New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM

An incisivemedia publication
VOLUME 240—NO. 117
WEDNESDAY, DECEMBER 17, 2008

SENTENCING GUIDELINES

Expert Analysis

'Cavera,' 'Adelson': Second Circuit Gives Truly Advisory Guidelines

By **Alan Vinegrad**

And **Douglas Bloom**

In the wake of the U.S. Supreme Court's decisions last year in *Rita, Gall* and *Kimbrough*, the U.S. Court of Appeals for the Second Circuit issued seemingly divergent opinions on the scope of post-*Booker* appellate sentencing review.

On the one hand, in *United States v. Regalado,* the court "confirm[ed] the broad deference that this Circuit has afforded the sentencing discretion of the district courts."[1] On the other hand, in *United States v. Cutler,* the court undertook a searching review of the trial record before ultimately concluding that the sentences were both procedurally unsound and substantively unreasonable.[2]

In its recent en banc decision in *United States v. Cavera* and subsequent opinion in *United States v. Adelson,* the Second Circuit reconciled these positions. In doing so, it set clear roles for sentencing judges and the appellate panels that review their work.

'United States v. Cavera'

Gerard Cavera is a former auto mechanic and contractor who "accumulated substantial unexplained wealth."[3] The FBI discovered one possible explanation for his prosperity: Mr. Cavera was purchasing large numbers of weapons in Florida and supplying them to a friend's nephew who, in turn, sold them on the streets of New York City. Mr. Cavera ultimately pleaded guilty to conspiracy to deal in and transport firearms.

ALAN VINEGRAD, *former U.S. Attorney for the Eastern District of New York, is a partner at Covington & Burling.* DOUGLAS BLOOM *is an associate at the firm.*

The court cautioned that "sentencing discretion is like an elevator in that it must run in both directions." While it operated against the defendant in 'Cavera,' it benefited the defendant in 'Adelson.'

At sentencing, Judge Charles P. Sifton noted that although Congress had instructed the U.S. Sentencing Commission on Guidelines to consider the "community view of the gravity of the offense" and, where appropriate, "take account of differences based on pertinent regional differences," the guidelines failed to do so with respect to gun trafficking. In particular, Judge Sifton found that the above-average population density in the U.S. District Court for the Eastern District of New York correlated with an above-average homicide rate and rendered gun offenses more dangerous. Judge Sifton also noted that gun trafficking was a particular problem in New York because it permitted offenders to circumvent the state's restrictive gun laws by importing guns from less-restrictive states. The court held that the guidelines' failure to account for the increased seriousness of gun trafficking in New York City and the concomitant greater need to deter the offense rendered them "less persuasive" and sentenced Mr. Cavera to 24 months imprisonment, six months above the advisory guideline range.[4]

Although Judge Sifton recognized that this sentencing approach would lead to disparities between districts, he concluded that these disparities were not unwarranted. Rather, Judge Sifton noted that the sentence would actually reduce the disparity between punishment for gun trafficking in the federal and New York state systems. The judge further noted that Congress had itself created interdistrict disparity through the fast-track program for immigration offenses and concluded that regional differences in the seriousness of an offense were no more unwarranted than differences in immigration-related docket loads.

In a decision issued before *Gall* and *Kimbrough,* the Second Circuit reversed.[5] The court held that the district court committed a procedural error "by sentencing [Mr.] Cavera on the basis of a policy judgment…rather than on circumstances *particular* to the individual defendant and his crime."[6] The court disagreed with the district court's reliance on the fast-track program as support for the notion that sentencing disparity was warranted in this case because Congress specifically approved the fast-track program. The court also disagreed with the district court's factual analysis, noting that several areas of New York City have low, suburban popula-

tion densities.

In an exceedingly rare move, following *Gall* and *Kimbrough,* the Second Circuit ordered rehearing en banc and reversed the panel's decision.[7] Six separate opinions were filed, including two concurrences and three dissents, principally reflecting a disagreement over whether the statistical evidence relied upon by the district court supported its conclusion that gun trafficking in the New York City area was more serious than the national average. The majority, by a 10-4 margin, held that the district court had sufficiently justified its upward variance.

