violations by InterOrdnance of 22 USC §2778(b)(2), which prohibits the import and export of certain firearms. This issue was not submitted to the jury. The corresponding recommended sentence was 33 to 41 months.

Mr. Rita argued that the district court should depart from the recommended range, asserting both departure provisions under the guidelines and statutory factors enumerated in 18 USC §3553(a). Specifically, Mr. Rita asserted that his military and civil service, his physical impairments, and his vulnerability to victimization in prison qualified him for a sentence below the recommended range. Perceiving itself presumptively bound by the guidelines range under Fourth Circuit precedent, the district court imposed a sentence of 33 months imprisonment.[4] In an unpublished per curiam opinion, the Fourth Circuit affirmed the sentence, holding that a sentence within the guidelines range is "presumptively reasonable" and determined, without analysis, that the district court had adequately considered the factors set forth in §3553(a).[5]

Mr. Rita sought a writ of certiorari review of his sentence, arguing in part that the Fourth Circuit's presumption of reasonableness effectively "resurrects the system rejected in *Booker*."[6] The government's opposition simply asserts that a circuit court's presumption of the reasonableness of a sentence that falls within the guidelines range did not render the guidelines mandatory or contravene the effect of *Booker*. The government's response is only two-pages in length, relying on previously filed briefs opposing petitions making similar arguments.[7]

'United States v. Claiborne'

Mr. Claiborne pleaded guilty to a two-count indictment without a plea agreement, at which time the parties stipulated to the applicable statutory penalties. The indictment charged him with distribution of a controlled substance, with a corresponding punishment of zero to 20 years imprisonment and with possession of a controlled substance, a charge requiring a mandatory five-year minimum sentence because the amount of crack cocaine seized exceeded 5 grams by three-hundredths of a gram. The maximum statutory sentence on the second charge was 20 years.[8]

In sentencing Mr. Claiborne, the district court determined, over the government's objection, that the defendant's qualification for the safety-valve exemption under the

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guidelines exempted him from the mandatory minimum sentence. The court further ruled that Mr. Claiborne: "(1) had no criminal history points; (2) had not used or threatened violence or possessed a weapon; (3) did not cause any injury; (4) did not supervise, manage, lead, or organize other criminal actors; and (5) offered the government all information he had concerning the offense."[9] The judge concluded that Mr. Claiborne's offense level, reduced by five points for the safety valve and acceptance of responsibility was 21, which, with zero criminal history points, resulted in a Sentencing Guideline range of 37 to 46 months. However, considering the defendant's strong family bonds, work history and the amount of drugs involved, the court imposed a below-guidelines sentence of 15 months imprisonment. The government appealed, arguing that the sentence imposed was unreasonable.

The Eighth Circuit agreed. Stating that the range recommended by the guidelines "is presumed reasonable," the court noted that sentences varying from that range are reasonable only where "the judge offers appropriate justification under the factors specified in 18 USC §3553(a)." "How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." Finding that Mr. Claiborne's sentence was an "extraordinary variance," the court held that the sentence was not supported by the requisite "extraordinary facts."[10]

Mr. Claiborne sought a writ of certiorari, arguing that "[t]he Eighth Circuit's approach rests on the false premise that this Court intended 'reasonableness' review to limit the range of choice available to judges considering §3553(a). Requiring 'extraordinary justification' for non-guidelines sentences negates the expanded district court discretion that the *Booker* remedy required in order to render the prior presumptive guidelines system 'effectively advisory.'"[11] The government opposed Mr. Claiborne's petition, arguing that since the presumption of reasonableness was not applied by the Eighth Circuit, the question regarding the validity of such a presumption was not presented in this case. Regardless, the government argued, as "explained in briefs in opposition to other petitions that raise the claim, according a Guidelines sentence a presumption of reasonableness is consistent with *Booker* and does not make the Guidelines effectively mandatory, and it is not clear that reasonableness review is materially different in circuits that have adopted the presumption than in those that have not."[12]

Questions for the High Court

The question presented in *United States v. Rita* was limited to whether the district court's choice of a within-guidelines sentence was reasonable and whether, in making that determination, it is consistent with *Booker* to accord a presumption of reasonableness to within-guidelines sentences. Finally, the Court asked whether that presumption justifies a sentence imposed without an explicit analysis by the district court of the §3553(a) factors and any other factors that might justify a lesser sentence.[13] In *United States v. Claiborne*, the question was whether the district court's choice of a below-guidelines sentence was reasonable and whether in making that determination it is consistent with *Booker* to require that a sentence which constitutes a substantial variance from the guidelines be justified by extraordinary circumstances (referred to as the "proportionality" principle).[14]

Transcripts of the oral arguments in 'Rita' and 'Claiborne,' held on Feb. 20, reveal the Court's focus on the presumption of reasonableness for within-guidelines sentences. With the exception of Justice Stephen Breyer's questions indicating an interest in continuing "guideline-centric sentencing," the other Justices were not revealing their positions.

