



## TAX LITIGATION ISSUES

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### *The Promise of 'Booker': Probationary Tax Sentences*

Before the U.S. Sentencing Guidelines became effective in 1987, many white-collar defendants convicted of federal offenses received probationary sentences. After the guidelines were implemented, however, the overall number of convicted defendants who avoided prison declined precipitously, from approximately 48 percent in 1984 to 6.2 percent in 2007.<sup>1</sup> Moreover, the length of prison sentences imposed on such defendants nearly tripled during the same period of time.<sup>2</sup>

In its 2005 decision in *United States v. Booker*, the Supreme Court rendered the guidelines advisory, returning greater discretion to district judges to impose reasonable sentences.<sup>3</sup> In 2006, we noted that more than a year after *Booker*, the majority of sentences imposed in federal criminal cases continued to fall within the applicable guidelines range.<sup>4</sup> Subsequently, in *Kimbrough v. United States*<sup>5</sup> and *Gall v. United States*,<sup>6</sup> the Supreme Court held that, after *Booker*, district courts have the discretion to sentence defendants outside the guidelines range and that appellate courts may not presume that below range sentences are unreasonable.

While preliminary analysis suggests that *Kimbrough* and *Gall* have yielded modest increases in the number of nonguidelines sentences,<sup>7</sup> it is clear that *Booker* and its progeny permit judges to weigh a defendant's entire life in imposing a fair and just sentence. *United States v. Tomko*,<sup>8</sup> a criminal tax case currently pending in the U.S. Court of Appeals for the Third Circuit, uniquely highlights this renewed flexibility in sentencing.

#### 'United States v. Tomko'

From 1996 through 1998, William Tomko directed numerous subcontractors working on his home to falsify invoices to make it appear that their work had been done for Mr. Tomko's construction company at one of its job sites. Accordingly, construction costs relating to Mr. Tomko's house



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were paid through his company, which improperly deducted the expenses, and Mr. Tomko failed to report the value of the construction costs incurred by the company as income on his personal income taxes. Through this scheme Mr. Tomko managed to evade more than \$225,000 in personal federal income taxes.

After Mr. Tomko pleaded guilty to income tax evasion in the U.S. District Court for the Western District of Pennsylvania, the Probation Department computed his guidelines sentencing range as 12 to 18 months of incarceration. At sentencing, defense counsel argued for a downward departure based on:

- (1) the impact Mr. Tomko's incarceration would have on his business, including the danger that more than 300 innocent employees might lose their jobs;
- (2) Mr. Tomko's exceptional charitable and community activities, including his work with Habitat for Humanity in its efforts to assist victims of Hurricane Katrina; and
- (3) Mr. Tomko's extraordinary acceptance of responsibility.

In support of the motion, Mr. Tomko submitted numerous letters from his friends, family and community leaders attesting to his generosity and compassion.

The government opposed the defendant's motion, arguing that a probationary sentence would send the message to others that "you can buy your way out of trouble" and that home confinement was particularly unwarranted given its view that Mr. Tomko's home was "stole[n] from the government." Rather, the government argued that incarceration was necessary to deter others, and that "the threat of jail is real for these white-collar criminals that commit tax fraud and what we need to do is make good on this threat."<sup>9</sup>

#### Sentencing Court's Decision

As required under *Booker*, the district court considered the factors set forth in 18 U.S.C. §3553(a) in imposing sentence. The court first noted that Mr. Tomko's offense was nonviolent, not ongoing in nature, not part of a larger pattern of criminal activity, and that there were no identifiable victims of the offense. The court also stated that Mr. Tomko had negligible criminal history, gainful employment, a solid family and strong educational background.

The court then turned to the factors set forth in §3553(a)(2), acknowledging that while tax evasion was a serious offense, Mr. Tomko had led an otherwise "crime-free life and there was little likelihood of recidivism." Finally, the court considered the kinds of sentences available, the sentencing range, any pertinent policy statements, and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as required under §3553(a)(3)-(6). Recognizing the need for consistent sentencing and noting that these considerations "generally weigh in favor of sentencing a Defendant within the Guidelines range," the court concluded that mitigating factors warranted a sentence below the applicable range.<sup>10</sup>

Thus, after weighing all of the relevant factors, the court sentenced Mr. Tomko to 250 hours community service, three years of probation, including one year of house arrest, and a \$250,000 fine. The court also ordered Mr. Tomko to undergo 28 days of in-house treatment for alcohol abuse.<sup>11</sup>

