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WHITE-COLLAR CRIME

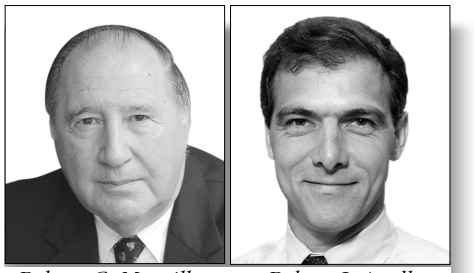
BY ROBERT G. MORVILLO AND ROBERT J. ANELLO

Post-'Booker' Sentencing: Not What We Might Have Expected

The substantial sentences recently handed down in the case of Bernard Ebbers, the former CEO of WorldCom, and to the Rigas father and son team from Adelphia Communications dashed the hopes of many white-collar defense practitioners who may have believed that *United States v. Booker*[1] signaled the end of harsh sentences for business crime.

The U.S. Court of Appeals for the Second Circuit's decisions following *Booker* have made clear that the U.S. Sentencing Commission Guidelines still are the overall determinative factor in federal sentencing.

High-profile cases such as those involving the Ebbers and the Rigases, as well as statistics recently released by the Department of Justice, strongly suggest that the U.S. Supreme Court's decision in *Booker* will not—as some in Congress seem to have feared—reduce the sentencing guidelines to an insignificant reflection of congressional desire. In white-collar cases, sentencing judges—perhaps to demonstrate their understanding of congressional intent—generally have continued to base their sentences on the guidelines. *Booker* and its progeny, however, provide judges an opportunity and, indeed, a requirement to evaluate other factors—particularly, details of a defendant's background, in formulating an appropriate sentence.



Robert G. Morvillo *Robert J. Anello*

'United States v. Ebbers'

In the highly publicized case of *United States v. Ebbers*,[2] Judge Barbara S. Jones of the U.S. District Court for the Southern District of New York on July 13 sentenced Bernard Ebbers, the 63-year-old former CEO of WorldCom, to 25 years in prison—essentially a life sentence. His guidelines range was between 30 years and life due to a staggering loss number, which was estimated to be as high as $11 billion. In *United States v. Rigas*,[3] Southern District Judge Leonard B. Sand sentenced John Rigas, the 80-year-old and ailing founder of Adelphia Communications, to 15 years in prison and his son and former Adelphia CFO Timothy Rigas to 20 years. Each defendant was convicted of bank fraud, securities fraud and related charges.

Mr. Ebbers and the Rigases are not the only defendants who have been on the receiving end of harsh white-collar sentences in the Second Circuit in the wake of *Booker*. In *United States v. Eberhard*,[4] Judge Robert W. Sweet recently sentenced a Manhattan-based investment adviser and securities broker to a sentence at the bottom of his 151- to 188-month guidelines range. Todd Eberhard received a sentence of 151 months, or 12.5 years, in prison following his guilty plea to conspiracy, investment advisory fraud, and obstruction of justice charges.[5] His loss calculation was $7 million to $20 million. In imposing the sentence, Judge Sweet looked carefully to the non-guidelines factors listed in 18 USC §3553,[6] as he was instructed to do by the Second Circuit's decision in *United States v. Crosby*.[7] After doing so, he nevertheless concluded that "a Guideline sentence is warranted in this case."[8]

Immediately after the Supreme Court's decision in *Booker,* many in Congress criticized the decision and called for immediate legislative action to right what they believed to be judicial meddling in Congress' law-and-order prerogative.[9] These recent decisions, and national statistics that demonstrate that, post-*Booker*, the vast majority of sentences are within or close to those that the guidelines require, suggest that continued legislative restraint is appropriate.

Recent Second Circuit Case Law

Several Second Circuit Court of Appeals decisions in the aftermath of *Booker*—bookended by the court's Feb. 2 opinion in *Crosby* and its June 24 opinion in *United States v. Martinez*[10]—have had significant effects on white-collar sentencing practice. In *Crosby,* the Second Circuit outlined its understanding of *Booker* and how it should be applied. After reviewing the basics of

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Booker—including that sentencing judges must "consider" the guidelines and all of the other factors listed in §3553(a) and appellate judges must review sentences under a standard of "reasonableness"—the Court of Appeals noted that *Booker* and 18 USC §3553(a) "do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." District judges are not to "return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." *Crosby* further provided for remand for reconsideration, rather than resentencing, using a plain-error standard, for cases sentenced prior to *Booker* and *Blakely v. Washington*.[11]