The Supreme Court's decision in these cases will resolve whether a within-guidelines sentence is presumptively reasonable. The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia circuits specifically have adopted a presumption of reasonableness. Those that have not include the First, Second, Third, Ninth and Eleventh circuits.

NYCDL Amicus Briefs

• *Looking at the Numbers*. The New York Council of Defense Lawyers (NYCDL) has filed amicus briefs in both *Rita* and *Claiborne*, each in support of the petitioner. In support of its briefs, and "[t]o aid the Supreme Court in understanding the practical impact of the presumption of reasonableness and the requirement of extraordinary circumstances," the NYCDL submitted its findings in more than 1,500 post-*Booker* cases in which the sentence was reviewed for "reasonableness."[15] Interestingly, this data comes in the face of a dearth of such information from the U.S. Sentencing Commission.[16]

The NYCDL surveyed all cases from Jan. 1, 2006 through Nov. 16, 2006 in which a circuit court of appeals engaged in a reasonableness review of a sentence. According to the NYCDL, this data demonstrates how the "unreasonableness review" has functioned in practice, "revealing how courts of appeals have applied *Booker*'s standard." Of the 1,515 cases analyzed, approximately 10 percent of these cases involved sentences above the guidelines that were appealed by the defendants. More than 95 percent of those sentences were affirmed (only 7 cases were vacated). In contrast, approximately 85 percent of the below-guidelines sentences appealed by the government were vacated as unreasonable. Of the total 1,515 cases, only 4.7 percent of these were below-guidelines sentences appealed by the government, while 9 percent were below-guidelines sentences appealed by the defendant, none of which were found to be unreasonable. Finally, the remaining 1,152 cases were within-guidelines sentences appealed by defendants. Only 16, or approximately 14 percent, of these cases were vacated. However, all, but one, were vacated for procedural reasons. Therefore, only one within-guideline sentence appealed by a defendant was found to be substantively unreasonable.[17]

Further, the NYCDL broke down the findings by circuit, comparing the data collected from those circuits that have explicitly adopted a presumption of reasonableness for within-guidelines sentences with the data from the circuits that have not reached such a conclusion. The NYCDL's findings reveal that appellate courts universally are affirming within-guidelines sentencings: "Sentences outside the advisory-guidelines range, however, receive inconsistent treatment in favor of higher sentences. The courts have been deferential to above-guidelines sentences, but have collectively disfavored below-guidelines sentences appealed by the government. In those circuits formally applying a presumption of reasonableness nearly every below guidelines sentence appealed by the government has been reversed."[18] This compares with 65 percent of reversals in below-guidelines sentences in circuits that have not adopted a reasonableness presumption.

The NYCDL argues that this data suggests that appellate courts are not reviewing for unreasonableness in a manner consistent with §3553(a). The organization posits that this likely is the result of "(1) a general failure to attend to the words Congress used in §3553(a) and (2) a mistaken assumption that the guidelines incorporate all of the required §3553(a) considerations."[19] Furthermore, the NYCDL asserts that the circuit courts "inherent skepticism" of below-guidelines sentences, resulting in their almost universal reversal, "reflects the judicially created requirement that sentences outside of the guidelines be justified by unusual or unique—or in [Mr. Claiborne's] case 'extraordinary'—circumstances. This requirement, however, is without basis in the text, which assigns no hierarchy to the factors district courts are to 'consider,' and does not comport with §3553(a)'s parsimonious mandate."[20]

Reasonableness Standard

The Second Circuit has not explicitly adopted a presumption of reasonableness for within-guideline sentences. Out of the 77 Second Circuit cases analyzed by the NYCDL, six were above-guideline sentences appealed by the defendant, 11 were below-guideline sentences—eight of which were appealed by the defendant and three of which were appealed by the government, and the remainder were within-guideline sentences. All of the above-guideline sentences were affirmed. All of the below-guidelines sentences appealed by defendants were affirmed, while two of the three appealed by the government were vacated. All, but one, of the remaining within-guideline sentences, all of which were appealed by the defendant, were affirmed. The one reversal was on procedural grounds. Given that there were 77 sentences appealed, a defendant was successful only twice—2.5 percent of the time.[21]

The Second Circuit recently re-articulated the duties of district and appellate courts in sentencing cases in *United States v. Williams*.[22] The court stated that "[w]e have recognized that district courts are to impose sentences pursuant to the requirements of §3553(a)—including the requirements of §3553(a)'s parsimony clause [which provides that the sentence should be 'sufficient, but not greater than necessary']—while appellate courts are to review the sentences actually imposed by district court for reasonableness." The reasonableness review requires appellate courts to consider the sentence itself as well as the procedures employed in arriving at the sentence.

In *United States v. Wills*,[23] the government appealed a below-guidelines sentence imposed by the district court. In imposing the lower sentence, the sentencing judge relied on two factors under §3553(a)—the fact that the defendant was likely to be deported after his incarceration, thereby reducing the need to protect the public from him, and the fact that the defendant's sentence was highly disparate from his codefendants. The government appealed the sentence, arguing that it was unreasonable because the district court erroneously considered these factors. The Second Circuit agreed, finding the district judge's reliance on the defendant's deportation and disparate sentence was a legal error.

