New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 260—NO. 95
THURSDAY, NOVEMBER 15, 2018

Tax Litigation Issues

Expert Analysis

What Will Justice Kavanaugh Mean For Criminal Tax Defendants?

By **Jeremy H. Temkin**

On Oct. 6, 2018, Brett Kavanaugh became the ninth sitting justice on the Supreme Court. Notwithstanding the controversy surrounding his confirmation, practitioners around the country need to adapt to the reality that Justice Kavanaugh is likely to sit on the court for many years to come. In his previous position on the U.S. Court of Appeals for the D.C. Circuit, then-Judge Kavanaugh adjudicated more than 1,500 cases and authored over 300 majority, concurring, or dissenting opinions. This body of work arguably provides the clearest insight into how Judge Kavanaugh might shape the Supreme Court's jurisprudence in the coming years.

Regardless of what they think about Justice Kavanaugh's record on other issues, criminal defense lawyers are likely to view his approach to the imposition of sentencing—the most impactful issue facing their clients who may find themselves convicted of federal offenses—as somewhat of a mixed bag. Thus, while Justice Kavanaugh has articulated concerns that the post-*Booker* regime has brought too much unpredictability to sentencing, his decisions have demonstrated deference to district judges. Fortunately, this deference may be helpful to defendants convicted of federal tax offenses since district judges commonly exercise their discretion to grant substantial downward variances from the applicable Sentencing Guidelines.

Trends in Sentencing Tax Offenders

Following the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005), which made the U.S. Sentencing Guidelines advisory rather than mandatory, district court judges have significant discretion in determining a defendant's sentence. This discretion is frequently exercised in criminal tax sentences, which often vary significantly from (and fall substantially below) the applicable Guidelines. In the fiscal year ending Sept. 30, 2017 (the last year for which statistics are available), 430 defendants were sentenced in federal court based, primarily, on tax offenses. Of these defendants, 107 (24.9 percent) received a sentence within their Guidelines range, which was down from 223 of 605 (36.9 percent) similarly-

While Justice Kavanaugh has articulated concerns that the post-'Booker' regime has brought too much unpredictability to sentencing, his decisions have demonstrated deference to district judges.

JEREMY H. TEMKIN *is a principal in Morvillo Abramowitz Grand Iason & Anello P.C. Nicole Cassidy, an associate at the firm, assisted in the preparation of this article.*

situated defendants who received Guidelines sentences in fiscal 2012.

Moreover, when a district judge imposed a non-Guidelines sentence in a tax case, the result was far more likely to be beneficial to the defendant. Thus, of the 430 tax violators sentenced in fiscal year 2017, only seven (1.6 percent) received above-Guidelines sentences, compared with 316 (73.5 percent) who received below-Guidelines sentences. This reflects an improvement over fiscal 2012 when above-Guidelines sentences were imposed at roughly the same rate (1.2 percent or seven of 605) but below-Guidelines sentences were imposed in just 62 percent (375 of 605) of cases.

The vast majority of below-Guidelines sentences are not predicated on motions by the Government to reward defendants for their cooperation. Non-Government sponsored sentence reductions rose as a percentage of all tax cases: from 41.5 percent (251 of 605) in fiscal year 2012 to 48.8 percent (210 of 430) in fiscal year 2017, resulting in approximately a median 12-month sentence reduction for each period. In contrast, government-sponsored sentence reductions were granted to tax defendants at a rate of 20.5 percent (124 of 605) in fiscal year 2012 and 24.7 percent (106 of 430) in fiscal year 2017.

Moreover, tax defendants often do better than white-collar defendants generally. Not only do tax defendants receive below-Guidelines sentences at a higher rate than fraud defendants (73.5 percent vs. 55.2 percent in fiscal 2017), they also avoid jail more frequently. In fiscal 2017, tax defendants received a probationary sentence without any period of confinement in 22.5 percent cases, up from 19.5 percent in fiscal 2012. Meanwhile, other defendants convicted of fraud offenses received probationary sentences without confinement in just 15 percent of cases in fiscal 2017, down from 16.5 percent in fiscal 2012. In other words, defendants convicted of tax offenses tend to benefit from the status quo, especially in relation to other white-collar defendants.

> As Justice Kavanaugh takes his seat on the Supreme Court, his willingness to defer to district judges on sentencing issues may favor defendants convicted of tax offenses who frequently benefit from downward variances.