The Second Circuit has had plenty of opportunity to implement *Crosby's* call for remands—a legal database search revealed approximately 20 reported *Booker/Crosby* remands in white-collar cases since Jan. 12, and many more appeals are in the pipeline.[12] In most of those cases, the Second Circuit reviewed the district court's sentence and issued an appellate sentencing opinion but also remanded to the district court for reconsideration.[13] In a few of the remanded cases, the Second Circuit either did not address any arguments or addressed them in a cursory manner. In some of these cases, the appellants asked only for reconsideration in light of *Blakely* and *Booker* and did not make any arguments as to their own particular sentences.

Defense attorneys must be sure explicitly to raise the Sixth Amendment issue and ask for a remand. In a visa fraud case out of the U.S. District Court for the Eastern District of New York, one of two co-defendants was not granted a remand because he "neither raise[d] a Sixth Amendment challenge to his sentence nor join[ed] in that of [his co-defendant]."[14] Instead, the Second Circuit reviewed his sentence for clear error and affirmed it. In another case, the defendant, who had been convicted of mail fraud, asked for a remand for resentencing because the district court had not "adequately explain[ed] the basis for its upward departure." Because the defendant did not seek a *Booker/Crosby* remand, the court of appeals reviewed the sentence as it would have pre-*Booker* and concluded it should be affirmed.[15]

In its recent opinion in *Martinez,* the Second Circuit held that neither *Booker* nor the Supreme Court's decision last year in *Crawford v. Washington*[16]—which held that out-of-court testimonial statements by witnesses are barred under the Confrontation Clause unless the witnesses are unavailable and the defendants had a prior opportunity to cross-examine them—has altered the discretion of district court judges to consider hearsay testimony at sentencing proceedings.

In another development of interest to white-collar practitioners, the Second Circuit addressed the issue of *Booker* and forfeitures in *United States v. Fruchter*.[17] There, the court held that imposition of a criminal forfeiture under the (Racketeer Influenced and Corrupt Organizations Act) RICO statute, based upon facts determined by a judge by a preponderance of the evidence, did not violate *Booker*.

Statistics recently released by the U.S. Sentencing Commission do not translate to good news for white-collar defendants.

In *United States v. Doe*,[18] the Second Circuit found the sentence in a white-collar criminal case unreasonable under *Booker*. The defendant in *Doe* was convicted of two counts of making false statements on passport applications. The presentence report determined that the applicable guidelines range was six to 12 months in prison, but, because the defendant already had spent 18 months in prison, recommended that the defendant be sentenced to "time served." Southern District Judge Kevin T. Duffy instead upwardly departed to the statutory maximum of 10 years because the defendant refused to divulge his real name. The Second Circuit found the sentence unreasonable in light of the crime charged, the sentencing range recommended, the lack of criminal history and the district court's "inadequate balancing of these factors against the perceived threat posed by Doe."

Other Recent Sentencings

Unlike Mr. Ebbers, the Rigases, and Mr. Eberhard, other white-collar criminal defendants in the Second Circuit have received lower sentences than required under a mechanistic application of the guidelines. The sentences handed down to four defendants in *United States v. Hundley*[19] fell substantially below the guidelines ranges. In *Hundley,* defendants were convicted at trial of conspiracy, bank fraud (involving a loss of approximately $100 million), and tax fraud (evading taxes on approximately $29 million); two also were convicted of making false statements and one was convicted of perjury. Southern District of New York Judge Loretta A. Preska, citing a combination of traditional, guidelines-based downward departures and §3553 factors, sentenced the defendants well below their guidelines ranges. For example, the defendant convicted of making false statements, but not perjury, faced a guidelines range of 78 to 97 months but was sentenced to one year and one day in prison. The government is appealing three of these sentences.