#### Review by Panel of the Third Circuit

The government appealed Mr. Tomko's sentence, arguing that it was unreasonable in light of the circumstances of the case and the factors set forth in §3553(a). On appeal, a panel of the Third Circuit stated that in reviewing the sentence for reasonableness under *Booker*, it was required to accord broad discretion and deference to the trial judge to craft sentences that promoted the sentencing goals in §3553(a). The panel, however, concluded that although reasonableness review is deferential, it is not "utterly impotent" or the equivalent of a "rubber stamp" and that before affirming a sentence "we must assure ourselves that [the district court] actually gave 'meaningful consideration' to the §3553(a) factors and

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‘reasonably applied them to the circumstances of the case.’”<sup>12</sup>

Although no longer mandatory, the panel asserted that the guidelines remain a vital force in sentencing as they reflect a “rough approximation” of sentences that will accomplish the objectives set forth in §3553(a). Conducting its own review of the statutory factors, the panel concluded that cumulatively they “advocate[d] in the strongest possible terms for a sentence including a term of imprisonment.”

In addition to concurring with the government that a probationary sentence did not reflect the seriousness of the offense, the panel agreed that real deterrence could only be accomplished through jail time. The panel further found that the mitigating factors considered by the district court failed to distinguish Mr. Tomko from others with similar records found guilty of similar conduct, and disagreed with the district court’s conclusion that Mr. Tomko’s offense was “garden variety,” noting that the scheme spanned a number of years, involved sophisticated planning and Mr. Tomko’s coercion of multiple third parties.<sup>13</sup>

In sum, the panel found that while each of the mitigating factors—negligible criminal history, good record of employment and strong community ties and extensive charitable work—were appropriately considered by the sentencing court, those factors “pale in comparison to the numerous §3553(a) factors suggesting that a term of imprisonment is warranted in cases of tax evasion as willful and brazen as [Mr.] Tomko’s.”<sup>14</sup> Thus, the panel held that the sentence imposed was unreasonable, vacated the judgment of the district court and remanded for resentencing in accordance with its opinion.

## Rehearing En Banc

Fortunately for Mr. Tomko, other defendants, [and] the criminal defense bar, the panel’s decision is not the end of Mr. Tomko’s saga. Rather, months later, the panel granted Mr. Tomko’s petition for rehearing en banc and vacated its decision.<sup>15</sup> In an amicus curiae brief filed in support of Mr. Tomko, the National Association of Criminal Defense Lawyers and Federal Public and Community Defenders of the Third Circuit presented an important perspective on sentencing that is especially relevant in white-collar cases. In essence, the NACDL and FPCD argued that the Sentencing Commission failed to comply with Congress’s mandate to design a fair and just sentencing scheme and ignored the valid role of probationary sentences, especially in the context of tax and other white-collar cases. The amici further assert that in light of the broad discretion granted by the Supreme Court in *Kimbrough* and *Gall*, sentencing courts are free to downwardly depart from the guidelines and impose probationary sentences.<sup>16</sup>

According to amici, the fundamental flaw in the guidelines is that the commission ignored Congress’s determination that probation constitutes a punishment that will be warranted in many cases, and that sentencing courts should consider and are free to impose probationary sentences as a form of punishment, not an act of leniency. Citing language from and legislative history of the Sentencing Reform Act (SRA) directing both the Sentencing Commission and courts to consider “whether to

impose a term of imprisonment,” amici argue that “Congress intended the courts to first determine whether to imprison in light of the characteristics of the defendant, the circumstances of the offense, and all of the purposes of sentencing.”<sup>17</sup> Further, by precluding probationary sentences where the defendant’s offense level exceeds 10, the commission “fail[ed] to provide a mechanism that would guide” the threshold probation versus prison determination:

The guidelines offer no option that does not include a term of imprisonment, and none that reflect the ‘general appropriateness of imposing a sentence other than imprisonment’ in cases that do not involve recidivism, ‘a crime of violence or an otherwise serious offense.’

Finally, amici assert that the district court’s variance from the guidelines should be affirmed because the tax guidelines fail to reflect past sentencing practices. Essentially, they argue that the commission improperly failed to assess empirical evidence of pre-guidelines sentencing practices, including judicial decisions and sentencing data reflecting a significant percentage of probationary sentences imposed on tax offenders. According to amici, the guidelines are fatally flawed by the commission’s decision, in weighing pre-guidelines sentences, to exclude all sentences that did not result in incarceration and thus to average only those cases that yielded prison sentences. Accordingly, “a reasoned decision to diverge from the guideline range will not be an abuse of discretion.”<sup>18</sup>

The government responded to the amicus brief by arguing that the position urged by amici is not supported by law or policy. Rather, the government points to language in the SRA’s legislative history that expresses Congress’s determination that tax and other white-collar offenses were those for which existing “sentences [did] not accurately reflect the seriousness of the offense.” The government further asserts that Congress believed many probationary sentences had been granted “without due consideration being given to the fact that the heightened deterrence effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance.”<sup>19</sup> Accordingly, the government argues, the Sentencing Commission properly made a policy decision to adopt a tax guideline structure that did not specifically include probation.