The Court of Appeals remanded, directing the district court to resentence: "(1) without regard to [the defendant's] potential future deportation unless the court finds, with some particularity, that [Mr.] Wills is certain to be deported and that deportation, in view of [Mr.] Wills's individual circumstances will serve to protect the public; and (2) with consideration of why any putative similarities between [Mr.] Wills and his codefendants—if the judge finds these similarities relevant under §3553(a)(1)—warrant a narrower gap in sentences, while mindful of the national goal of avoiding unwarranted sentencing disparities."[24]

Nothing in the Second Circuit's decision prevents the sentencing court from imposing the same sentence. Rather, the Court of Appeals was not satisfied with the district court's stated rationale as it related to this specific defendant. Some believe the lesson for defense counsel is that "[w]hat the district court says is more important than what it does." Accordingly, counsel should make an effort to provide the court with "ammunition" that includes "individualized findings about [counsel's] particular defendant."[25]

Awaiting 'Rita,' 'Clairborne'

Transcripts of the oral arguments in *Rita* and *Claiborne*, held on Feb. 20, reveal the Court's primary focus on the presumption of reasonableness for within-guidelines sentences.[26] With the exception of Justice Stephen Breyer's questions indicating an interest in continuing a "guideline-centric sentencing system," the other Justices were not as revealing in their positions. To be sure, none expressed the candor found in the recent statement made by Justice Anthony Kennedy to Congress that he was "not comfortable with anything in the federal correctional system and with our sentencing policy."

Notably, during oral argument of the *Rita* case, the government articulated its view of the *Apprendi-Booker* doctrine, stating that a sentencing judge is "not…bound to impose [a guideline sentence] if the judge feels that a different level of punishment is appropriate…. [I]t necessarily implies that a judge does have a certain amount of freedom in an advisory guideline system to disagree with what the Sentencing Commission has found."[27] "Judges are still obligated to comply with 3553(a), which requires them to exercise discretion."[28]

The government's statements about the application of the *Booker* remedy seem to be in tension with some arguments advanced by the Department of Justice in lower court post-*Booker* litigation. Counsel would be well-advised to bring the government's stated position in the Supreme Court to the attention of district courts during sentencing hearings. Counsel should likewise endeavor to assist the district judge in making as complete a record as possible in support of a favorable sentence, including reference to reliance on the purposes of sentencing set forth in §3553(a)(2).

1. 543 US 220 (2005).
2. 127 SCt 551 (Nov. 2006).
3. Brief for Petitioner on Writ of Certiorari ("Rita's Brief") at pp. 1-2.
4. Id. at pp. 3-5.
5. 117 FedAppx 357, 2006 WL 1144508 (4th Cir. May 1, 2006).
6. Rita's Brief at pp. 6-7.
7. *Rita v. United States*, Memorandum for the United States in Opposition.
8. Brief of Petitioner on Writ of Certiorari ("Claiborne's Brief") at pp. 2-3.
9. Id. at pp. 3-4.
10. 439 F3d 479 (8th Cir. Feb. 2006).
11. Claiborne's Brief at pp. 7-8.
12. *Claiborne v. United States*, Brief for the United States in Opposition at pp. 11-12.
13. 127 SCt 551.
14. Id.
15. NYCDL Press Release, "NYCDL Files Amicus Briefs in the U.S. Supreme Court in 'Rita' and 'Claiborne' Cases (Jan. 23, 2007).
16. Douglas A. Berman, "Will the USSC Have More Data for 'Claiborne' and 'Rita'?," Sentencing Law and Policy Blog (Feb. 4, 2007) (available at: http://sentencing.typepad.com/sentencing_law_and_policy/2007/02/wil_the_ussc_h.html) (noting that the Sentencing Commission has not produced any new type of post-*Booker* sentencing data in almost a year).
17. See NYCDL Reasonableness Review Database, Summary of Findings at pp. 2a to 3a (available on NYCDL Web site at http://www.nycdl.org/newsDetails_public.ihtml?itemID=368).
18. *Rita v. United States*, Amicus Curiae Brief of the NYCDL at p. 3.
19. NYCDL Amicus Brief in Rita at pp. 3-4.
20. *Claiborne v. United States*, Amicus Curiae Brief of the NYCDL at p. 3.
21. NYCDL Reasonableness Review at pp. 14a-24a.
22. __F3d__, 2007 WL 241296 (2nd Cir. Jan. 30, 2007).
23. __F3d__, 2007 WL 366071 (2nd Cir. Feb. 5, 2007).
24. Id. at *6.
25. Steve Statsinger, "Circuit Once Again Shoots Down Lenient Non-Guideline Sentence," Second Circuit Blog (Feb. 11, 2007) (available at: http://circuit2.blogspot.com/).
26. Transcripts of the oral arguments are available on the Sentencing Law and Policy Blog available at http://sentencing.typepad.com/.
27. Transcript of oral argument, *Rita v. United States*, at page 34-35.
28. Transcript of oral argument, *Rita v. United States*, at page 37

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