Judge John Gleeson in the Eastern District last month sentenced the former Brooklyn Bar Association president, convicted of accepting bribes, to 27 months in prison, which was six months less than the low end of his 33 to 41 months guidelines range.[20]

In the U.S. District Court for the District of Connecticut, Judge Peter C. Dorsey sentenced below the guidelines in the high-profile corruption case against former Connecticut Governor John G. Rowland. On March 18, Judge Dorsey sentenced Mr. Rowland to one year and one day in prison and four months of home confinement.[21] Mr. Rowland, who pleaded guilty to accepting $107,000 in gifts from people doing business with the state and not paying taxes on them, initially faced a guidelines range of 15 to 21

months. On the eve of sentencing, however, the government revised its guidelines calculation to 30 to 37 months after prosecutors concluded that Mr. Rowland had not followed a requirement in his plea agreement that he fully disclose his financial condition.

Also in March, Judge Dorsey sentenced Sandra Martin, who had pleaded guilty to a $1 million check-kiting scheme and who had a criminal history, to 18 months in prison and four months of home confinement.[22] Her guidelines range was 24 to 33 months. In sentencing below the guidelines range, Judge Dorsey cited Ms. Martin's partial restitution of $500,000 and further adjusted the guidelines calculation due to the fact that her prior conviction had been 25 years earlier.

Recent USSC Statistics

Sentencing data that the U.S. Sentencing Commission (USSC) recently released confirms that the vast majority of sentences—particularly in cases involving fraud—are within or near to the guidelines range. Those statistics do not translate to good news for white-collar defendants.

According to the new data—which the USSC has been collecting since Jan. 12, 2005, when the Supreme Court issued its decision in *Booker*—Second Circuit courts have reported 898 sentencings between Jan. 12 and June 6, including 50 in the Southern District of New York and 386 in the Eastern District.[23]

The national data the USSC has compiled in its recent reports reveals that, post-*Booker*, 61.7 percent of the sentences reported were within the federal sentencing guidelines range, compared with 69.4 percent in 2003, the last time the USSC published sentencing data. Of particular interest to white-collar practitioners is the fact that, for the theft and fraud guideline, §2B1.1, the current national percentage of sentences within the guidelines range is 70 percent. The Second Circuit, however, is notable for having only 45 percent of its reported sentences within the guidelines range post-*Booker*, making it the circuit with the lowest percentage.

The national data further shows that the number of sentences below the guidelines range—other than government-sponsored departures[24]—is slightly up. Sentences below the guidelines range now account for 13.5 percent of all sentences reported, compared with 7.5 percent in 2003. Of the 13.5 percent, 2.9 percent were traditional judicial departures, with the court specifically citing reasons for departure "limited to, and affirmatively and specifically identified in…the federal Guidelines Manual" and/or additionally mentioning *Booker*, 18 USC §3553 or related factors. The other 10.6 percent did not mention the federal guidelines manual. In the Second Circuit, the percentage of sentences below the guidelines range is substantially higher, at 27.4 percent. (For theft/fraud on a national basis, this number is 15.8 percent.) Seven and a half percent of re-sentences were traditional judicial departures (versus 2.9 percent nationally), and 19.9 percent did not mention the guidelines manual (versus 10.6 percent nationally).

The national statistics also demonstrate that the average and median lengths of a sentence under the theft and fraud guideline have stayed in the 10 to 20 month range since 1999, but the average sentence length has fluctuated within that range. The average theft/fraud sentence stayed at 14-16 months from 1999 to 2003 but is at 20 months post-*Booker*. The median sentence has remained at 10-12 months.

Conclusion

After all of the upheaval in the courts concerning sentencing during the past year, perhaps only one thing has remained steadily predictable when it comes to white-collar sentences: lengthy sentences are here to stay.