Views on Criminal Sentencing

While criminal defense lawyers and many judges applaud the increased discretion provided to district judges in light of *Booker*, the shift to advisory Guidelines has been criticized by some, including Justice Kavanaugh. In a 2009 public hearing before the U.S. Sentencing Commission, Justice Kavanaugh argued that, from a policy perspective, consideration should be given to reinstituting mandatory federal Sentencing Guidelines to limit the amount of judicial discretion in sentencing. While Justice Kavanaugh recognized that he believes judges try to "check their [personal and political views] at the door," he warned that "[w]hen sentencing becomes completely unbounded, … it seems to me that the sentencing judge almost necessarily will be bringing his or her personal views or policy views on certain kinds of sentencing issues right into the courtroom and right into the individual defendant's sentence, and have an effect on that person's liberty."

Notwithstanding this suggestion that discretion should be limited, when ruling from the bench, Justice Kavanaugh has afforded district judges significant leeway in fashioning criminal sentences. In *United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008), the defendant was convicted of filing a false income tax return in violation of 26 U.S.C. §7206(1). Although the defendant's sentencing Guidelines range was 10-16 months of imprisonment, the district court imposed a sentence of probation and a $15,000 fine. The government appealed the sentence, arguing that it was substantively unreasonable. In writing for the majority, Judge Kavanaugh recognized that "[t]his case exemplifies our deferential substantive review of sentences—including outside-the-Guidelines sentences—in the wake of *United States v. Booker*." He acknowledged that the *Booker* sentencing structure "will lead to sentencing disparities and inequities

that can be explained by little more than the identities of the sentencing judges," and that "[u]npredictability and uncertainty in sentencing no doubt will ensue." Nonetheless, writing for a 2-1 majority, Judge Kavanaugh affirmed the sentence because it could not be said that the district court abused its discretion in imposing this sentence. With a nod to his views on Separation of Powers, Judge Kavanaugh cautioned that, "[t]o the extent the post-*Booker* federal sentencing system is unwise or inequitable—or becomes a roll of the dice that depends too much on the sentencing judge—those concerns must be addressed by the Congress and the President, who have the authority to produce new legislation."

Deference to district judges, however, does not always favor the accused. Justice Kavanaugh has argued in favor of sentences that were significantly *above* the Sentencing Guidelines range, or that were predicated on sentence enhancements. In *United States v. Brown*, 892 F.3d 385 (D.C. Cir. 2018), the district court sentenced a defendant convicted of unlawful possession of firearm by a felon to nine years in prison, above his Guidelines range of 78 to 97 months. While a majority of the D.C. Circuit panel hearing the case reversed the sentence for failure to adequately explain the upward variance, Judge Kavanaugh dissented, noting that the case should have been an "easy affirmance" because "the District Court fully explained the sentence, thus satisfying its procedural obligations, and because the 9-year sentence was substantively reasonable." Similarly, in *United States v. Fareri*, 712 F.3d 593 (D.C. Cir. 2013), Judge Kavanaugh authored a majority opinion finding the district court's application of a two-level "vulnerable victim" enhancement was justifiable under the due-deference standard because "it was at least reasonable for the District Court to conclude that the combination of these victims' characteristics … made them 'particularly susceptible' to [the defendant's] fraud."

Justice Kavanaugh's past decisions also reflect an antipathy to enhancing sentences based on acquitted conduct. In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the court held that a "not guilty" verdict does not preclude a sentencing court from considering conduct underlying an acquitted charge so long as the conduct is proved by a preponderance of the evidence. In *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015), Judge Kavanaugh expressed frustration with this grant of judicial discretion, writing that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement on the rights to due process and to a jury trial." He further stated that, "[a]t least as a matter of policy, if not also as a matter of constitutional law, I would have little problem with a new federal sentencing regime" that forbids a judge from relying on uncharged conduct to increase the sentence. Nonetheless, he concurred in the denial of rehearing the case en banc due to governing Supreme Court case law.

Conclusion

Notwithstanding Justice Kavanaugh's articulated concerns that *Booker* has generated "[u]npredictability and uncertainty in sentencing," he has previously noted that the cure for this perceived problem lies with the Legislative and Executive Branches. In the meantime, as Justice Kavanaugh takes his seat on the Supreme Court, his willingness to defer to district judges on sentencing issues may favor defendants convicted of tax offenses who frequently benefit from downward variances. Moreover, given his views on the subject, Justice Kavanaugh might be a key vote to eliminate the enhancement of sentences based on acquitted conduct.

Reprinted with permission from the November 15, 2018 edition of the NEW YORK LAW JOURNAL © 2018 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-11-18-16