While the court was divided on the ultimate outcome of the case, it spoke with one voice in setting forth the respective roles of district and appellate courts in the post-*Booker* sentencing world. The court, in an opinion authored by Judge Guido Calabresi, held that sentencing courts have "very wide latitude" to decide the proper punishment for a particular offense and offender.[8] Following *Rita, Gall* and *Kimbrough*, it is "emphatically clear that the Guidelines are guidelines —that is, they are truly advisory." Nonetheless, district courts "are not free to ignore" them, nor are they merely a "body of casual advice." They remain the "starting point and the initial benchmark" for sentencing.[9]

Still, sentencing courts are "generally free to impose sentences outside the recommended range" even based solely on disagreements with the policies underlying the guidelines.[10] In doing so, sentencing courts must ensure that the justification for any variance is strong enough to support it, recognizing that extraordinary circumstances are not necessary to justify a deviation from the guidelines and there is no "rigid mathematical formula" by which the justification can be measured. Rather, district courts are instructed to employ their "informed and individualized judgment" to reach a sentence that is "sufficient but not greater than necessary to fulfill the purposes of sentencing."[11]

In contrast to the district court's wide discretion, "appellate courts play an important but clearly secondary role in the process of determining an appropriate sentence." Sentencing decisions are reviewed "under a deferential abuse-of-discretion standard." With respect to procedural review, the district court must sufficiently explain its sentence, satisfying the reviewing court that it considered the parties' arguments and had a "reasoned basis" for its decision.[12] As long as the district court's decision is reasoned, however, appellate courts "must defer heavily to the expertise of district judges" and the court will set aside a sentence as substantively unreasonable only in "exceptional cases."[13]

Finally, the court affirmed that, in the Second Circuit, guidelines sentences are not presumed reasonable. Although the court recognized that the wide discretion provided to district courts and the narrow scope of appellate review might lead to greater sentencing disparities, it noted that the Supreme Court held those disparities "a necessary cost" of *Booker.*[14]

Judges can now do what they are suited to do: use experience and judgment in determining what price a defendant should pay for a crime, aided by the guidelines but in no sense governed by them.

Responding to dicta in *Kimbrough* suggesting "closer review" where a district court varies based on policy disagreements with the guidelines in "a mine-run case," the court noted that beyond the crack ratio at issue in *Kimbrough,* a number of guideline adjustments "apply without modulation to a wide range of conduct."[15] The court specifically cited the violent crime enhancement for firearms offenses (which can apply to anything from burglary to murder) and the loss enhancement for financial crimes. With respect to the latter, the court noted that the amount of loss can, on its own, cause the advisory guidelines range to "drastically vary."[16] Thus, a district court could conclude that, even given a particular amount of loss, "there is a wide variety of culpability amongst defendants," warranting "different sentences based on the factors identified in §3553(a)." The court will review any such sentence "especially deferentially."[17]

Response to 'Cutler'

The Court also resolved the apparent conflict in Second Circuit precedent created earlier this year when, in *United States v. Cutler,* the Court undertook a particularly searching review of the factual record before concluding that a sentencing decision was not only procedurally, but also substantively, unreasonable.[18]

The *Cavera* opinion directly responded to *Cutler,* substantially limiting it in two respects. First, *Cavera* provides for an extremely deferential form of substantive sentencing review. In doing so, the Court rejected an interpretation of *Cutler* that would suggest "a more searching form of substantive review."[19]

Second, while the Court upheld the result in *Cutler,* it did so by citing Judge Rosemary Pooler's concurrence in *Cutler* rather than the majority opinion. In her concurrence, Judge Pooler urged that the *Cutler* majority should have remanded the case after finding procedural errors, offering the district court an opportunity to arrive at procedurally sound sentences, before undertaking a substantive review.[20] By citing to the concurrence as *Cutler's* "result," a fair reading of *Cavera* is that *Cutler's* precedential import is limited to the conclusion that the sentences in that case were procedurally flawed, leaving to another day whether the same sentences, if the result of proper procedures, are substantively reasonable. Notably, *Cavera* goes on to hold that where the district court commits a significant procedural error, "one proper course" would be the one suggested by Judge Pooler in *Cutler*—to remand to allow the district court either to offer a better explanation or to correct the error, "rather than for the appellate court to proceed to review the sentence for substantive reasonableness."[21]

