

SENTENCING MITIGATION AND DEPARTURES POST BOOKER

First and foremost, in order to get a sentence mitigated you must object to anything you think is inaccurate in the presentence report or inaccurate as it relates to relevant conduct. Second, you have to be creative in what mitigating factors would warrant a departure below the applicable guideline range that have not been considered by the sentencing commission.

After United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005), the Sentencing Guidelines became advisory. In essence, they already should have been advisory in that 18 U.S.C. §3553 and all the related factors contained in that statute existed from the passage of the Sentencing Reform Act in 1984 and declared constitutional as in United States v. Mistretta, 488 U.S. 361 (1989). Somehow courts became adverse to departures and considered the guidelines mandatory notwithstanding an outside the heartland analysis for departures for extraordinary circumstances not adequately considered under the Federal Sentencing Guidelines. After Booker, it appeared that this standard was no longer applicable and variant sentences could be applied if the court determined under the other factors established under 18 U.S.C. § 3553 that there was reason to go below the guidelines and the resulting sentence was reasonable. Once again, the Supreme Court has eroded its own decision in

Booker by the decision rendered in Rita v. United States, 177 Fed. Appx. 357 (4th Cir. 2006). Here, the Court determined that the guidelines were presumptively reasonable but were still advisory. Therefore, judges could use the guidelines to impose a reasonable sentence. Those judges who were still willing to go below the guidelines for mitigating factors and reasons established under 18 U.S.C. §3553 have now been overturned as imposing unreasonable sentences because the sentence that was imposed did not fall within a factor that was outside those already considered by the sentencing guidelines. Here we are, once again, back where we started. Now, in United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006) and United States v. Kimbrough, 174 Fed. Appx. 798, 799 (4th Cir. 2006) the question arises as to whether or not the pre-Booker standard for downward departures, "outside the heartland", is applicable to post-Booker analysis in sentencing mitigation below the guidelines. There was a time when the sentencing mitigation factors, after Booker, were subjected to a reasonableness standard, but now, with Rita, it appears the question turns on whether the issue was considered by the Sentencing Commission in the application of the guidelines. For example, the Eighth Circuit has rejected downward variance based on factors accounted for in the guidelines. See United States v. Pepper, 486 F.3d 408 (8th Cir. 2007). The Sixth Circuit vacated a sentence where the court

failed to provide any reasons for the sentence being imposed. The sentence must be both procedurally and substantively reasonable. "Procedural reasonableness" requires a sentencing judge to consider the factors outlined in 18 U.S.C. § 3553(a) to enable Appellate review. See United States v. Johnston, ___F.3d___ (6th Cir. May 25, 2007) Case No. 05-4277.

Also, in a very noteworthy case in the Tenth Circuit, the Tenth Circuit rejected a large upward departure and variance from the sentencing guidelines based on uncharged conduct that was not related to the charged offense. See United States v. Allen, ___F.3d___ (10th Cir. May 31, 2007) Case No. 06-6111. In this case the guideline range was 120-135 months, however, the district court sentenced the defendant to 360 months finding that the advisory guideline range was vastly inadequate to reflect upon other unrelated criminal conduct the defendant had participated in. The conduct was unrelated to sale of methamphetamine which was the charged offense.

Before Booker downward departures were granted when a court analyzed a case and determined that a downward departure from the sentencing guidelines was warranted because the circumstances surrounding the departure were outside the heartland of factors considered by the Sentencing Commission when creating the guidelines. In United States v. Rivera, 994 F.2d 942 (1st Cir. 1993), Defendant Rivera, convicted of a drug

offense involving the transportation of one pound of cocaine. Rivera was sentenced to 33 months pursuant to the applicable guideline range. At Rivera's sentencing hearing, the District Court held that it did not have the authority to depart from the guidelines. Rivera appealed and this Court remanded for resentencing because the District Court erroneously found that it did not have legal authority to depart. (In Rivera's case, the factor which would have allowed the Court to depart was "unusual family circumstances.")

