

## **Sentencing Rules Create Confusion**

John D. Copeland  
J.D., LL.M., Ed.D.

Before 1987, federal district court judges set sentences for those convicted of federal crimes largely at their discretion. Many attorneys and legal experts viewed such broad judicial discretion as inherently unfair. Punishment for the same criminal conduct varied between judicial districts. A crime resulting in a lengthy jail term in one federal district might result in a short sentence or probation in a different federal district. Justice seemed haphazard, unfair and sentencing unpredictable.

In 1987, Congress passed the U.S. Federal Sentencing Guidelines to solve the problems. To make federal sentencing more uniform, the guidelines use a mathematical formula for sentencing. Every offense has a base level which sets the range of punishment. For example, a first offense for financial fraud is a level 6 base offense. The guidelines set a punishment range of zero to six months in prison for a defendant convicted of fraud.

The base offense level rises, however, if there are aggravating factors. Financial fraud resulting in a loss of more than \$ 1 million rises to a 22 level. For a level 22 offense, the punishment range is 41 to 51 months. If the crime causes a loss of more than \$100 million and has more than 250 victims, it is a level 38 offense with a sentencing range of 20 to 25 years.

### **White-collar Crimes**

Under the guidelines, some high profile, white-collar criminals received harsh sentences in recent years. Former WorldCom CEO, Bernard Ebbers, received a 25 years sentence without parole after his conviction for conspiracy, filing false financial statements and securities fraud. Tyco's former CEO, Dennis Kozlowski, got 25 years for similar crimes. John Rigas, the founder and former CEO of Adelphia Communications, received 15 years for conspiracy, bank fraud and securities fraud. For the 83 year-old Rigas, 15 years equals a death sentence. The list of convicted white-collar criminals with jail sentences of 12 to 25 years includes the Condant's Walter Forbes, Computer Associates' Sanjay Kumar, Enron's Jeff Skilling and Tyco's Mark Swartz.

Many legal experts view the long sentences applied under the guidelines to nonviolent white-collar criminals as too harsh. The sentences often exceed those given under state criminal laws for people convicted of murder, rape or child molestation. The guidelines' critics contend the guidelines leave little room for mercy or common sense in imposing federal sentences.

### **Confusing Guidelines**

For years, it was mandatory that federal district judges follow the guidelines in setting sentences. In 2004 and 2005, however, the U.S. Supreme Court made some surprising and confusing rulings on the guidelines. In a series of decisions, the Supreme Court declared the guidelines violated a defendant's sixth amendment right to a fair trial because judges considered evidence not before the jurors during trials when setting

sentences. Judges could consider facts not proved at trial as aggravating factors in increasing the offense levels for punishing defendants. The Supreme Court held that was unfair; which makes sense.

The Supreme Court also held, however, the guidelines were unconstitutional only if mandatory. So long as the guidelines were advisory, judges were free to use them in setting sentences. Judges could consider the guidelines' ranges under a general standard of reasonableness. But what exactly did that mean? If a trial judge imposed a sentence within what the guidelines advised, was an appeals court required to presume the defendant's sentence was reasonable? What if a judge imposed a sentence above or below what the guidelines advised? Was such a sentence presumed unfair? If so, then on appeal the state would have to prove the sentence was fair.

In June of 2007, the Supreme Court further confused matters by holding in *Rita v. United States* that appellate courts could choose to presume that sentences within the guidelines are reasonable. Does this mean appellate judges are also free to choose that sentences within the guidelines are unreasonable?

Now we have another Supreme Court ruling that may, or may not, clarify the judicial application of the guidelines. In December, 2007, the Supreme Court ruled in *Gale v. United States* the guidelines are only one factor a judge should consider in deciding a proper sentence. A judge cannot presume the guidelines' range for a particular crime is reasonable. Further, an appellate court in reviewing a lower court's decision cannot presume a sentence outside the guidelines' range is unreasonable.

Have the guidelines made federal sentencing more equitable, understandable, and predictable, as Congress intended? It increasingly appears the answer is no. Perhaps it is time to scrap the guidelines and start over with a less mechanistic formula. It is at least time to evaluate how well the guidelines are working.