Unique Sentencing Departures

Are You Being Creative?

BY DARRELL A. CLAY

Following trial, your client was convicted of several federal offenses. The client, and you, must now contend with the cold reality of the Federal Sentencing Guidelines.

In a post-*Booker* world, the Guidelines are truly that, guidelines. But their overarching importance cannot be understated given the presumed reasonableness that attaches to a within-Guideline sentence. *See Rita v. United States*, 551 U.S. 338, 347 (2007) ("The first question is whether a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines. We conclude that it can."); *United States v. Morris*, 448 F.3d 929, 931-32 (6th Cir. 2006) ("A sentence that falls within a properly calculated advisory guideline range is credited with a rebuttable presumption of reasonableness.").

Accordingly, defense counsel should muster every potential argument for reducing the Total Offense Level. A trial conviction permits arguments at sentencing that might violate the usual provisions of plea agreements that no other departures apply and requiring a within-Guideline sentence. A little creativity can thus go a long way in trying to minimize the ultimate sentence.

This article outlines a number of unusual or unique downward departures that have been granted by courts. Some are specifically referenced in the Guidelines, while others arise from matters well outside the Guidelines' various provisions.

Cultural Differences

Pursuant to U.S.S.G. § 5H1.10, a sentencing court may not consider the defendant's race, sex, national origin, creed, religion, or socio-economic status. Despite this, under appropriate circumstances, courts have granted downward departures based on "cultural differences," at least where "cultural differences" does not operate as a subterfuge for considerations of race or national origin. *Cf. United States v. Yu*, 954 F.2d 951, 954 (3d Cir. 1992) ("[W]e prefer to leave to another day the question of whether a foreign culture is subsumed within the term 'national origin,' a fact which the Sentencing Commission ... has deemed irrelevant in the determination of a sentence. Hence, we do not decide that 'national origin,' as that term appears in the Sentencing Guidelines, includes within it any and all cultural differences."), *cert. denied*, 506 U.S. 1048 (1993).

Thus, in *United States v. Yang*, No. 1:97-cr-288 (N.D. Ohio Jan. 6, 2000), an Asian woman and her father, who was CEO of the company where she also worked, were convicted of stealing trade secrets from a business competitor. At sentencing, the district court granted the daughter a one-level downward departure based on "filial piety," explaining:

> Defendant has persuasively argued that there are fundamental differences between American and Chinese culture with respect to the role women play in society, business, and especially family relationships. The Defendant, therefore, was bound by duty to her father ... to obey his commands and perform her assigned role in the family and in the business. The cultural standards at issue with the Defendant take this case outside the "heartland" of cases contemplated by the Sentencing Guidelines, and, as such, a 1 level downward departure is warranted.

Although the daughter's sentence was vacated on appeal and the matter remanded for resentencing, this was based on a different downward departure. *See United States v. Yang*, 281 F.3d 534, 547 (6th Cir. 2002), *cert. denied*, 537 U.S. 1170 (2003). On appeal, the United States did not challenge the district court's one-level downward departure based on cultural differences. *See id.*

Lack of Personal Profit

In a number of sentences arising from fraud-related convictions, courts have departed downward from the otherwise applicable offense level because the defendant did not directly profit from the illegal activity. The stated rationale is that it is truly an exceptional case where a person engages in a fraud without directly profiting from the conduct. *See* U.S.S.G. § 2B1.1 cmt. 19(D) ("There may be cases in which the offense level ... substantially overstates the seriousness of the offense."). Thus, cases in which the individual does not seek to, or actually, profit from the fraudulent conduct lie outside the so-called "heartland" of § 2B1.1, permitting the lack of personal profit to be a basis to depart.

For example, in *United States v. Takai*, 941 F.2d 738 (9th Cir. 1991), the defendants were convicted of bribing and conspiring to bribe a federal official. To avoid having to sentence defendants, who were first time offenders, to imprisonment, the district court granted a combination departure based in part on the fact that they "'did not seek or receive any pecuniary gain.'" *Id.* at 741 (quoting district court).