In making its decision to depart, this Court began with a review of "*[t]he basic theory of the sentencing guidelines.*" Rivera, 994 F.2d at 946. This Court stated that "[i]n an ordinary situation, the statutes, and the Guidelines themselves, would require the judge to apply the appropriate guideline - a guideline that would normally cabin, within fairly narrow limits, the judges power to choose the length of a prison term. 18 U.S.C. §3553(a), (b). Should the judge face a situation that was not ordinary, the judge could depart from the guidelines sentence, provided that the judge then sets forth the reasons for departure. 18 U.S.C. §3553(b), (c). A court of appeals would review the departure for reasonableness. 18 U.S.C. § 3742." Rivera, *id.* The basic theory of the sentencing guidelines clearly establishes that there are circumstances

particular to a specific case which would allow a court to depart from the otherwise applicable guideline range.

This Court, in Rivera, also discussed the Sentencing Statute's law governing departures. 18 U.S.C. § 3553(b) states, in part, that the sentencing court "*shall impose a sentence of the kind, and within the range...established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines...*" The statute also provides for an exception for departures and states that the sentencing court shall impose a Guideline sentence "*unless the court finds that there exists an aggravating or mitigating circumstance of a kind taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.*" 18 U.S.C. §3553(b). Thus, it has been clearly established that in ordinary cases the Court must apply the Guidelines. However, upon a determination that the case is not ordinary, the Court may have the authority to depart.

This Court, in Rivera, also discussed the four ways that the guidelines deals with departures. The Guidelines divides its discussion of departures into four categories. Category one deals with "*Cases Outside the Heartland*". Category two deals with "*Encouraged Departures.*" Category three deals with "*Discouraged Departures.*" And, category four deals with

"Forbidden Departures." Appellant asserts that his case falls within the first category, *"Cases Outside the Heartland"*.

The Guidelines distinguish between "heartland cases" and "unusual cases." The introduction to U.S.S.G. Ch. 1, Pt. A, (4)(b), states, in part, that when *"a court finds an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm, the court may consider whether a departure is warranted."* In the case at bar, the sentencing Court stated that this case was not the norm. While lamenting over his obligation to apply the guidelines to the appellant's case, the Judge stated *"I'm familiar with the evidence in the case. And it's a case that involves a serious allegation of pollution, which is important, but this is not at all comparable to what one might consider where one might consider an individual a polluter in that sense and that's what I find very troublesome."* (S.T. pp. 17-18).

The Court obviously believed that this case was outside the heartland. However, erroneously believed that it did not have the authority to depart. The Court also stated that the appellant's conduct was an "aberration." (S.T. p.19). Although the Court relied on Rivera in finding that he did not have the power to depart, the appellant asserts that the Court misunderstood the holding in Rivera. The Court found that there were no circumstances, such as the appellant's aberrational

behavior, in the appellant's case mentioned in the category of "Encouraged Departures" therefore, he could not depart.

Appellant asserts that the Guidelines do allow for departure considerations even when specific characteristics are not detailed in the guidelines themselves. The introduction to U.S.S.G. Ch.1, Pt.A, (4)(b) states that *"the commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."* It is clear that through its misunderstanding of Rivera, the sentencing Court erroneously believed that it did not have the discretion to depart in the case at bar. The Guidelines, as well as this Court's interpretation of departure considerations, did give the sentencing Court the authority to depart from the guidelines in Appellant's case. The sentencing Court found that this was an unusual case and that the appellant's behavior was an aberration. Also see, United States v. Marcello, 13 F.3d 752 (3rd Cir. 1994), United States v. Gully, 992 F.2d 108 (8th Cir. 1993), United States v. Morales, 972 F.2d 1007 (9th Cir. 1992), United States v. Dickey, 924 F.2d 836 (9th Cir.), cert. denied, 112 S.Ct. 383 (1991), United States v. Takai, 941 F.2d 738 (9th Cir. 1991) and United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) holding that a defendant's aberrant behavior a valid departure consideration.

The Third Circuit Court of Appeals has suggested that such a downward departure is, indeed, possible. In United States v. Rodriguez, 961 F.2d 1089 (3rd Cir. 1992), the Appellate Court said that "[i]f a case technically qualifies for such an increase but it is clear that the defendant's conduct did not create any increased risk for those whom the school yard statute was intended to protect, we believe that a one- or two-point downward departure to eliminate this increase would be permissible. Rodriguez, 961 F.2d at 1095 n.8. In U.S. v. Adkins, 937 F.2d 947 (4th Cir. 1991), the Fourth Circuit stated "career offender" would be considered a type of criminal history, and not an alternative to criminal history. As a result, once a defendant has been qualified for career offender status, and placed in criminal history category VI, he still stands on an equal footing with everyone else whose criminal history calculation is category VI. Adkins, supra, at p. 952. That is, the district judge was authorized to depart downward.