Moreover, the government asserts that the commission was not bound by prior practice, as amici suggested, but was authorized to independently develop a sentencing range consistent with the purposes of sentencing as set forth in §3553(a). In addition, the government argues that amici have interjected into the case a policy dispute which, while important, is not pertinent to the case at hand: “Amici’s view that the Commission should have enacted a guideline that absolutely precluded imprisonment is a policy disagreement, not proof that the Commission violated its enabling legislation.” Rather, the government asserts, amici failed to prove that the tax guidelines do not reflect congressional policy and §3553(a) considerations, “[a]nd they fail to persuasively explain, in this mine-run case, why it was reasonable to sentence defendant Tomko to probation with home detention.”

Finally, the government argues that the district court’s sentence was both procedurally and substantively unreasonable under *Booker*, arguing that the judge failed to consider general deterrence, which it argues is a primary factor in tax prosecutions under §3553(a), and that the probationary sentence was substantively unreasonable because it was “overly lenient.”<sup>20</sup> Rather than taking on the policy issues underlying the guidelines, Mr. Tomko understandably focuses on defending his probationary sentence, stressing that it varied from the applicable guidelines range for incarceration by only three levels, and that the district court imposed a fine eight times greater than the applicable guidelines range. And relying on the Supreme Court’s decision in *Gall*, Mr. Tomko argues that a “deferential abuse-of-discretion standard, prevents the appellate court from reversing a district court’s decision simply because it concluded that a different sentence also was “appropriate.”<sup>21</sup>

## Conclusion

The en banc rehearing of *Tomko* was scheduled for mid-November.<sup>22</sup> Regardless of the resolution of the Third Circuit’s reconsideration of *Tomko*, that case and the approach urged by amici provide an important reminder of the relevance of individual factors under §3553(a) and the complex application of those factors in sentencing white-collar defendants, especially in tax cases.

1. U.S. Sentencing Commission, “2007 Sourcebook to Federal Sentencing Statistics,” 27 Fig. D (2007) (available at <http://www.uscc.gov/ANNRPT/2007/Table16.pdf>).
2. Frank O. Bowman, III, “The Failure of The Federal Sentencing Guidelines: A Structural Analysis,” 105 Colum. L. Rev. 1315 (2005).
3. 543 U.S. 220 (2005).
4. John J. Tigue and Jeremy H. Temkin, “Sentencing in Criminal Tax Cases Post-Booker,” *New York Law Journal* (May 18, 2006).
5. 128 S.Ct. 558 (2007).
6. 128 S.Ct. 586 (2007).
7. “U.S. Sentencing Commission Preliminary Post-‘Kimbrough’/‘Gall’ Data Report, United States Sentencing Commission, September 2008 (available at [http://www.uscc.gov/USSC\\_Kimbrough\\_Gall\\_Report\\_September\\_08\\_Final.pdf](http://www.uscc.gov/USSC_Kimbrough_Gall_Report_September_08_Final.pdf)).
8. 498 F.3d 157 (3d Cir. 2007).
9. *Id.*
10. 498 F.3d at 162.
11. *Id.*
12. *Id.* at 163.
13. *Id.* at 165-67.
14. *Id.* at 172.
15. 513 F.3d 360 (3d Cir. 2008).
16. Brief of Amici Curiae National Association of Criminal Defense Lawyers and Federal Public and Community Defenders of the Third Circuit in Support of Appellee on Rehearing En Banc, *United States v. Tomko*, 05-4997 (Oct. 1, 2008).
17. *Id.* at p. 5.
18. *Id.* at p. 27.
19. Government’s Brief in Response to Brief of Amici Curiae, *United States v. Tomko*, No. 05-4997 (Oct. 23, 2008) at p. 3 (citing S. Rep. No. 225, 98th Cong., 1st Sess. 91-92 (1983)).
20. Supplemental En Banc Brief for the Plaintiff-Appellant, *United States v. Tomko*, No. 05-4997 (Oct. 1, 2008).
21. Supplemental Brief for the Defendant-Appellee, *United States v. Tomko*, No. 05-4997 (Oct. 1, 2008).
22. 538 F.3d 644 (3d Cir. 2008).