'United States v. Adelson'

Richard Adelson was the chief operating officer and (eventually) president of Impath, a biomedical device company. Impath's CEO put tremendous pressure on her employees to maintain the company's healthy results. When those expectations could not be met, certain employees undertook a sophisticated scheme to falsify the results. Mr. Adelson eventually became aware of the scheme and rather than expose the conspiracy, he chose to join it. He was convicted after trial of conspiracy, securities fraud and filing false statements.

Judge Jed S. Rakoff began sentencing by calculating Mr. Adelson's advisory guideline range. Starting at a base offense level of 6, the court added 24 points because Mr. Adelson intended to cause Impath's shareholders to lose more than $50 million. The court then added an additional 16 points for, among other things, the number of victims and leadership role, arriving

at an offense level of 46—literally off the guidelines chart and yielding an advisory guideline range of life imprisonment. As the court noted, "[e]ven the Government blinked at this barbarity."[22]

The court took particular issue with the impact that the loss calculation had on Mr. Adelson's advisory guideline range. The court noted that "because of their arithmetic approach and also in an effort to appear 'objective,' [the guidelines] tend to place great weight on putatively measurable quantities, such as…the amount of financial loss in fraud cases."[23] Because successful public companies tend to issue millions of shares, "the precipitous decline in stock price that typically accompanies a revelation of fraud generates a multiplier effect that may lead to guideline offense levels that are, quite literally, off the chart" and typically reserved for "international narcotics traffickers, Mafia dons and the like."[24] The court concluded that this phenomenon exposed "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic…."[25]

The court found that the other 3553(a) factors—in particular, that Mr. Adelson did not originate the conspiracy, led an otherwise "exemplary" life, and would suffer substantial monetary penalties coupled with a bar from future service as an officer or director of a public company—weighed heavily against imposing a guideline sentence. Instead, the court imposed a sentence of 42 months' imprisonment and $50 million in restitution. Mr. Adelson appealed his conviction and the government appealed the sentence. On Aug. 16, 2007, the Second Circuit summarily affirmed Mr. Adelson's conviction but held the government's appeal of the sentence pending the Supreme Court's decision in *Gall*.[26]

Last week, well over a year after staying its decision and five days after the decision in *Cavera*, a panel of the court issued a two-page summary order affirming Mr. Adelson's sentence.[27] The court seized on *Cavera's* language providing for "especially deferential" review of nonguideline sentences predicated on variances from sentences suggested by the guidelines' fraud loss table. Rejecting the government's argument that the district court had "discarded the Guidelines in favor of [its] personal view of the seriousness of the offense," the court held that Judge Rakoff had arrived at a sentence that "was not a failure or refusal to recognize the Guidelines, but rather a carefully considered reliance on the §3553(a) factors."[28] Although *Adelson* was a summary order and thus does not have precedential effect, it is a striking example of the *Cavera* principles in action.

Second Circuit Sentencing

Through *Cavera* and *Adelson*, the Second Circuit made clear that *Booker* restored much of the district courts' historic sentencing discretion, leaving the guidelines truly serving only as guidelines. At the same time, the court cautioned that "sentencing discretion is like an elevator in that it must run in both directions."[29] While it operated against the defendant in *Cavera*, it benefited the defendant in *Adelson*.

If history is any guide, the elevator will normally be headed down. In the six months following the Supreme Court's decisions in *Kimbrough* and *Gall,* 38.8 percent of defendants nationwide received a below-the-range sentence, whereas only 1.6 percent of defendants received an above-the-range sentence.[30] Even excluding government-sponsored downward departures, 13.7 percent of defendants were sentenced below-the-range.

In the Second Circuit, the gap is even wider, with 54.9 percent of defendants receiving a below-the-range sentence, compared to 0.6 percent of defendants receiving an above-the-range sentence. Excluding government-sponsored departures still leaves 31.1 percent of sentences below-the-range.[31]

The reason for this phenomenon is clear. By and large, the guidelines are heavily tilted toward stiff, if not severe, sentences. The circumstances of individual cases and defendants will, therefore, typically tend toward more leniency.