The Fourth Circuit recognizes an exception as expressed in U.S. v. Ivester, 75 F.3d 182, 184 (4th Cir. 1996), where the denial of a departure is based on the court's mistaken belief that it does not have the authority to order such departure. U.S. v. Fletcher, 74 F.3d 49, 56 (4th Cir. 1996).

Certainly development of the case law, over a period of time, has given encouragement to district judges who felt, with

good reason, that the sentencing guidelines placed them in a straitjacket from which they had little chance to escape. However, there is now some indication that the guidelines are gaining flexibility. In U.S. v. Rivera, 994 F.2d 942, 952-954 (1st Cir. 1993) (Breyer, C.J.), the court recognized that there was room in the theory and implementation of the guidelines for some of the human factors which had hitherto been "discouraged" or forbidden outright.

In making the §4A1.3 determination whether a defendant's criminal history category significantly overrepresents (or underrepresents) the seriousness of his past conduct and the likelihood he will commit crimes in the future, the sentencing court...must take into account information, "including factors which the Commission may have otherwise considered in promulgating other provisions of the Guidelines"...[including] ...age and immaturity at the time of the prior offenses.

See U.S. v. Spencer, 25 F.3d 1105 (D.C. Cir. 1994), citing U.S. v. Shoupe, 988 F.2d 440, 445 (3d Cir. 1993).

The Sentencing Commission did not adequately take into account cases that are, for one reason or another, unusual. See Koon v. U.S., Nos. 94-1664 and 94-8842, U.S. Supreme Court, June

13, 1996. Therefore, it falls to the district judge to make such a determination.

Faced with uncertainty with regard to the trial court's understanding or motivation for its sentence, the Court of Appeals has sometimes remanded, or at least asked the district court to clarify its sentencing rationale. U.S. v. Quinones, 26 F.3d 213, 219-20 (1st Cir. 1994). Remand is the most useful option in this case to resolve the uncertainty.

Such an exception was found in the Third Circuit case of U.S. v. Kikumura, 918 F.2d 1084 (3rd Cir. 1990). In Kikumura, the defendant's applicable guideline range was calculated to be approximately 30 months. However, the district court, upon imposing the sentence, upwardly departed from the guideline range due to the defendant's other uncharged conduct. In so doing, the district court sentenced the defendant to a term of 30 years, which amounted to an upward departure of 330 months from the median of the applicable guideline range. The Third Circuit held that "the clear and convincing standard is, under these circumstances, implicit in the statutory requirement that a sentencing court 'find' certain considerations in order to justify a departure [under] 18 U.S.C. §3553(b)." Kikumura, 918 F.2d at 1102.

Such a position was also set forth in an article by the Honorable Boyce F. Martin, Jr.. Judge Martin contended that due

process was offended by permitting relevant conduct to be established by a preponderance of the evidence. In at least some cases, proof beyond a reasonable doubt should be required. While the preponderance standard is appropriate for determining the drug quantity in an offense of conviction, it is inappropriate when it essentially permits the government to rely on separate conduct for which the defendant was not convicted. See Boyce F. Martin, Jr., *The Cornerstone Has No foundation -- Relevant Conduct in Sentencing and the Requirements of Due Process*, 3 Constitutional L.J. 25-54 (1993).

Whether the court was clearly erroneous in not recognizing that it had the power to depart downward from the guidelines when it determined that the offense severity overstated the Defendant/Appellant's involvement in the instant offense.

Factual findings of the District Court will be affirmed unless clearly erroneous, 18 U.S.C. §3742(e). The reviewing Court must "give due deference to the District Court's application of the guidelines to the facts."

In an attempt to eliminate the widespread sentencing disparity, Congress enacted the Sentencing Reform Act of 1984 (the Act).