1. 125 SCt 738 (2005).
2. No. S4 02CR.1144(BSJ). See Michael Bobelian, "Ebbers Sentenced to 25 Years for Role in WorldCom Fraud," NYLJ, July 14, 2005.
3. No. S102CR1236LBS. See Roben Farzad, "Jail Terms for 2 at Top of Adelphia," N.Y. Times, June 21, 2005. Disclosure: The authors' firm represented Timothy Rigas.
4. No. 03 CR. 562-01(RWS), 2005 WL 1384038 (SDNY June 9, 2005).
5. The United States attorney's office press release on the Eberhard sentencing put the sentence at 13 years, 4 months, as did news reports. However, Judge Sweet's opinion states the sentence is 151 months, or 12.5 years.
6. These factors include (1) the nature and circumstances of the offense and history and characteristics of the defendant; (2) the need for the sentence to reflect the seriousness of the offense, afford adequate deterrence, protect the public and provide the defendant with needed training and care; (3) the kinds of sentences available; (4) the guidelines range; (5) policy statements; (6) avoidance of sentencing disparities; and (7) restitution.
7. 397 F.3d 103 (2d Cir. 2005).
8. Judge Sweet earlier this year published three additional post-*Booker* sentencing opinions in white-collar cases, all involving significantly lower sentences than *Eberhard*. In each case, Judge Sweet reviewed the applicable guidelines and §3553(a) factors and sentenced the defendants at the lower end of the guidelines range, as he did in *Eberhard*. *United States v. Blume*, No. 04CR1159RWS, 2005 WL 356816 (SDNY Feb. 14, 2005); *United States v. Mascolo*, No. 04 CR. 0310, 2005 WL 351108 (S.D.N.Y. Feb. 9, 2005); *United States v. West*, No. 03 CR. 508(RWS), 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005).
9. See, e.g., Carl Hulse & Adam Liptak, "New Fight Over Controlling Punishments Is Widely Seen," N. Y. Times, Jan. 13, 2005.
10. No. 04-2075-CR, 2005 WL 1492079 (2d Cir. June 24, 2005).
11. 542 US 296 (2004).
12. When *Booker* was decided in January, the Second Circuit already had more than 200 pending appeals or "held cases" in the wake of *Blakely v. Washington*, which were on hold pending a decision from the Supreme Court in *Booker*. See Order & Appendix, *In re: Special Order of Stay* (2d Cir. Jan. 19, 2005) (available at www.sentencing.typepad.com).
13. As the court stated in one of these opinions, "[w]e nonetheless address the issues raised on appeal in order to assist the distrct court in fulfilling its obligations under *Crosby*." *United States v. Barber*, Nos. 04-2930-CR et al., 2005 WL 1249248 (2d Cir. May 26, 2005); see also *United States v. Fleuristal*, No. 04-2447, 2005 WL 1317012 (2d Cir. June 1, 2005) ("because the District Court on remand will still be obligated to 'consider' the Guidelines, it is within our discretion to adjudicate Guidelines issues before remanding").
14. *United States v. Konstantakakos*, 121 Fed. Appx. 902 (2d Cir. 2005).
15. *United States v. Miller*, 127 Fed. Appx. 531 (2d Cir. 2005).
16. 541 U.S. 36 (2004).
17. Nos. 02-1422(L) et al., 2005 WL 1389888 (2d Cir. June 14, 2005).
18. No. 04-1973, 128 Fed. Appx. 179 (2d Cir. 2005).
19. No. 02 CR. 441(LAP). Judge Loretta A. Preska, who sentenced the defendants in *Hundley*, did not issue a written sentencing opinion. The United States attorney's office for the Southern District of New York issued a press release about the sentencing on April 19, 2005 (available at www.usdoj.gov). See also April 20, 2005 IRS press release, available at www.irs.gov; "Hotel Owner Gets 8 Years in Fraud," N.Y. Times, April 20, 2005.
20. See Daniel Wise, "Former Brooklyn Bar Head Gets 27-Month Prison Term," NYLJ, July 6, 2005.
21. See William Yardley & Stacey Stowe, "A Contrite Rowland Gets a Year for Accepting $107,000 in Gifts," N.Y. Times, March 19, 2005; William Yardley & Stacey Stowe, "Prosecutors Say Rowland Should Get a Longer Sentence Because He Hid Some Assets," N.Y. Times, March 18, 2005.
22. See Carole Bass, "Incomplete Sentences," New Haven Advocate, April 7, 2005.
23. U.S. Sentencing Commission, "Special Post-*Booker* Coding Project: Information for All Cases, Cases Sentenced Subsequent to *U.S. v. Booker* (Data Extraction as of June 6, 2005)," July 14, 2005, at 6 (available at www.ussc.gov). A document purported to be an earlier version of the July 14 report, dated July 11-12, 2005, indicates that the USSC had received only "one-sixth of the expected cases from Southern [sic] New York." See U.S. Sentencing Commission, "Sentencing in the Aftermath of *United States v. Booker*," July 11-12, 2005 (available at www.sentencing.typepad.com).
24. These include departures for §5K1.1 "substantial assistance" and for §5K3.1 "early disposition program." This percentage has remained relatively stable—26.4 percent now, compared with 22.2 percent in 2003.