Truly Advisory Guidelines

Cavera and *Adelson* do not herald a return to the pre-guidelines era of unbridled sentencing discretion. However, they bring federal sentencing about as close to that era as can be expected, absent abolition of the guidelines altogether. Sentencing judges can now do what they are well-suited to do: use their experience and judgment in determining what price a particular defendant should pay for his or her crime, aided by the guidelines but in no sense governed by them, with very deferential appellate review. As Judge Reena Raggi noted in her *Cavera* concurrence, such a sentencing regime "reflects an acknowledgement of the general insights and judgment that district courts develop—a sort of judicial common sense simply by virtue of imposing scores of sentences each year."[32]

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1. 518 F.3d 143, 147 (2d Cir. 2008); see also *United States v. Fleming,* 397 F.3d 95, 100 (2d Cir. 2005) ("The appellate function in this context should exhibit restraint, not micromanagement").
2. 520 F.3d 136 (2d Cir. 2008), cert. denied sub nom *Freedman v. United States,* 129 S. Ct. 512 (2008).
3. See *United States v. Luciana,* 379 F. Supp. 2d 288, 291 (E.D.N.Y. 2005).
4. Id. at 296.
5. *United States v. Cavera,* 505 F.3d 216 (2d Cir. 2007). The opinion was originally issued on June 6, 2007—two weeks before the Supreme Court's decision in *Rita v. United States*. However, *Rita* prompted comments from other members of the Court, leading to a superseding opinion on Oct. 11, 2007. Notably, the government did not oppose the appeal in *Cavera* and amicus curiae was appointed to argue the district court's position.
6. 305 F.3d at 222 (emphasis in original).
7. *United States v. Cavera,* 2008 WL 5102341 (2d Cir. Dec. 4, 2008). Following *Gall* and *Kimbrough*, the government argued in favor of the district court's decision.
8. Id. at *5.
9. Id.
10. Id.
11. Id. (internal quotations omitted).
12. Id. at *9.
13. Id. at *6, *10.
14. Id. at *10 (quoting *Kimbrough v. United States,* 128 S.Ct. 558, 574 (2007)).
15. Id. at *8.
16. Id.
17. Id.
18. *Cutler,* 520 F.3d at 175-76; see also Alan Vinegrad and Douglas Bloom, "'Cutler': Second Circuit's Evolving Reasonableness Review, 239 NYLJ, 3 (Col. 1) (April 17, 2008).
19. *Cavera*, 2008 WL 5102341 at *6.
20. *Cutler,* 520 F.3d 136, 176 (Pooler, J. concurring).
21. *Cavera,* 2008 WL 5102341 at *6.
22. *United States v. Adelson*, 441 F. Supp. 2d 506, 511 (S.D.N.Y. 2006).
23. Id. at 509.
24. Id. at 506, 509.
25. Id. at 512. Similar sentiments were expressed by Judge Frederic Block in *United States v. Parris,* 573 F.Supp.2d 744, 754 (E.D.N.Y. 2008) ("While I acknowledge that the Guidelines 'reflect Congress' judgment as to the appropriate national policy for [securities fraud]'…this does not mean that the Sentencing Guidelines for white-collar crimes should be a black stain on common sense.") (citation omitted).
26. *United States v. Adelson,* 237 Fed. Appx. 713, 718 (2d Cir. 2007).
27. *United States v. Adelson,* 2008 WL 5155341 (2d Cir. Dec. 9, 2008).
28. Id. at *1.
29. *Cavera*, 2008 WL 5102341 at *10.
30. See United States Sentencing Commission, Preliminary Post-*Kimbrough/Gall* Data Report at Table 1 (September 2008) available at http://www.ussc.gov/USSC_Kimbrough_Gall_Report_September_08_Final.pdf.
31. See id. at Table 1-2.
32. *Cavera*, 2008 WL 5102341 at *20 (Raggi, J., concurring).