The Act created the United States Sentencing Commission (the Commission) and assigned it the task of formulating guidelines and policies which would maintain consistency,

fairness, and sufficient flexibility in sentencing. The Commission completed its guidelines in 1987. One source of controversy, arising from the Sentencing Guidelines, concerns the amount of flexibility and discretion that Congress intended the courts to retain. Of particular uncertainty is the court's authority to consider offender characteristics, including a defendant's family obligations, in departing from the Sentencing Guidelines. The Act created tension between the previous indeterminate sentencing system, with its focus on the individualized sentence, and the new system, with its focus on numerical equality for defendants convicted of similar crimes.

Despite the shift in focus, a majority of the Act's provisions retain some discretion for judges. Congress expressly stated in the Act that "*[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.*" Congress also allowed judges to depart from the Guidelines in limited circumstances. The Act allows a court to depart from a specified sentence if the judge determines there is an aggravating or mitigating circumstance "of a kind, or to a degree" which the Sentencing Commission failed to consider adequately. 18 USC §3553, et. seq., and 5K2.0. The legislative history of the Act similarly reflects the intent that courts retain discretion to impose individualized sentences in special cases. The Senate Judiciary Committee instructed judges to examine the characteristics of each specific offender thoughtfully and comprehensively.

The Sentencing Reform Act's conflicting directives left the Sentencing Commission with a choice about the appropriate weight to give offender characteristics. The Sentencing Commission chose to ignore them altogether.

In the majority of the other sections, the Commission's guidelines parallel the discretionary language of the Sentencing Reform Act, but the Commission adopted a restrictive

interpretation in the area of offender characteristics. As a result, several guideline provisions about judicial discretion and relevant sentencing considerations conflict.

Consistent with the Sentencing Reform Act, the Guidelines call for an active judicial role in determining whether to depart from the Guidelines' recommended sentence. Although the Guidelines generally direct courts to determine an appropriate sentence by matching the offense categories with the offender characteristic categories, the Commission acknowledged that a court may depart from that prescribed range if a particular case should present "atypical features." The Guidelines also limit the information the judge may regard in her sentencing decision by prohibiting consideration of certain factors, but generally the Commission stated its intention not to limit the factors a court may consider.

The Commission specifically allowed judges to depart downward because of a defendant's substantial assistance to authorities. Instead of providing additional specific bases for departure, the Commission listed factors which might constitute grounds for departure but which the Commission admittedly did not discuss. The Commission stated that it did not intend this list of factors to be exhaustive. Rather, the Commission stated that the departure decision would fall within the discretion of

the courts. A court could depart even though the Commission adequately considered the specific factor.

Courts should attempt to ascertain from the from the Sentencing Reform Act and its legislative history a general congressional intent and give that intent effect. Thus, because the statutory language leans toward the retention of flexibility in sentencing, the courts should exercise that flexibility and impose individualized sentences rather than allow one restrictive policy statement ("not ordinarily relevant") to remove much of their discretion. In order to effectuate each provision of the Sentencing Reform Act and the Sentencing Guidelines, courts should view policy statements as advisory, not prohibitive.

Furthermore, the words "not ordinarily relevant" themselves literally indicate the discretion to depart in the extraordinary case. Since the flexibility exists in the language of the Act and the Guidelines, courts should not tie their own hands and interpret the Guidelines, as one court warned, like "*robot[s] inside a guidelines glass bubble.*" The courts should view the Guidelines as a "heartland" for the typical case, as Congress intended, but then recognize the available discretion to depart for the atypical case.

The flexibility to depart based on offender characteristics not only exists in the literal language of the statutory

directives and the Guidelines, but it also existed in the minds of the Commission members when they drafted the Guidelines. A member of the Sentencing Commission confirmed that body's expectation and approval of judicial departures. Despite making an initial choice-numerical uniformity over individualization- the Commission viewed the guidelines, and in particular the policy statements, as evolutionary concepts, capable of analysis and revision.

When Booker came along a standard of reasonableness was issued in determining whether a variant sentence was appropriate. After Rita, courts are turning back the clock to an analysis of whether the Commission considered a particular factor in determining the guidelines before a departure could be granted.

Neither the Commission nor the courts have said they are returning to an "outside the heartland" analysis but it appears that we are headed in that direction. This type of circumstance begins to erode the Booker decision and makes Booker impotent. Courts are still required, however, to articulate reasons for sentences above or below the guidelines. See United States v. Walters, ___F.3d___ (5th Cir. June 21, 2007) No. 05-51634.