On appeal, the Ninth Circuit affirmed. Drawing an analogy to federal prostitution crimes, under which the Guidelines permit a departure where the defendant did not commit the offense for profit and coercion was not involved, the Ninth Circuit held that the district court could consider lack of pecuniary gain. *Id.*; *see also United States v. Cunningham*, 985 F.2d 575 (9th Cir. 1993) (table opinion, full text available at 1993 WL 27016) (affirming departure based on lack of personal profit; departure "justified because Cunningham did not receive any kickbacks or other personal profit for his illegal conduct, which may be unusual for a bank fraud case.")

Extraordinary Restitution

Several courts have recognized that truly extraordinary efforts to make restitution may be a permissible basis to depart downward. As the Sixth Circuit noted in *United States v. Demonte*, 25 F.3d 343 (6th Cir. 1994), "[w]e have acknowledged that *voluntary* restitutionary payments may constitute 'exceptional circumstances' that justify a downward departure greater that than contemplated in Section 3E1.1" *Id.* at 346 (emphasis in original).

One of the leading decisions discussing this departure is *United States v. Kim*, 364 F.3d 1235 (11th Cir. 2004). There, the district court departed downward based on defendants' efforts to pay their restitution obligation of $268,237.03

promptly. Defendants tendered $50,000 on the day they pled guilty, and paid the remaining balance at sentencing. Although troubled by the post-indictment timing of the payments, the Eleventh Circuit nevertheless overruled the government's challenge and affirmed the sentences, explaining:

> We agree with the Government that the timing of Appellees' payment — specifically, their failure to pay restitution before criminal indictment, and only pursuant to a negotiated plea agreement — cuts against the voluntariness of their act and militates against granting a downward departure. However, we see no need to draw a bright line rule that limits departures based on extraordinary restitution to those defendants who paid restitution before indictment and not pursuant to a plea agreement.

Id. at 1245.

Other courts have granted downward departures under similar circumstances. *See, e.g.*, *United States v. Oligmueller*, 198 F.3d 669 (8th Cir. 1999) (affirming one-level departure for extraordinary restitution where defendant began making restitution payments before indictment); *United States v. Robson*, No. 1:07-cr-267, 2007 WL 4510259 (N.D. Ohio Dec. 18, 2007) (court departed downward three levels because defendant made restitution at a time when he had no assets, was not working, and had not been charged with a crime).

Extenuating Circumstances

Some courts have departed when the defendant's conduct arose under "extenuating circumstances." For example, in *United States v. Williams*, 432 F.3d 621 (6th Cir. 2005), the court affirmed a two-level departure for a defendant convicted of being a felon-in-possession. The district court departed after finding that the defendant possessed the gun only after receiving threats from family and friends of a man the defendant had shot in self-defense the year before as that man was robbing the defendant. The district court explained:

> "While this is not a defense or an excuse for the crime, it is a mitigating factor not adequately taken into consideration in formulating the Guidelines. This fact pattern appears to be one contemplated by U.S.S.G. § 5K2.11, which permits a departure in cases where a defendant commits a crime in order to avoid a perceived greater harm."

Id. at 623 (quoting district court's opinion).

Greater Significance of First-Time Incarceration

Several courts have found it appropriate to depart downward in sentencing a first-time offender, reasoning that incarceration for such a person has a greater impact than for a previously-incarcerated defendant. *See*, *e.g., United States v. Baker*, 445 F.3d 987, 992 (7th Cir. 2006) ("Also significant is the district court's finding that a prison term would mean more to Mr. Baker than to a defendant who previously had been imprisoned. Consideration of this factor is consistent with § 3553's directive that the sentence reflect the need for 'just punishment,' and 'adequate deterrence.'") (citations omitted); *United States v. Qualls*, 373 F. Supp.2d 873, 877 (E.D. Wis. 2005) ("Generally, a lesser period of imprisonment is required to deter a defendant not previously subject to lengthy incarceration than is necessary to deter a defendant who has already served serious time yet continues to re-offend.").

Conclusion

The foregoing are just some of the many unique departures that can be found in federal criminal sentencing jurisprudence. Even a one-level departure can reduce the total length of a defendant's sentence, so defense counsel should not hesitate to make creative arguments when circumstances permit.

Darrell A. Clay, CMBA's Vice-President of Membership and a former chair of the Criminal Law Section, is a partner with Walter | Haverfield LLP, where he practices in the areas of white collar criminal defense, complex civil litigation, and aviation law. Darrell was co-counsel for the daughter in United States v. Yang. *He has been a CMBA member since 1997. He can be reached at dclay@walterhav.com.*